True peace is not merely the absence of tension;
it is the presence of Justice

- Martin Luther King Jr.

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MESSAGE OF HIS LORDSHIP THE CHIEF JUSTICE

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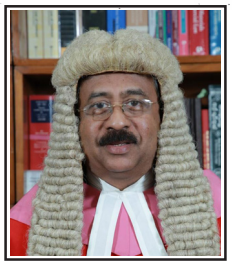

30th November 2021

It is indeed a great pleasure to forward this message to be published in the "JSA Law Journal 2021".

The outbreak of COVID-19 pandemic has raised major concerns due to its adverse impact on multiple areas such as wealth, access to justice, health, employment and livelihood. There is a likelihood that such impact may lead to disputes revolving on complex legal issues and the responsibility to resolve such issues would rest on the shoulders of the justice system.

We all know that change is an inevitable part of the legal profession. However, it is the speed and breadth of change that we experienced during the past two years due to the pandemic that is unprecedented in our lifetimes. As all of us continue to adapt to the constraints and limitations imposed by the pandemic and now look forward to a post-pandemic period, it becomes clear that this change is not straightforward or seamless. One of the most pressing needs that became a major challenge to the justice system during this crisis thus far has been to ensure the availability of justice services while adhering to health advisories. As a response to this need, many courts started transitioning into online hearings, many of them for the very first time and thereby demonstrated the capacity of the justice system to adapt to change and adopt innovative approaches with a people-centered lens. I take this opportunity to acknowledge, recognize and congratulate all Judicial Officers and other court staff who bravely steered through these difficult times and contributed immensely to these successes.

I believe that the current crisis also offers us an opportunity to rethink on all paradigms and set long term strategies. A discussion on how we can expand our parameters to develop a better, stronger and a more resilient justice system with promise of equal access to justice for all, is no doubt a need of the day.

Whilst commending the members of the Judicial Service Association of Sri Lanka and the Editorial Board for their untiring and sincere efforts to launch this publication during these difficult times, I also take this opportunity to wish the Judicial Officers throughout the country success in all future endeavors.

Jayantha Jayasuriya, P.C.
Chief Justice

MESSAGE OF THE HONARABLE ACTING DIRECTOR OF SRI LANKA JUDGES' INSTITUTE

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At the request of the Editor of the Judicial Service Association (JSA) - 2021, it is with great pleasure, I pen this message to the "JSA Law Journal 2021 (Volume VIII)".

It is commendable, that, the JSA has continued their Annual Law Journal publication this year too, despite the hardships experienced due to the COVID 19 Pandemic. This year publication contains very interesting Articles worthy, to read, not only by JSA members also the members of the legal profession in general.

I also take this opportunity to appreciate, and thank all the Judges who contributed Articles to enhance the quality of the journal. I hope this opportunity will be there in future too for the Judges to share their knowledge and sharpen their academic writing.

I wish the JSA all success.

D.F.H. Gunawardhana,
Judge of the High Court,
Acting Director/SLJI.

13th of December 2021

සභාපති / தலைவர் / Chairman — ගරු අග්‍රවිනිශ්චයකාර ජේ. සී. ජයසූරිය (ජනාධිපති නීතිඥ) / கௌரவ நீதியரசர் ஜே. சி. ஜயசூரிய, (ஜனாதிபதி சட்டத்தரணி) / Hon. Chief Justice J. C. Jayasuriya, PC

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

I take great pleasure in writing this note as the President of the JSA to this JSA Law Journal Volume VIII, published in 2021, amidst a challenging environment that prevails in the country due to the Covid-19 pandemic.

Even though the objectives of the JSA at its inception were merely the welfare of its members, it has spanned over the years to promote close relations between the members and uplift the professional and personal lives of its members. Today, it would not be an exaggeration to say that the JSA, with the support of its members, has reached an unparalleled height and has been recognized as an organization that represents the voice of the majority in the judiciary and is credited with upholding the rule of law by safeguarding the independence of the judiciary.

Over the years, the JSA has carried out several programs keeping those objectives at its heart, and the stakeholders of the justice system have commended it in Sri Lanka for its yeoman service in preserving the independence of the judiciary. Nevertheless, the JSA has always come forward to render its shoulder to its members in overcoming their burning issues of filial nature, such as overcoming the obstacles in gaining school admissions to their children.

One of the important developments this year -*inter alia*- is an unprecedented increase in the numbers of the JSA membership due to the newest intake of judges. I take this opportunity to welcome all new members to the JSA with a warm and open heart.

The JSA, in the past, has organized several programmes to create a platform for judicial officials to interact among themselves and capacity building. It goes without saying that, due to this global pandemic, most of our planned programs were hampered. However, I assure you that as the JSA, we have taken many novel initiatives to increase member benefits and interaction among members you would begin to enjoy and cherish in the coming days and years.

We also take this opportunity to call upon each and every one of you, irrespective of your seniority, to interact more with the JSA and lend your co-operation and assistance to make our collective goals a reality, despite many a challenge. The JSA is the only association run by judges like us for their mutual benefit, with the sole aim of achieving success through hard work and commitment.

Finally, let me conclude by thanking our Secretary, two Vice Presidents, and the Ex-Co members and, last but not least, by any means, all of you for your heartfelt support for making this year's work a success.

EDITOR'S NOTE

'True peace is not merely the absence of tension: it is the presence of justice (Martin Luther King Jr). Although all three arms of a state are bound to uphold the rule of law, people, who rest the sovereign power, expect and focus more on the Judiciary for upholding justice. People can tolerate flaws and flops of the legislator or the administrator, but not with Judiciary, without realising that judicial independence is structurally and institutionally designed and controlled by the acts of parliament; those members of parliament mostly hold the ministerial portfolio, in the west minister model of liberal democracy. Pandemic or normalcy, conflict or post-conflict, economic crisis or boom - whatever situation prevails- the society always demands justice from the Judiciary. How to mitigate this demand is a vital question to answer. One of the responses- that can be done and implemented- is to enhance the sense of justice, despite other structural challenges.

"Education is the most powerful weapon you can use to change the world" (Nelson Mandela). Judicial education is the only weapon a judge -judicial officer- has to develop with skills attributed to enhancing the sense of justice. How and why to give a fair hearing, develop grasping knowledge, identify the core issue of litigation, evaluate relevant facts with the substantive law, and give the reasons for conclusions are things a judge can only comprehend, through proper judicial education, which is the pathway to achieve the pinnacle of meaningful judicial service in an institutionalised constitutional democracy.

Academic writing is one of the ways to identify a specific legal issue and addresses the issue with the support of the law and practice of a given time in local and foreign jurisdictions. A genuine comprehensive analysis of legal literature will help judges and the legal fraternity play their roles effectively to reach legal innovation. The JSA Law Journal aims to provide a stepping stone for judicial education and create an academic sphere for legal innovation.

I believe this journal has achieved objectivity by carrying articles from various stakeholders of the legal fraternity. I sincerely thank everyone who spent their valuable time and knowledge, despite their busy schedules, contributing to the journal successfully. I extend my special thanks to Justice Mahinda Samayawardhena- Judge of the Supreme Court, Hon. Pamila Ratnayake - High Court Judge - Professor Jeeva Niriella, Dr. Kokila Konasinghe and Dr. Chamila S. Talagala for their contributions to decorating this journal colourful with their diligently written articles.

I take this opportunity to thank the president, secretary, and committee members of the Judicial Service Association and the editorial board members for their timely support and encouragement to publish this journal. I am indebted to my Assistant Editor, Harshana De Alwis, for his tireless support. If he had not extended his helping hand, it would not have been possible for me to make this Volume VIII of the JSA Law Journal successful.

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Part - I

THE IDENTIFICATION OF THE CORPUS IN PARTITION ACTIONS

Justice Mahinda Samayawardhena,
LLB, LLM, MPhil, DFM (Colombo), LLM (Monash)
Judge of the Supreme Court.

Introduction

Did you know that one of the main grounds on which partition judgments are challenged in the appellate courts is failure to identify the corpus? This article will shed some light on how to grapple with this issue, making your judgments sustainable from the District Court through to the Supreme Court.

In a partition action, if the corpus cannot be identified, *ipso facto*, the action shall fail. If the corpus cannot be identified, there is no necessity to investigate the title, as the title shall be investigated on an identifiable portion of land. The court shall not first investigate the title and then look for the land to be partitioned; it shall happen *vice versa*.

A partition action cannot be filed to partition a portion of the land. The entire land should be brought into the action and the co-owners of the whole corpus should be made parties.

The finding that the corpus has not been properly identified decides the fate of the case, the court shall reach that decision only after careful consideration of all the facts and circumstances of the case and not as a convenient method of summarily disposing of long-drawn-out partition actions without analysing the complicated pedigrees set forth by the parties to the action.

It is not good practice for a District Judge to dismiss a partition action on failure to identify the corpus after a full trial. If he does so, he is guilty of dereliction of his duty as a judge. He must address that issue not in his judgment but before the case is fixed for trial proper and take remedial steps.

The identification of the corpus cannot be raised as a ground of appeal for the first time in the appellate court because it is mainly a question of fact and not a pure question of law.

If a party contests the identification of the corpus, he must raise it as an issue in the District Court. However, merely raising it as an issue will not suffice unless he has taken necessary steps to show the correct corpus by way of a plan. Oral evidence without a plan is inadequate.

Legal Provisions

There are safeguards provided in the Partition Law, No. 21 of 1977, for the proper identification of corpus.

Section 4(1)(b) of the Partition Law enacts that, in addition to the particulars required to be stated in a plaint by the Civil Procedure Code, every plaint presented to court for the purpose of instituting a partition action shall contain a description of the land sought to be partitioned by reference to physical metes and bounds or by reference to a sketch, map or plan which shall be appended to the plaint.

Sections 8(1)(d), 9 and 10 provide for the costs of the preliminary survey. The court shall fix a date within seven weeks of the date of acceptance of the plaint for the plaintiff to deposit the estimated costs of the preliminary survey. If he fails to do so, the court may dismiss the action. After completion of the preliminary survey, the court shall make sure the full costs of the survey are paid to the surveyor.

It is important to remember that the commission for the preliminary survey (and also summons to defendants) shall be issued only after the registration of the partition case as a *lis pendens* under the Registration of Documents Ordinance.

In the summons, the court shall fix a date to file statements of claim. This date is commonly known as the summons returnable date. According to section 13(2), the summons returnable date shall be a date not earlier than thirty days after the initial date fixed for the return to the commission for preliminary survey. This is reiterated in section 16(1) which states that the commission returnable date shall be a date earlier than thirty days prior to the date specified in the summons.

The surveyors shall be directed to send in their preliminary/final plans and reports together with field notes on or before the due date. The surveyors prefer to display on their nameboards and letterheads that they are "Court Commissioners" but are in fact slow to accept court work and, even if accepted,

do not give priority to it. This practice shall be discouraged and if surveyors are not interested, after giving them a hearing, their names shall be struck off from the panel of surveyors and they shall be directed to remove the "Court Commissioner" tag from their nameboards and letterheads.

When statements of claim are filed after the preliminary plan, parties get the opportunity to set out their claim in detail in reference to the preliminary plan. This will help the court adjudicate the competing claims of the contesting parties effectively. This will also prevent parties from filing several amended statements of claim.

Section 16(2) is an important section. A copy of the plaint shall be attached to the commission. In addition, a copy of an old plan, if available, can also be attached for the identification of the corpus (subject to producing the original at the survey). Such plans can be produced to the surveyor not only by the plaintiff but also by any other (contesting) defendant.

If the land depicted in the plan or plans produced by the contesting defendants is substantially different from the land sought to be partitioned by the plaintiff, the surveyor shall report it to court for further directions. If the surveyor seeks such directions, the District Judge should not ignore it. The surveyor is entitled to seek directions from the District Judge in carrying out commissions to prepare the preliminary plan and the final plan.

Section 16(2) enacts that the court may issue a commission at the instance of any party to the action authorising the surveyor to survey any larger or smaller land than that pointed out by the plaintiff. If such an application is made after the preliminary plan, the surveyor shall be directed to depict such larger or smaller land on the preliminary plan.

In terms of section 16(3) to (6), if any other third party or parties make claims at the survey, the surveyor shall serve notice on them requiring them to make applications to court to be added as parties to the case. If such new claimants fail to appear in court, it is prudent to reissue notice on them by court despite section 16(6) dispenses with such further notice/summons on them.

Section 17 requires the surveyor to issue notice on all the parties named in the plaint informing them of the date of the survey fourteen days before the date so fixed. The surveyor shall also take steps to orally proclaim the date after beat of tom-tom on the land to be surveyed.

Section 18 deals with the return to the surveyor's commission. After executing the commission, the surveyor shall transmit to court the plan and report, field notes, and acknowledgement receipts of notices served on any third parties.

According to section 18(1)(b), the preliminary plan shall contain:

(i) the boundaries of any divisions of the land subsisting at the time of the survey, such divisions being indicated by appropriate letters or numerals;

(ii) the boundaries of any land belonging to the state which may fall within the land surveyed;

(iii) the locations of all buildings, walls and wells, such locations being indicated by appropriate letters or numerals;

(iv) the trace or course of any road, path or stream within the boundaries of the land; and

(v) any other physical feature of or on the land which in the opinion of the surveyor may be necessary for or prove of assistance in the adjudication of the partition action.

According to section 18(1)(a), the report to the preliminary plan shall contain:

(i) the dates on which notice of survey was issued to the parties;

(ii) the nature of the land surveyed and of any buildings, walls, wells, trees, plantations, fences and other improvements thereon;

(iii) whether or not the land surveyed is, in the opinion of the surveyor, substantially the same as the land sought to be partitioned as described in the schedule to the plaint;

(iv) the parties to the action who were present at the survey and the name and address of any person (not being a party to the action) who, at the time of the survey, preferred any claim, and the nature of such claim and the date of service of the notice referred to in section 16(3);

(v) the persons, if any, who pointed out the land to be surveyed;

(vi) the result of the surveyor's investigation of any particular fact or matter specifically referred to in the terms of the commission;

(vii) the existing means of access to the land from the nearest public road; and

(viii) any fact, matter or circumstance relating to the survey or to the land surveyed which, in the opinion of the surveyor, may be necessary for or prove of assistance in the adjudication of the partition action.

This section does not require the surveyor to record the nature of the claims of parties to the case although it provides for recording the nature of the claims of third parties. This is a lacuna in the law. However surveyors can and usually do record the nature of the claims of parties to the case under section 18(1)(a)(viii). The court can, in the commission, direct the surveyor to record the nature of the claims of parties to the case at the preliminary survey, which claims, in my practical experience, are more often than not genuine and without distortion or exaggeration.

The sanctity attached to the preliminary plan and report

Once the court receives the preliminary plan and report, it is advisable for the court to ascertain whether it contains the requisites set out in section 18(1). The court can give further directions to the surveyor on any matter relating to the survey and require him to resubmit the plan and report. For instance, if the extent of the land given in the commission/plaint as the land to be partitioned is two acres and according to the preliminary survey the land is only one acre and the discrepancy is not explained in the report, it is the duty of the court to give proper directions to the surveyor in that regard. The same should be adopted when the surveyor has surveyed a larger land. Let me overemphasise that these matters must be addressed before the case is taken up for trial and ideally before statements of claim are filed.

As I stated previously, it is the duty of the surveyor to seek instructions from the court when he is confronted with such issues before sending the plan and report to court.

In *Uberis v. Jayawardene*,[1] Basnayake C.J. held:

It is the duty of a surveyor to whom a commission is issued to adhere strictly to its terms and locate and survey the land he is commissioned to survey. It is not open to him to survey any land pointed out by one or more of the parties and prepare and submit to the court the plan and report of such survey. If he is unable to locate the land he is commissioned to survey, he should so report to the court and ask for further instructions.

The court took a similar view in *Brampy Appuhamy v. Menis Appuhamy.*[2]

In order to minimise future litigation, once the court receives the preliminary plan and report, it may be prudent to give one date for consideration of the plan and report although there is no statutory requirement to do so. This date can coincide with the date for the filing of statements of claim. If this is not done, consideration of the preliminary plan and report can take place when the case is called in open court to fix the date of trial in terms of section 24 of the Partition Law.

Section 35 mandates a minimum of thirty days for the consideration of the final plan. As was held in *Wickremaratne v. Samarawickrema*,[3] the period of thirty days shall be computed after the date the return of the surveyor is received in open court and not from the date the return is received by the court.

In *Sopaya Silva v. Magilin Silva*,[4] the plaintiffs filed action to partition a land in extent of 8 acres, 3 roods and 29 perches, but the surveyor surveyed a land in extent of 11 acres, 1 rood and 33 perches. The trial proceeded uncontested and at the time of writing the judgment the judge, having noticed this discrepancy, dismissed the plaintiff's action on the basis that the *lis pendens* had not been properly registered. There was no issue regarding the wrongful registration of the *lis pendens* at the trial and the District Judge followed this course of action without hearing the parties. This is a violation of the rule of natural justice—*audi alteram partem*. The Court of Appeal held that the *lis pendens* was properly registered but that error lay in the preliminary survey. S.N. Silva J. in the Court of Appeal (later C.J.) summarised the statutory scheme at pages 108-109 in the following manner:

> *On receipt of the surveyor's return to the commission, which disclosed that a substantially larger land was surveyed, it was incumbent on the District Judge to decide on one of the following courses of action, after hearing the parties, viz:*
>
> (i) *to reissue the commission with instructions to survey the land as described in the plaint. The surveyor could have been examined orally as provided in section 18(2) to consider the feasibility of this course of action;*
>
> (ii) *to permit the plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action*

involves the amendment of the plaint and the taking of other consequential steps including the registration of a fresh lis pendens;

(iii) *to permit any of the defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claim of that defendant and the taking of such other steps as may be necessary in terms of section 19(2).*

In the Supreme Court case of *Jayaratne v. Premadasa*,[5] judgment was entered by the District Court without contest to partition a land of 71 acres as depicted in the preliminary plan when the plaintiff had in fact filed the action seeking to partition a land of 30 acres. The judgment was obviously unsustainable. Weerasuriya J. held at 345:

> *Licensed surveyor Ramakrishnan who was commissioned to do the preliminary survey had failed to locate and identify the amalgamated lands as described in the schedule to the plaint. By surveying an extent of 71 acres, which exceeded the extent he was commissioned to survey by 41 acres, the commissioner had failed to comply with the terms of the commission. The commissioner should have reported the fact that he was unable to locate a land of about 30 acres and asked for further instructions from the District Judge. It is unfortunate that even the learned District Judge who heard the case had failed to give due consideration to the wide discrepancy in the extent. On a perusal of the supplementary report of the commissioner it would appear that on a superimposition of lot 33 of F.V.P. 259 on the preliminary plan certain lots would fall outside lot 33 and therefore certain exclusions had been recommended from the corpus. At the trial contents of the supplementary report appear to have received scant attention of the Court. On the above material, I hold that the District Court had acted wrongly in proceeding to trial in respect of what appeared to be a larger land than that described in the plaint and not properly identified. In any event the peremptory steps relating to an amendment of the plaint, the registration of a new lis pendens and the fresh declaration in terms of section 12 have not been complied with. Therefore, I set aside the proceedings in the District Court leading up to the trial and the judgment and the interlocutory decree.*

You may have now realised that if District Judges are conscious of their duties, these glaring discrepancies would have been noticed the day the preliminary plan was sent to court by the surveyor.

Section 18(2) is another important section. It states that the preliminary plan, the report and the field notes may be used as evidence of the facts stated or appearing therein at any stage of the partition case without further proof. There is sanctity attached to the preliminary plan and report. Nevertheless, this does not relieve the District Judge of his duty to satisfy himself of the accuracy of the plan, report and field notes. The proviso to section 18(2) allows the court to summon the surveyor to court to be orally examined on any point or matter arising on or in connection with the preliminary plan and report.

Section 18(3) states that if there is still doubt about the accuracy or otherwise of the surveyor's preliminary plan and field notes, the court can, either of its own motion or on the application of a party to the action, get them verified by issuing a commission to the surveyor-general; and, if necessary, get a fresh preliminary plan and field notes prepared through the surveyor-general in which event the surveyor-general's plan would be the preliminary plan for the action.

There is no express provision in the Partition Law to issue a commission to another surveyor to prepare an alternative preliminary plan. This should nevertheless be understood *inter alia* subject to section 19(2) of the Partition Law.

In *Fernando v. Perera*,[6] the plaintiff was not satisfied with the court commissioner's preliminary plan and had another commission issued to another surveyor for a second preliminary plan. At the trial, the court accepted the commissioner's plan as the preliminary plan and the plaintiff came before the Court of Appeal by way of revision against this finding. Upholding the order of the District Judge, Ranaraja J. stated:

> *Section 18 of the Partition Act provides for parties dissatisfied with the preliminary plan prepared on commission issued by court to make an application for a commission to issue on the surveyor-general. The petitioner has not availed himself of this provision of law. Similarly there is a provision in that section for a party to have a surveyor who conducted the survey to be summoned to court and examined in any matter arising from the preliminary plan and report filed in court. The petitioner has not*

had recourse to that provision. Instead he had sought a fresh commission on another surveyor to conduct a second preliminary survey which is not permitted by law.

However, if all the parties have proceeded with the trial on an alternative preliminary plan and the admissions and issues have been recorded on that basis, the losing party, in my view, cannot get the entire proceedings quashed taking up the position for the first time in appeal that the trial proceeded on the alternative preliminary plan. The preliminary plan is prepared to identify the corpus. As I stated at the outset, identification of the corpus, which is a question of fact, cannot be taken up in appeal for the first time.

Any defendant can move the District Court to get the plan or plans which he relies on superimposed on the preliminary plan through the court commissioner to establish his rights to the land and call the court commissioner and his surveyor to give evidence at the trial if necessary. This is usually done in seeking exclusion of portions of land from the land depicted in the preliminary plan.

Section 19(2) provides that where a defendant seeks to have a larger land than that sought to be partitioned by the plaintiff the subject matter of the action, his statement of claim shall include all the particulars that shall be included in a plaint under sections 4 and 5 of the Partition Law. He shall take steps to survey the larger land and register the action as a *lis pendens* affecting such larger land and take all other steps as if he were the original plaintiff. Such new commission may also be issued to the same surveyor unless the court on acceptable grounds decides to issue the commission to any other surveyor on the panel, because in such circumstances the case becomes a new case and the new (second) preliminary plan becomes the preliminary plan on which the case proceeds to trial.

Pitfalls to Avoid

There is a tendency to dispose of partition actions on the basis that the identification of the corpus has not been established upon a comparison of the boundaries of the land described in the schedule to the plaint with the existing boundaries as depicted in the preliminary plan, little realising that the plaintiff reproduces the schedule to old deeds executed several decades ago in the schedule to the plaint as the land to be partitioned whereas the surveyor shows the existing boundaries in the preliminary plan. The plaintiff has to

do so in order to identify the land and for the purpose of the registration of the *lis pendens* and to show the relevance of his title deeds to the land to be partitioned.

It is also relevant to note that the extent of the land in old deeds is often given by traditional land measures based on paddy or kurakkan sowing extent without reference to a plan, and the same is repeated in the schedule to the plaint as the extent of the land to be partitioned. When the surveyor gives the extent of the land in English standard measures and not ancient land measures, it leaves room for different interpretations making the identification of the corpus an issue.

The issue of identification of the corpus is usually raised by the party/ co-owner who is in possession of the corpus seeking dismissal of the action and not with a view to bringing the entire land to partition. The District Judge should be perceptive to these realities.

Let me draw your attention to the recent Supreme Court judgment delivered by me in the case of *Hapuarachchi v. Podi Nilame*,[7] which I believe is helpful in understanding some areas to be addressed during the trial and in the course of writing the judgment.

In this case, the plaintiff filed action seeking to partition a land in extent of 15 *lahas* of paddy sowing area. The boundaries and extent given in the schedule to the plaint were taken from the old deeds mostly executed in the 1920s. With no surveyor plans being available, the extent of the land given in these old deeds is speculative. It was a common occurrence at that time for a deed to purport to convey either much more or much less than the actual entitlement. The land was situated at Ampe in the Kegalle District. In the preliminary plan, the surveyor depicted a land in extent of 1 acre, 1 rood and 32 perches. The identification of the corpus was put in issue by the contesting defendants at the trial.

In the District Court the cross examination of the plaintiff was based on the premise that in that area 8 *lahas* of paddy sowing area is equal to 1 acre and the preliminary plan should have depicted a land slightly less than 2 acres but instead depicted a land only in extent of 1 acre, 1 rood and 32 perches and therefore only part of the land had been surveyed by the surveyor. On that basis, dismissal of the action was sought in the District Court.

However the position of the said defendants in the Supreme Court was that according to the accepted Sinhala land measures, 7 *lahas* is equal to 1 bushel and, 1 bushel being 2 roods, 14 *lahas* is equal to 4 roods or 1 acre, and 15 *lahas* would be a little over one acre *viz*. 1 acre and 12 perches; but the surveyor surveyed a land of 1 acre, 1 rood and 32 perches, i.e. a land in excess of the land to be partitioned, and hence there was a serious question as to the identification of the corpus. They wanted the plaintiff's action to be dismissed on the ground that a larger land had been surveyed by the surveyor.

This is a textbook case which highlights the unreliability of comparing ancient land measures with English standard equivalents.

It was held in this case:

> *This is a common issue confronted by judges and lawyers in partition actions where the extent of the land in old deeds is given by way of traditional land measures based on paddy or kurakkan sowing extent without reference to a plan. The plaintiff reproduces in the schedule to the plaint the schedule to the old deeds prepared decades if not centuries ago as the land to be partitioned. The surveyor commissioned to prepare the preliminary plan shows the existing boundaries of the land, not the old boundaries stated in the schedule to the plaint. The surveyor further shows the extent of the land in English standard measures and not ancient land measures. The difficulties arise when the traditional land measures are compared with the English standard equivalents. The common conversion tables found in various sources are unreliable.*
>
> *If I may reiterate what has already been stated by experienced judges in the past, it is not possible to correlate sowing extents accurately with surface extents. Such a correlation depends on various factors such as the size and quality of the grain, the fertility of the soil, the peculiarities of the sower and local conditions (e.g. the violence of the wind at the time of sowing and the water supply to the sowing area). In unfertile soil the seed would be sown thicker than in fertile soil. An inexperienced sower would scatter seeds unevenly, thereby requiring more seeds than an experienced sower. If the quality of the grain, be it paddy or kurakkan, is poor, more grain would be necessary than if the quality were high. It is also relevant to note that the sizes (the capacity) of the traditional measures such as lahas and neliyas differ not only between districts but also within districts.*

The contesting defendants further argued that, of the four boundaries shown in the preliminary plan, the southern and western boundaries differed from the boundaries given in the title deeds. The land had been surveyed to prepare the preliminary plan sixty-four years after the execution of the first deed produced at the trial. According to the deeds, the southern boundary was "the limit [boundary] of Galpathage Watta" and according to the preliminary plan, the southern boundary was "Millagahamula Watta alias Hitina Watta". According to the deeds, the western boundary was "Ditch and Stone Fence" and according to the preliminary plan, the western boundary was "Madugahamula Kanati [the name of the land] and the Paddy Field". In that context it was held:

> *[I]t is noteworthy that in the old deeds the southern boundary is identified by the owner of the land and not by the name of the land. Galpathage Watta means "the land belonging to Galpatha". In the preliminary plan, the surveyor shows the existing boundaries. Galpatha, who is mentioned in the old deeds, would not have been among the living at the time of the survey, and his descendants and successors would have been in possession of the land to the south of the land to be partitioned. Instead of giving the names of the present owners of the land on the southern boundary, the surveyor has given the name of the land. This discrepancy cannot be interpreted as the southern boundary in the preliminary plan being different from the boundary of the title deeds.*
>
> *The same principle applies to the western boundary. The old title deeds identify the western boundary as "Ditch and Stone Fence". In the preliminary plan prepared 64 years after the first known deed executed in 1927, the surveyor identifies the western boundary as "Madugahamula Kanati [the name of the land] and the Paddy Field". This does not necessarily mean there is a discrepancy in the western boundary. The name of the land to the western boundary is not given in the old deeds. The ditch and the stone fence which existed many moons ago cannot be expected to have remained unchanged when the surveyor went to the land more than 64 years after the execution of the first known deed. Furthermore, the stone fence indicates that there were two lands separated by a fence in 1927.*
>
> *It is a grave error to conclude in partition actions that the identification of the corpus is not established upon a mere superficial comparison of*

the schedule to the plaint, which is a reproduction of the schedules to old deeds, with the existing boundaries as depicted in the preliminary plan. Boundaries do not remain unchanged. They change over the years due to various factors, be it natural or man-made.

Whether or not the preliminary plan represents the land described in the schedule to the plaint shall be determined upon a consideration of the totality of the evidence led in the case and not solely by such a comparison.

Another argument of the contesting defendants to contend that the land to be partitioned had not been properly identified was that the surveyor had not stated in the report to the preliminary plan that the land surveyed by him was in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint. As I have already stated, section 18(1)(a)(i)-(viii) of the Partition Law sets out the several items to be included in the surveyor's report. Section 18(1)(a)(iii) refers to the above requirement. In the report relevant to this case, both this question and the answer were not there. This is different from leaving the question unanswered or answering the question in the negative. This lapse should have been spotted by the District Judge no sooner he received the preliminary plan with the report. It was not clear whether the surveyor had failed to record this question and answer by mistake in his handwritten report. It may even have been intentional since the contesting defendants had told the surveyor that a portion of the land to the west should be included in the corpus and the surveyor was awaiting further directions. On this point it was held:

Without raising this issue for the first time in this Court, the [contesting] defendants should have raised it in the District Court when the court granted the parties a number of dates for consideration of the preliminary plan. I accept that the surveyor shall record the above-stated question and answer it in the report. (Sopaya Silva v. Magilin Silva [1989] 2 Sri LR 105) However, failure to answer this question or answering it in the negative shall not be decisive. In other words, the court cannot dismiss a partition action on the basis that the surveyor in his report to the preliminary plan has failed to answer or answered in the negative the question "Whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint". Nor can the court blindly accept that the preliminary plan depicts

> *the entire land to be partitioned, if the surveyor in his report answers the above question in the affirmative. Whether or not the land has been correctly identified shall be finally decided not by the surveyor but by the court having taken into consideration the totality of the evidence adduced before it. The answer to the said question by the surveyor is undoubtedly an important item of evidence but it cannot decide the whole case.*

In *Ratnayake v. Kumarihamy,*[8] the plaintiff filed a partition action seeking to partition a land of 4 *lahas* of kurakkan sowing extent. The extent of the land shown in the preliminary plan was 8 acres, 1rood and 16 perches, which the contesting defendants contended was far in excess of the extent described in the schedule to the plaint. The defendants contended that the English equivalent to the customary Sinhala measure of 1 *laha* of kurakkan sowing extent is 1 acre, and the preliminary plan depicted a land more than double the correct extent. However, upon consideration of the totality of the evidence led in the case, the District Court held and the Court of Appeal affirmed that the land described in the preliminary plan was the land described in the schedule to the plaint, notwithstanding that it did not correspond to the traditional Sinhala measurement. On appeal, the Supreme Court upheld the judgment of the Court of Appeal, which is reported in *Ratnayake v. Kumarihamy*.[9] Udalagama J. in the Supreme Court stated at 307-308:

> *I would also reiterate the observations of the President of the Court of Appeal in the impugned judgment that land measures computed on the basis of land required to be sown with Kurakkan vary from district to district depending on the fertility of soil and quality of grain and in the said circumstances difficult to correlate the sowing extent with accuracy. Thus there cannot be a definite basis for the contention that 1 Laha sowing extent be it Kurakkan or even paddy would be equivalent to 1 acre.*

Final Remarks

The question as to whether the preliminary plan represents the land described in the schedule to the plaint is mainly a question of fact and not a pure question of law. This important question shall be determined upon consideration of the totality of the evidence led in the case and not by taking into account one or two items of evidence.

The District Judge must be vigilant throughout the partition case. His duty is not confined to presiding over the trial and writing the judgment. He

must actively participate not only at the trial but also in the process leading up to the trial and thereafter until the final decree is entered and delivery of possession of the divided lots is effected. He must foreclose unwanted future litigation.

The District Judge can disregard pedantry and high technical objections in dealing with partition cases. Notwithstanding that the system of justice that prevails in our country is adversarial as opposed to inquisitorial, the District Judge must understand that his role is different in a partition case. Nevertheless, he need not overstep the boundary line and take control of the entire case rendering the appearance of counsel in a partition case redundant. The District Judge must strike a fine balance and give true meaning to the proper and efficient administration of justice.

ENDNOTES

[1] (1959) 62 NLR 217

[2] (1958) 60 NLR 337

[3] [1995] 2 Sri LR 212

[4] [1989] 2 Sri LR 105

[5] [2004] 1 Sri LR 340

[6] CALA/187/95, CA minutes of 02.10.1995

[7] SC/APPEAL/52/2018, SC minutes of 10.06.2021

[8] [2002] 1 Sri LR 65

[9] [2005] 1 Sri LR 303

RIGHT TO APPEAL ON CONVICTION REREADING OF GUNASEKERA V ATTORNEY GENERAL[1]

Pamila Ratnayake[2]

In the criminal justice system, before finally determining the guilt of an accused, his/her accusation is heard on number of tiers. It has been designed so, to minimize human errors that can happen when decisions are made by human beings.

In Sri Lankan court system, an appeal against an order of magistrate's court lies to High Court and thence to the Supreme Court. Thus every accused has his/her case heard at least in three different levels before final determination.

Practice in Sri Lanka

In preferring appeals from magistrate's courts, the practice has been for a long time is to wait for sentencing after conviction is entered before filing the appeal. Even if an appeal filed after the conviction, courts used to wait till sentencing to send the case record to High Court.

In magistrate's courts, after pronouncing verdict of guilty, usually a certificate of previous conviction is called before sentencing as required by law[3]. If the accused is dissatisfied with conviction, and if he wants to prefer an appeal, standard practice has been to prepare an appeal in advance and file it once sentencing is done. After sentencing the case record is sent to High Court.

When an appeal is before High Court, the Attorney General's Department takes over the task of defending magistrate's court order. Until sometimes back one of the preliminary objections typically taken up by the state was that the appeal was out of time as it had not been preferred within appealable period[4]. In order to avoid an early dismissal on this technicality, a practice was developed to prefer an appeal once the verdict is pronounced but before sentencing. Nevertheless, courts generally waited till sentencing to

1 2012 (B.L.R) 215
2 LL.M (Colombo), High Court Judge, Negombo
3 S. 2, Prevention of Crimes Ordinance No. 2 of 1926
4 14 days as per s. 320(1)(a) of the Code of Criminal Procedure Act No. 15 of 1979

send the case to High Court. However, this led to another objection from the state labeling it as a premature appeal.

Thus the appellants faced either of the above objections when they were before High Courts. Lately, this tendency towards preliminary objections diminished and appeals were considered on merits.

The Judgment of Gunasekera v Attorney General

In 2011, two leave to appeal applications were filed in the Supreme Court bearing numbers 114A/2011 and 115/2011 respectively by the same person against dismissal of two appeals filed by him in Provincial High Court of the North Western Province in Chilaw. Those were preferred against a judgment of magistrate's court in Marawila. Leave was granted on 24.08.2011 on the following question on law;

Did the High Court Judge err in rejecting both the petitions of appeal dated 15.03.2008 and 26.05.2008?

The Supreme Court judgment was delivered on 09.07.2012 upholding the appeal and the High Court of Chilaw was directed to hear both appeals together on merits. Sensing the significance of the ruling the Bar Association Law Journal Volume XIX published in 2012 reported it under the citation Gunasekera v Attorney General 2012 BLR 215. This judgment is being relied upon by to date, in some instances, in preferring an appeal before sentencing, hitherto considered as premature, on the assumption that the Supreme Court has recognized the right to prefer an appeal before sentencing.

Creating a Confusion

It created uncertainty as for the earlier practice of sending the case record to High Court after sentencing despite it being preferred before. A practice has been developed to send the case record to High Court without proceeding to sentencing, once an appeal is lodged just after conviction.

This practice paves way for following sequence of events, though hypothetical.

In the event the High Court confirms the conviction entered in the magistrate's court, if the accused is still dissatisfied by that order, he can prefer an appeal to the Supreme Court. If the Supreme Court confirms the conviction of the magistrate's court, the case will be sent back to the latter through High Court. Though one cannot predict the exact time, anyone can easily understand that in practice it takes a considerable time.

Thereafter, the magistrate's court proceeds to sentencing. In the event the accused is dissatisfied by the sentence imposed on him in magistrate's court, he has a right to prefer an appeal to the High Court. If the High Court affirms the sentence, and the accused is again dissatisfied, he has to prefer an appeal to the Supreme Court against the sentence. There the Supreme Court finally decides the matter.

In such a scenario, a case against an accused is heard at least on six different occasions in three different forums. Certainly the accused has to devote his time and money over a considerable period. Certainly he is not benefitted as far as those aspects are concerned.

Instead of appealing just after entering conviction, if the accused waits till the magistrate imposes sentence, as per the practice that had been, if dissatisfied he can prefer an appeal to High Court and it will decide whether the conviction is correct or not and whether the sentence is excessive or not, acting in terms of section 328 of the Code of Criminal Procedure.

If the accused is the still dissatisfied with High Court ruling he can prefer an appeal to the Supreme Court and it will decide the matter for the final time. In such a scenario the accused's case is heard or reviewed in three different forums on three different occasions. Surely the Accused will be spending his time and money but more or less half the amount compared to the previous scenario.

Furthermore there is another aspect of this if it is allowed to continue. If an appeal against conviction before sentencing is allowed, after going through the entire process, if the conviction is finally affirmed in the Supreme Court, the case would be send back to magistrate's court for sentencing. The standard practice is for the magistrate who entered the conviction to impose the sentence.

Taking into consideration the time normally required for the process through the High Court to the Supreme Court and back to the magistrate's court, it is unrealistic to expect the magistrate who entered the conviction to remain in the same court. In such a situation the convicting magistrate has to come back to the original court to impose the sentence rescheduling work in his present court. In some extreme instances, the magistrate who entered the conviction may be retired or not in the service. In such an event another magistrate has to be appointed to impose the sentence.

As all above needs ministerial steps by the administrative body of the magistrates, and even in the event it is done in a great competency, it would take some time. Therefore the accused has to wait further for sentencing after spending time in processing his case through the superior courts.

Why not in High Courts

When considering normal course of events in a High Court, after conviction of an accused in a trial before it, sentence is usually imposed on the very same day. State counsel for the prosecution and defense counsel on behalf of the accused make sentencing and mitigating submissions respectively, and after considering those submissions court decides its sentence.

In High Courts some accused face death penalty and some face life imprisonment and some longer terms of imprisonment. For certain offences there are mandatory minimum sentences, the lower threshold being either seven years[5] or ten years[6]. If the principle behind right to appeal against a conviction is so progressive and universal, it is difficult to fathom why that right is not available to an accused in a High Court case, where he faces longer sentences.

As per the guideline judgments pronounced by superior courts, in High Courts, when the sentence imposed on an accused is over a particular period, they are not normally released on bail pending appeal. In case of a murder conviction, the accused has no right to be released on bail pending an appeal.[7] In most of the cases accused face trial in a High Court while on bail. A person who was on bail throughout his trial is deprived of the same pending his appeal depending on the severity of the punishment and not on anything else. This is mainly to prevent the system falling to a mockery.

In a trial before a magistrate's court, for Penal Code offences, the maximum prison terms that can be imposed on an accused is two years.[8] There are exceptions under other laws but even then the maximum is four years.[9] In most of the Magistrate's Court cases if the accused does not have any previous convictions, he is ended up being handed down with a suspended sentence. Even if a magistrate's court imposes an active term of imprisonment on an

5 S. 365B(2)(b) of the Penal Code
6 Ibid, s. 364(2)
7 S. 333(4) of the Code of Criminal Procedure and s. 20(3) of the Bail Act No. 30 of 1997
8 Ibid, s. 14
9 Ibid, s.16

accused, except in extreme instances the accused is entitled to be released on bail, pending appeal.[10]

Comparing above two situations, it seems that a person who is facing a grave and much severe sentence does not have the right to appeal against his conviction, whereas a person who faces a lesser sentence has that right.

Facts of the case

In this backdrop this article intends to reread the judgment in ***Gunasekera v Attorney General.***

First it is pertinent to examine the facts and circumstances which led to the pronouncement that the right of appeal against any conviction, sentence or order has been guaranteed by domestic law as well by international conventions.

The accused in the case, one Gunasekera was charged before magistrate's court of Marawila in case bearing number 47222 for committing offences punishable under section 62(b) of the Sri Lanka Bureau of Foreign Employment Act and section 386 of the Penal Code respectively. After the accused pleaded not guilty the trial proceeded and the magistrate found the accused guilty for the charges.

After the conviction, before the sentence was imposed, on 13th May, 2008, the accused preferred an appeal to the Provincial High Court of the North Western Province in Chilaw. Afterwards the magistrate imposed the sentence on the accused on 14th May, 2008, whereby the accused was imprisoned for a period of one year and subjected to a fine of Rs.15000. Thereafter, another appeal was preferred to the same High Court on 26th May, 2008 challenging the sentence.

Decision of the High Court

Both appeals were taken up together on 10th of May, 2011 and were dismissed *in limine*. The first appeal was dismissed on the basis that it was a premature appeal since it was preferred before imposing of the sentence. The second appeal was dismissed on the basis that the appellant had only canvassed the sentence and not the conviction and hence it was not filed in terms of the provisions of the Code of Criminal Procedure. Therefore it is apparent that both appeals were dismissed on technicalities without considering merits.

10 Ibid, s. 323(1)

Supreme Court Judgment

Holding that the High Court erred in dismissing both appeals Justice Shirani Thilakawardana in her judgment observed as follows.

> It is significant to note that the end result of this perfunctory dismissal was that the learned High Court judge of provincial High Court of the North Western Province holden at Chilaw by this judgment delivered by her on 10th May 2011 had neither re-considered the findings nor made a careful evaluation of the grounds and/or merits on which the conviction and sentence were imposed by the Magistrate's Court of Marawila.[11]

The act of the High Court of Chilaw in dismissing both appeals on mere technicalities led the Supreme Court to emphasize the right of appeal for an accused as enshrined in the International Covenant on Civil and Political Rights (ICCPR)[12], to which Sri Lanka is a signatory.

However, in the judgment, it is nowhere specifically stated that an accused shall have the right to prefer an appeal against a conviction alone by the Magistrate's Court before sentencing.

Referring to the manner in which the appeals were preferred, the Supreme Court observed as follows:

> However, it must be pointed out that a deviant procedure, unlike that which has been practiced over a long period of time, has been followed in this case. Whereas the procedure followed is to lodge an appeal after the conviction and the sentence, here one appeal was lodged after the conviction and another after the sentence, for no fathomable reason.[13]

That indicates the Supreme Court also did not fully approve the method adopted by the appellant in preferring two appeals. It did not find fault with the magistrate's court for not sending the case record to High Court immediately after receiving the first appeal. If the Magistrate's Court had not followed the correct procedure there, the Supreme Court could have pointed out that.

Statutes governing appeals

It is important to see here whether the statutes governing the appeal procedure in Sri Lanka provides for entertaining appeals before sentencing.

11 2012 (B.L.R) p. 215 at p.216

12 Adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A(XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

13 2012 (B.L.R.) at p.217

Appeals from Magistrate's Courts are heard in Provincial High Courts. (Since the Court of Appeal was vested with the power before the establishment of Provincial High Courts, provisions in the Code of Criminal Procedure and Judicature Act still refer to Court of Appeal.)

Judicature Act, which empowers magistrate's court to perform all duties required by law, creates a right to appeal from its decisions, for the dissatisfied, subject to the provisions of any law, to the Court of Appeal (Now to the Provincial High Court) in accordance with any law, regulation or rule governing the procedure and manner for so appealing.[14]

Provincial High Courts have been conferred with that jurisdiction by High Courts of the Provinces (Special Provisions) Act No. 19 of 1990.[15]

The Judgment of ***Gunasekera*** reproduced preamble and section 4 of the High Courts of the Provinces (Special Provisions) Act in emphasizing the right of appeal available to an accused.

The preamble of the Act reads as follows;

> *An Act to make provisions regarding the procedure to be followed in and the rights of appeal to and from the High Court established under Article 154P of the Constitution; and for matters connected therewith or incidental thereto.*

Section 4 of the Act reads as follows;

> *4. A party aggrieved by any conviction, sentence or order entered or imposed by a Magistrate's Court, a Primary Court…may subject to the provisions of any written law applicable to the procedure and manner for appealing and the time for preferring such appeals, appeal there from to the High Court established by Article 154P of the Constitution.*

Thus the legislative intent in enacting the Act is conferring appellate jurisdiction on Provincial High Courts. While section 4 says any conviction, sentence or order, it qualifies it further by adding "*may subject to the provisions of any written law applicable to the procedure and manner for appealing and the time for preferring such appeals*".

As the Judicature Act as well as the High Courts of the Provinces (Special Provisions) Act specifically state that the right of appeal MAY SUBJECT TO PROVISIONS OF ANY LAW GOVERNING THE PROCEDURE FOR APPEALS it invariably acknowledges that there are laws which govern the procedure of

14 S. 31 of the Judicature Act

15 S. 2 of the High Courts of Provinces (Special Provisions) Act

appeals other than the Judicature Act and the High Courts of the Provinces (Special Provisions) Act.

High Courts of the Provinces (Special Provisions) Act confers the power of entertaining appeals from the magistrate's court hitherto exercised by the Court of Appeal, on the High Court. However, it does not create rules as to procedure and the time frame as to appeals. Therefore, provisions contained in the Code of Criminal Procedure as to preferring appeals from the Magistrate's Court to Court of Appeal are to be considered as still regulating the procedure in Provincial High Courts in respect of appeals from the magistrate's courts.

Section 320(1) says *any person who shall be dissatisfied with any* **JUDGMENT OR FINAL ORDER** *pronounced by any magistrate's court in a criminal case or matter to which he is a party may prefer an appeal* and sets the time frame as *fourteen days from the time of such judgment or order being passed or made*. The manner of preferring the appeal is *by lodging with such magistrate's court a petition of appeal*.

Section 185 of the Code of Criminal Procedure speaks of the verdict of the magistrate after taking the evidence for the prosecution and defence. *If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence*.

Therefore passing the sentence upon finding an accused guilty is a single transaction which cannot be separated into pieces. Section 320(1) confers the right of appeal on a dissatisfied accused with any **JUDGMENT OR FINAL ORDER** and not with a part of it. Lodging the petition of appeal shall be within fourteen days from the time of such judgment or order and not from verdict. Section 323(6) requires the magistrate to transmit the case record to High Court on a petition of appeal being lodged and that section shall be read along with sections 320(1) and 185.

Therefore, provisions in the High Courts of the Provinces (Special Provisions) Act, Judicature Act and ICCPR Act[16] cannot be taken and read in isolation but together with the Code of Criminal Procedure, which provides the procedure for appeals.

International law as to appeals from conviction

The judgment says the international law has recognized the right to appeal from a conviction. Article 10 of the Universal Declaration of Human

16 Section 4(2), Act No. 56 of 2007

Rights requires the right to fair trial for anyone. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right of a person convicted of a crime to have his conviction and sentence being reviewed by a higher tribunal according to law.

All these international conventions demand the countries of the world to guarantee fair and impartial trial for their subjects in a transparent and uniformly way. International covenants do not provide procedural laws but leave it to respective countries to formulate. The international covenants lay down minimum standards that should be observed by member countries. However, they do not intend to destabilize the systems in member countries by requiring them to act in unrealistic ways. Thus a country has the liberty to set the procedure respecting the rights of the accused.

There are some jurisdictions which statutorily recognize the right to prefer an appeal before sentencing but only in exceptional instances. The general rule even in the United Kingdom is that an appeal should prefer after the sentence.

Section 2 of the Criminal Appeal Act 1968 amended in 1995, provides that if the Court of Appeal thinks that the conviction is unsafe, it shall allow the appeal and if not shall dismiss.

In *R v Drew*[17] it was decided that it would generally be inappropriate to seek to appeal before sentence had been passed and that rarely would the Court of Appeal entertain an appeal short of that stage.

There are instances where an appeal can be preferred before passing the sentence. However, it must be facilitated by the procedure. In the United Kingdom, an appeal can be preferred before passing the sentence when the conviction in considered unsafe to allow the sentencing. There is a procedure to follow in such cases and the leave of the appellate court has to be obtained first. *R v Lanning*[18] was a case where an appeal was preferred before passing of the sentence in which the appellate court said that where, after conviction but before sentence, a point arises as to the validity of the indictment it should be investigated by the Court of Appeal and not by the Crown Court.[19]

Accused do not always have the right to appeal against conviction but must get leave within 28 days from the Court of Appeal which will only be

17 81 Cr. App. R. 190 CA
18 90 Cr. App R. 450
19 Archbold Criminal Pleading, Evidence and Practice (2018), Sweet & Maxwell Chapter 7-43 p 1253

granted if the grounds are considered to be properly arguable. The sentencing judge also issues a certificate in certain instances. As such merely because an accused is unhappy with his conviction, he can't appeal but has to substantiate that something has gone seriously wrong with the trial process itself as such that the guilty verdict is unsafe.[20]

As provided for by the procedural law, in the United Kingdom, the appellate procedure before sentencing has been regulated with an orderly approach leaving no room for ambiguity. However, in the absence of such a procedure, allowing appeals before sentencing would lead to chaos.

Conclusion

Although the judgment did not specifically speak of an exclusive right to appeal before passing the sentence, it has now been cited as giving such right. The editors of the BASL Law Journal having understood the importance of this judgment have taken excerpts of the judgment in preparing the head note. However, it is of great importance when reading a judgment to go through the full text written by the court without confining the reading to the head note given in the law report.

What was before the Supreme Court in that case was in fact a question of law; did the High Court Judge err in law when rejecting two appeals?

The Supreme Court decided to answer the question of law in favour of the appellant and to allow the appeal as the High Court had denied the appellant the opportunity to exercise his universally guaranteed rights. In arriving at the conclusion the eminent justices of the Supreme Court cited Universal Declaration on Human Rights and ICCPR to emphasize the importance of protecting those rights and also local legislation to show that an appeal preferred just after the conviction is not liable to be dismissed only for that reason.

Citing excerpts from two previous judgments by the Supreme Court[21], the learned judges say that *reference is clearly an indication that where the spirit of the law is vanquished the law itself is diminished to the extent.*

However, the Supreme Court did not emphasize on the procedure. It has said that it couldn't fathom why the appellant resorted to such a deviant

20 https://www.defence-barrister.co.uk/appealing-against-a-crown-court-convcition

21 Kiriwanthe and Other v Nawarathne and other 1990 2 SLR 393 and Read v Samsudin(1895) 1 NLR 292

procedure in preferring the appeal. In other words the procedure adopted hitherto has been considered as normal.

The practice of preferring appeals before sentencing is not widely used. It is rarely exercised. That is due to sensible majority of lawyers. However, it paves way to manipulate the procedure in order to disturb smooth flow of affairs by distracting the attention of the sentencing magistrate. Even the instances are few and far between this can be used by some, be it natural or legal persons, in order to avoid the ignominy of being sentenced by a court of law.

What is discouraged in fact by the ***Gunasekera vs Attorney General*** is, dismissing cases merely on technicalities, in appellate level, without considering merits and evaluating the grounds of appeal. The Supreme Court has expressed the importance of international conventions as to the rights of the accused and also what the intention of the legislature in passing law.

This judgment should be hailed in many aspects. It blends international covenants as to rights of accused persons with domestic law to defeat technicalities in the path to justice. It shows that what is important is to respect the rights of the accused even at appellate level. In other words it expects courts to refrain from inclining to technicalities to dispose cases hastily. It demonstrates dispensing justice is more important than disposing cases. However, this salutary judgment has been misinterpreted and misused to promote the same it intended to despise; technicalities.

APPROPRIATE RESPONSE TO CHILDREN IN CONFLICT WITH LAW: POLICY AND GUIDELINES FOR JUVENILE SENTENCING IN SRI LANKA

Professor Jeeva Niriella[1]

Abstract

Justice for children includes legislations, policies, legal procedures and alternative mechanisms support system provided in the justice system specifically applicable to children who are victimized by crimes, children who are testified in a Court case as witnesses, and children are charged for law breaking (in other words children who are in conflict with the law). As in most legal systems, many research studies have been conducted on child victims (children who are victimized by criminal offences) in Sri Lanka; little research has been done on children who are in conflict with the law, especially on juvenile sentencing. Adequate research has not been done in Sri Lanka on formal response towards juvenile delinquency and appropriateness of juvenile sentencing to achieve the objective/s of juvenile sentencing. Furthermore, the domestic standards relating to juvenile sentencing are not aligned with international standards. Absence sentencing policy and guidelines lead for a wide disparity of sentencing for similar offences. Thus, there is a research gap and paradox in the area of juvenile sentencing. The main objective of this study is to fill the research gap and paradox by suggesting policy and guidelines in respect of juvenile sentencing. To reach the aforementioned objective, this study is expected: to understand the gaps and demerits in the existing legal frame work of juvenile sentencing; to realize the importance of striking an appropriate balance between certainty/uniformity and judicial discretion of sentencing in imposing the most appropriate degree of punishment on delinquent and to understand the necessity of the applicability of the relevant International standards in improving the existing law relating to juvenile sentencing. This doctrinal research study heavily engages in a descriptive and

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detailed analysis of legal rules found in primary sources such as domestic statutes, international treaties, statistics, government circulars and regulations and case law in respect of the issue of lacking a proper sentencing policy in juvenile delinquency. Secondary resources such as print and electronic text material also utilize in completion of this study.

Key words: Child offenders, policy, rehabilitation, reintegration, youthful offenders

1. Introduction

Child population in Sri Lanka is approximately 36% of the total population in Sri Lanka. It is often stated that children are the soul and the future of a nation. Protection of children is one of the main responsibilities of adults today. Therefore, it is the responsibility of the adults in the community to properly treat and rehabilitate a child who is in conflict with law. Due to immaturity and young age children are more likely to be tempted to commit offences. They are often victims of the circumstances. Children who are in conflict with the law should not be treated similarly to adults when responding to their offenses. In Sri Lanka, law in relation to juvenile sentencing is contained in different penal statutes such as the Penal Code 1883; Prisons Ordinance, No. 16 of 1877; Children and Young Persons Ordinance, No. 48 of 1939; Youthful Offenders (Training School) Ordinance, No. 42 of 1944, Probation of Offenders Ordinance, No.10 of 1948 and Code of Criminal Procedure Act, No. 15 of 1979. Under the aforementioned laws, it is imposed different modes of sentences on juvenile delinquents when responding to their violations of law. Court has a wide discretion in determining sentences on juvenile offenders. Such judicial discretion leads to a wide disparity in juvenile sentencing. The wide disparities of sentencing for similar offences reveal that the criminal justice system of Sri Lanka requires reforms in the law relating to juvenile sentencing. Children in conflict with the law are often dealt with in the same manner as adult offenders. Although, in Sri Lanka, different sentencing alternatives are recognized in the penal statutes for juvenile delinquents, Courts demonstrate, its preference in imposing custodial punishment. It reveals that our law in relation to juvenile delinquency is not aligned with international standards adopted in international treaty law which focuses on the best interest of the child, even though that child is an offender who has committed an offence. Under this backdrop, this doctrinal research study suggests policy and guidelines in respect of juvenile sentencing.

2. Understand the gaps and demerits in the existing legal frame work of juvenile sentencing: A Critique

2.1 Constitutional Provisions and Child Right Charter

Chapter 3 of the Constitution of Sri Lanka enshrines the fundamental rights of the citizens in Sri Lanka. Article 12 of the Constitution guarantees the equal protection of the law, and non-discrimination before the law. However, the same provision states that 'nothing shall prevent special provision being made for the advancement of children'.[2] Furthermore, the Directive Principles of State Policy place an obligation on the state to 'promote with special care the interests of children and youth, so as to ensure their full development'.[3]

Sri Lanka signed the Convention on the Rights of the Child (CRC) on 26th January 1990 and ratified on 12th July 1991. Sri Lanka's obligations under the CRC were subsequently adopted into state policy by way of the Children's Charter in 1992. Although this policy document is not an enforceable law and there is no corresponding Act of Parliament that incorporates the Convention into national law, this policy document directed many of the policies contained therein to use the international standards in relation to child affairs. Then existing laws have been amended with the influence of the Charter. The significant developments in relation to child affairs, especially in relation to juvenile sentencing, the establishment of Juvenile Court and repealing corporal punishment as a method of sentencing under Sri Lankan law

2.2 The legal framework for juvenile sentencing

The main statutes that govern juvenile sentencing in Sri Lanka are as follows:

1. The Children and Young Persons Ordinance, No. 48 of 1939 (CYPO);
2. The Probation of Offenders Act, No. 10 of 1948 (POA); and
3. The Youthful Offenders (Training School) Act, No. 42 of 1944 (YOTSA).

In addition to the aforementioned statutes the Penal Code 1883; Prisons Ordinance, No. 16 of 1877; and Code of Criminal Procedure Act, No. 15 of 1979 are also encompassed related laws in children's justice.

The CYPO provides for the establishment of Juvenile Courts, the treatment of juvenile offenders and the safeguarding of children and young persons in need

2 See Article 12 (4).
3 Article 27 (13).

of care and protection. Under the CYPO, a 'child' is defined as an individual under the age of fourteen. A 'young person' is defined as an individual between the ages of fourteen and sixteen. More importantly, the CYPO mandates that every Court dealing with a child or young person shall focus primarily on the welfare of the child which means the best interest of the child.

The POA provides for the circumstances under which a Probation Order may be made by a Court. Probation Orders function as alternatives to the institutionalization of children that come into conflict with the law (juvenile offender). The Act also stipulates the circumstances, duration, and conditions governing a Probation Order.

The YOTSA provides for the establishment of training schools for the detention, training and rehabilitation of male youthful offenders between the ages of sixteen and twenty-two. The purpose of the YOTSA is to attempt to change a child's behaviour through education and training.

As far as the minimum age of criminal responsibility of a child[4] is concerned, Sri Lankan law creates some confusions. There is no uniform definition of a 'child' under Sri Lankan law. Although Sri Lanka is a member country to CRC and human beings under the age of 18 should be considered as children, there are two main definitions provided in CYPO for human beings who are coming under different age limit as 'child' and 'young persons'. Accordingly, the human beings who between the age sixteen and eighteen eventually should be considered as adults. Moreover, section 75 of the Penal Code provides for a minimum age of criminal responsibility at 12 years old. However, human beings who are between the ages of twelve and fourteen can be held criminally responsible (section 76) if it can be proved that the child has a level of maturity to understand the nature and consequences of his or her conduct. Under section 76 of the Penal Code, the Court has the discretion to determine whether the child has mature enough to understand the circumstances and the consequences what the child has done.

Under the present context, Children's Magistrate (in Juvenile Court) may determine any charge against a child or a young person except murder, culpable homicide, attempt to murder or culpable homicide and robbery. According to CYPO Children's Magistrate is obliged to consider a report produced by the probation officer in determining the punishment. A respective Probation Officer is required to examine the background and circumstances

4 N.V. PARANGAPE, CRIMINOLOGY AND PENOLOGY (Central Law Publications 2005).

of the juvenile, such as the home surroundings, school record, health and character in producing the report. Furthermore, CYPO specifically prohibits imprisoning a child offender. Instead, along with other statutes, CYPO proposes the following sentencing options: Discharge after due admonition; Delivery to parent or guardian on executing a bond that they would be responsible for the good behaviour of the offender; Placing the offender on probation; An order placing the offender in charge of a fit person, approved home or certified school; Substitution of custody in remand home for imprisonment; Conditional discharge; Suspended sentences of imprisonment, Community service in lieu of imprisonment and Detention during the President's pleasure in lieu of sentence of death.

A defect in the CYPO is observed regarding Certified and Approved Schools, which are meant for children in conflict with the law. Section 26(1) authorizes Court to order sending a child offender of 12 years and a young person of 14 to 16 years to an approved school or a certified school. Section 35(1) of the CYPO authorizes Court to send a child of 12 years who needs care and protection to an approved or certified school. Furthermore, CYPO makes provisions only in relation to sending children to certified schools and approved schools and ignores institutionalizing children in voluntary children's homes.

This reveals that the juvenile sentencing requires a policy and guidelines in determining the most appropriate degree of sentence with the aim of rehabilitating juvenile offender.

3. Rehabilitation as a main objective of Punishment for Juvenile Offenders

Rehabilitation of the offender was the principal aim of punishment in the sociological school of criminology.[5] Under this theory, the offender is considered as a victim of the society who needs treatment to make him/her understand of his/her offensiveness and to change him/her into a better person. According to this theory, punishment should not be punitive, but it should be a therapeutic tool that could be used to reform the offender to reintegrate him/her into the society as a law-abiding person.[6] The objective of this theory is to make the offender a better person capable of being

5 Clarkson CMV and Keating HM., Criminal Law Text and Material, 4th Edition, London, Sweet and Maxwell Ltd (1998); Sirohi J.P.S., Criminology and Criminal Administration, Allahabad -2, Law Agency, (1995).

6 Ponnaian M., Criminology and Penology, Delhi, Pon Rai Publications, (1995).

reintegrated into society by improving the offenders' character. In this theory, perpetrators are viewed as patients in their entire socio-economic surroundings, whereas crimes are viewed as symptoms of an illness that could be cured with appropriate remedy (punishment). Therefore, offenders are sent to jails to reform (correct/ rehabilitate) and reintegrate them into society as law-abiding persons. Preventing the recurrence of crime by rehabilitating offenders is different from achieving the same under deterrence, retribution or incapacitation. The offender who was subjected to fear or suffer may commit a similar offence or another offence when that fear or suffering has been erased from his/her mind. But the knowledge of the difference between good and bad is not expunged from a person's mind easily. Therefore, logically, the rehabilitation process which attempts to change the offender's wrongful status of mind is more successful in reducing crime than the other theories; deterrence, incapacitation and retribution.

It is recognized that stiff/harsh/corporal punishments are not necessarily the required response towards juvenile delinquency, but rehabilitation should be the main aim of punishment of juvenile offenders. It also recognized that adults are responsible for the care, protection, rehabilitation of delinquents. By some research studies conducted in other different jurisdictions it was found that corporal punishments do not reduce the juvenile delinquency rate or such punishments do not contribute to decrease the reconvicted and recidivism rate in juvenile delinquency.[7] Some researchers suggested that community-based corrections are more effective than the institutional based corrections to meet the best interest of juveniles, rehabilitate them and to reduce the reconvicted and recidivism rate of juvenile delinquency.[8] Therefore, it is clear that juvenile delinquents should be treated specially and differently from adult offenders with the aim of rehabilitation them and reintegration to the society as reformed persons.

4. Relevant International Standards for a Better Policy

4.1. Principle of Best Interest of the Child /Well-being of a Child

Article 1 of the Convention on the Rights of the Child states that a child is a person below the age of 18 years and emphasizes that they should enjoy all

7 Andrews D.A. et al., Does Correctional treatment Work? A Clinically Relevant and Psychologically Informed Meta- analysis, 28 CRIMINOLOGY, p. 369 (1990).

8 Mark W. Lipsy & David B. Wilson, Effective Intervention for Juvenile Offenders, in SERIOUS AND VIOLENT JUVENILE OFFENDERS, RISK FACTORS AND SUCCESSFUL INTERVENTIONS, Rolf Loeber & David P. eds., Farrington Sage Publication (1998).

the rights stated in the convention. The document consists of 54 articles and has been prepared based on 4 core principles. They are Non-discrimination; Best interest of the child; Right to survival and development and Respecting the views of the child. Among the four main principles, Best Interest of the Child is the principle that should be adopted in juvenile sentencing. As provided by the Article 3 of the United Nations Convention on the Rights of the Child (CRC) best interest of the child should be a primary consideration in all actions concerning children undertaken by courts.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) also recognizes the fact that a juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult. This reveals that Best Interest of the Child is a principle adopted in juvenile sentencing.

Rule 5 of the Beijing Rule refers to two of the most important objectives of juvenile justice. The first objective of the Rule 5 is the promotion of the well-being of the juvenile. This is the main focus of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court model, thus contributing to the avoidance of merely punitive sanctions.[9]

4.2. Principle of Proportionality

The principle of Proportionality is another principle adopted in CRC in addition to the above-said core principles. Principle of proportionality basically recommends that the punishment should be proportionate with the crime committed. Article 40 (4) of the CRC states that 'A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.' It is therefore clear that not only the gravity of the offence but also the well-being of the child should be considered in determining an appropriate sentence.

The second objective of Rule 5 of Beijing Rule is "the principle of proportionality". This principle is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of just desert in relation to the

9 Further see Rule 14

gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example, social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reaction (for example, by having regard to the offender's endeavor to indemnify the victim or to her or his willingness to turn to a wholesome and useful life). By the same token, reactions aiming to ensure the welfare of the young offender may go beyond necessity and therefore infringe upon the fundamental rights of the young individual, as has been observed in some Rules. The proportionality of the reaction to the circumstances of both the offender and the offence, including the victim, should be safeguarded. In essence, rule 5 calls for no less and no more than a fair reaction in any given cases of juvenile delinquency. The issues combined in the rule may help to stimulate development in both regards: new and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles.

4.3 Other Guiding Principles in Juvenile Sentencing

Institutionalization is the last resort

Rule 17 of the Beijing Rules provides some guiding principles of disposition of a case. Rule 17.1 states that the disposition of the competent authority should be guided by the following principles: (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society; (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum; (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response; (d) The well-being of the juvenile shall be the guiding factor in the consideration of his or her case. According to Rule 17.2, Capital punishment should not be imposed for any crime committed by juveniles. Rule 17.3 suggests that Juveniles should not be subject to corporal punishment.

The Beijing Rules provide a large variety of disposition measures could be made available to the competent Court allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include: (a) Care, guidance and supervision orders; (b) Probation; (c) Community service orders; (d) Financial penalties, compensation and restitution; (e) Intermediate treatment and other treatment orders; (f) Orders to participate in group counselling and similar activities; (g) Orders concerning foster care, living communities or other educational settings; (h) Other relevant orders.[10] According to Rule 18.2 of the Beijing Rule, No juvenile should be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary.

According to Rule 19 of the Beijing Rules, the Least possible use of institutionalization. Rule 19 aims at restricting institutionalization in two regards: in quantity (last resort) and in time (minimum necessary period). Rule 19 reflects one of the basic guiding principles of resolution 4 of the Sixth United Nations Congress: a juvenile offender should not be incarcerated unless there is no other appropriate response. The rule, therefore, makes the appeal that if a juvenile must be institutionalized, the loss of liberty should be restricted to the least possible degree, with special institutional arrangements for confinement and bearing in mind the differences in kinds of offenders, offences and institutions. In fact, priority should be given to 'open' over 'closed' institutions with facilities of correctional or educational.

Rule 19 could be justified under progressive criminology which advocates that the use of non-institutional over institutional treatment. Little or no difference has been found in terms of the success of institutionalization as compared to non-institutionalization. The many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences.

After-Care Service

Disposition in juvenile cases, more so than in adult cases, tends to influence the offender's life for a long period of time. Thus, it is important that the Court or an independent body (parole board, probation office, youth welfare institutions or others) with qualifications equal to those of the Court

10 Rule 18. 1

that originally disposed of the case should monitor the implementation of the disposition. In some countries, a *juge de l'exécution des peines* has been installed for this purpose.

5. Factors to be considered in determining the sanction

In determining the sentence, the Court may take into account aggravating and non-aggravating factors. These factors can be categorized into four main groups : Factors relating to the juvenile offender, factors relating to the victim, factors relating to the offence and other general factors come under the large perspective of the society.

Factors relating to Juvenile offender

Good character, mental health condition of, repentance shown by remorse shown with the plea of guilt, no previous convictions, offering compensation to aggrieved party, differential bad association, ignorance of law, degree of participation, degree of foreseeability, relationship with the victim, delay in trial are some factors considered by the Courts in different jurisdictions including Sri Lanka[11]

Factors relating to the victim

Damage caused to the victim, vulnerable situation of the victim, victim offender relationship and contribution of the victim to commit the offence are some of the factors should be considered under this aspect.

Factors relating to the offence

The nature and the gravity of the offence are the two main factors to be considered under this aspect.

Factors relating to society

Social danger, influence of the society, secondary ill-effects of the family, delay in trial and mandatory and statutory guidance such as mandatory minimum sentencing should be considered under this category of factors.

11 ***Sajeewa alias Ukkuwa and Others v AG*** (2004) 2 Sri L R 263;; ***Kumara v. AG*** (2003) 1 Sri L R 139; ***King v. Edwin*** 47 NLR 575; Further see Andrew Ashworth, Sentencing and criminal Justice 2nd Edition, Butterworth, (1995); Van Der Merwe , Sentencing Johannesburg Juta and Co. Ltd. ((1993). .

6. Conclusion

Juvenile delinquency exists as a social problem in every country, and the same is true of Sri Lanka. Furthermore, Protection of the children in the conflict with the law has been under constant reform in Sri Lanka. Protecting, caring for and rehabilitating juvenile delinquents are of utmost importance in the juvenile justice system. Rehabilitation of the juvenile delinquents, the reduction of the reconvicted and recidivism rate of juvenile delinquency is not achieved in a successful manner. One reason is the issues in juvenile sentencing. Although Sri Lanka is a signatory to CRC, our law relating to juvenile sentencing is not par with the international standards adopted by international instruments. The existing penal laws provide wide discretion to the Court. No proper after-care service is adopted to prevent juveniles from committing further crimes after release. The existing situation called policy and guidelines that the Court may consider in juvenile sentencing.

INTEGRATING ENVIRONMENTAL RULE OF LAW INTO MARINE ENVIRONMENT GOVERNANCE IN SRI LANKA

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Abstract

As an island nation, maritime affairs play a significant role in Sri Lanka's socio-economic and political spheres. As a consequence, pollution resulting fromshipping, ports, fishing, tourism and other economic activities is rampant in themaritime zonesand the coast of Sri Lanka. Theinternational law of the sea has evolved to recognizethe duty of the states to protect and preserve the marine environment, and this paper seeks to analyse, how as a party to the UNCLOS as well as an island nation,Sri Lanka has set up its marine governance system to ensure coastal and ocean environmental protection. For this purpose, this paper evaluates the system set up by the international legal system for marine governance,and evaluates it against the legal, institutional and policy frameworkestablished by Sri Lanka to ensure proper governance of maritime and coast-related activities. It is highlighted that even though Sri Lanka has adopted a network-based approach with multiple focal points regulating marine governance,in light of the increasing number of unlawful commercial and corporate activities occurring in the coastal belt, the loopholes in the national governance framework, especially regarding monitoring and evaluation,have become evident. Hence, this paper argues that in order to curb the lack of coordination, information sharing and sector-oriented division in the institutional structure that are hampering the effective marine governance of Sri Lanka, the structure needs to be reviewed by integrating the principle ofenvironmental rule of law and other principles of international environmental law, as well as securing international and regional cooperation in curbing marine pollution and ensuring effective governance.

Key Words

Environmental rule of law, Governance, Marine environment, Marine pollution, Law of the Sea, UNCLOS

Introduction

Context and Background

Ocean is considered one of the main natural capitals on earth and scientists have indicated that 80% of marine pollution comes from land-based sources and that developing countries discharge 90% of the wastewater and 70% of industrial water without treating it (world ocean network).With the increase in the use of the seas and the coasts for both domestic and commercial activities, the world is facing issues related to overexploitation of fisheries resources, pollution by pesticides and other harmful methods of fishing, pollution by oil spills and waste from ships, waste washed from developed countries,have caused irreparable harm to the marine environment.

Governance of maritime affairs occurred in a case by case basis where the private maritime laws developed ahead of the United Nations Convention on the Law of the Sea (UNCLOS) which entered in to force in 1982. However, historically the states have treated the ocean as an exploitable resource. This is because many states depended on the ocean for its resources and the mobility for powerful naval states which were not rich in natural resources. Hence, even the UNCLOS is also based on the balancing of coastal state's rights to exploit its resources and the naval state's rights in navigation. In this context, the International Maritime Organisation (IMO) has predicted that the maritime CO^2 levels are going to increase significantly in the coming decades: whereby the forecast is that there would be an increase by 50% to 250% in the period leading up to 2050, based on the current rates of economic growth.[1]

In relation to marine environmental governance in the international sphere, the UN has noted that the existing policy only provides for sectoral governance structures which result in a lack of clear mechanism or policy approach to enhance cooperation and coordination in a manner that would effectively address the issue of marine conservation.[2]

1 R Perera, PT Kumara and J Gunasekare, (eds) SathSamudura(MEPA, Colombo, 2018).

2 Oceans and the Law of the Sea, Report of Secretary General of the United Nations (10 September 2007) UN Doc A/62/66/Add.2; Y Chang, Ocean Governance: A Way Forward (Springer, New York, 2012).

Tobias N. Hofer defines Marine pollution as '*the harmful effect caused by the entry into the ocean of chemicals or particles. It reduces the quality of ocean environment that leads to unhealthy conditions for all organisms including humans...Major marine-based pollution sources include oil/chemical spills from transportation of oil and accidents in the sea, off shore oil exploration facilities, disposal of non-degradable litter substances by vessels such as plastics, periodic dry docking and servicing of vessels, ballast water discharge, deep sea mining activities and volcanic eruptions*.[3]

Puthucherrilnotes that '*Anthropogenic activities like commercial and non-commercial shipping, the use of air guns for seismic surveys, military sonar, underwater detonations and construction, resource extraction and fishing activities and offshore wind farms, and other technology used to capture marine renewable energy, can lead to increasing levels of underwater noise, which can pose serious threats to marine living resources, including death, injury, and stranding of marine animals. For instance, it has been found that noise generated by seismic air guns reduce catch rates by 40 to 80 percent, severely impacting the distribution and abundance of fish stocks. Catch rates do not return to normalcy even days after the noise has abated*'.[4] Further, the unprecedented growth of fibre-optic submarine cables creating electromagnetic waves that affect the marine species, power plants including those in the coastal areas create a number of threats to the marine environment.

These and the causes of marine pollution that will be mentioned in relation to Sri Lanka indicated that there is a real threat to marine environment in a global and domestic level, requiring more analysis regarding the systems that are set up to address marine pollution.

Sri Lanka has a unique and strategic location in the Indian Ocean, which gives the country a significant position in terms of marine transfer. Sri Lanka covers an area of about 65,610 square kilometres with significant temporal and spatial variations in the climate of the island. Given itsstrategic location, the country has been a crucial point of attention as a destination between East and West shipping routes, and has attracted the attention of many maritime

3 TN Hofer (ed), Marine Pollution: New Research (Nova Science Pub Inc, New York, 2008); A Senaratne, 'Overcoming challenges of marine pollution for healthy oceans' available athttp://www.ft.lk/article/430261/Overcoming-challenges-of-marine-pollution-for-healthy-oceans; accessed 9 March 2020.

4 TG Puthucherril, 'Protecting the Marine Environment: Understanding the Role of International Environmental Law and Policy' (2015) 57 (1) Journal of the Indian Law Institute 48-91 available at http://www.jstor.org/stable/44782490; accessed 1 March 2020.

countries that were trading in thisroute.[5] Interest of the maritime super-powers in Sri Lanka also led to colonisation of the country and the introduction of their respective laws to the Sri Lankan legal system.[6]

Being an island makes Sri Lankan population rely on the ocean and its resources for both domestic life, food security, and their commercial activities such as fishing, tourism, transportation of trade and cargo and governmental and national security aspects. Hence, a significant portion of marine environmental pollution occurs through anthropogenic and land-based activities. It is also noted that Sri Lanka is entitled to harvest the marine resources in the ocean and on the ocean bed surrounding Sri Lanka, which is eight times the size of the island's land mass, according to international regulations.[7]

As a coastal state and a developing nation with significantly lesser bargaining power in the international law-making arenas, Sri Lanka is grappling with a number of marine pollution issues, which prompts the need for research of this nature to explore the need to evaluate the system in place for the protection of the marine environment.

It is reported that in Sri Lanka, marine pollution occurs from different sources such as heavy metals including Ferrous (Fe), Zinc (Zn), Cadmium (Cd), Copper (Cu) and Lead (Pb) due to land-based activities.[8] According to studies, the problem is that these metals are reported in concentration levels that are higher than the permissible levels incoastal waters. It is noted that the main reason for this lies in the fact that the industrial (e.g. Katunayake and Ekala industrial zones) and municipal sources are in close proximity, leading to coastal pollution.[9]

One of the key causes of coastal state marine environmental pollution is due to shipping: through emission by the ships, oil and chemical spills, and accidents. TheIMO has revealed that for the year 2012, the total shipping emissions were approximately 938 million tonnes CO^2, and 961 million tonnes CO^2 for GHGs combining CO^2, CH^4, and N^2O.[10]Sri Lanka has suffered from

5 DM Gunasekera, 'Sri Lanka's contribution to the Indian Ocean' available at https://www.dailynews.lk/2018/10/12/features/165258/sri-lanka%E2%80%99s-contribution-indian-ocean; accessed 5 March 2020.

6 *Ibid.*

7 Marine Environment Protection Authority, *Annual report* (Ministry of Environment, Colombo, 2011).

8 Senaratne (n 3).

9 *Ibid.*

10 R Perera, PT Kumara and J Gunasekare (n 1).

a number of instances related to oil spills, chemical spills and ship accidents. One of the key incidents of chemical spills was the M/T Granba chemical tanker accident at Trincomalee where there was a leak of sulphuric acid from one tank to the ballast water tank. Another significant issue is harmful types of invasive alien species brought in with ballast water.[11]Studies have reported 26 previously unrecorded species from the inner harbour area of Colombo, some of which are found in the ballast water of ships.[12]

Moreover, issues that Sri Lanka faces, which are also global phenomena are: depletion of marine resources and degradation of marine biodiversity caused by over-exploitation of resources. Puthucherrilnotes that unsustainable exploitation of the living resources in the oceans including fishing practices within and beyond the areas under national jurisdiction of the coastal states cause adverse impacts on the marine biodiversity and the environment.[13]The UN has noted that many fish stocks have decreased to the level of collapsing as a result of overfishing, illegal, unreported and unregulated (IUU) fishing, use of destructive and unregulated fishing practices, equipment and gear, by-catch and discards, and bottom fisheries.[14]

Most of these instances of pollution are based on human activities and can be regulated through a coherent system of rules and regulations directed at minimising the adverse impacts of such activities on the marine environment, and ensuring effective monitoring and evaluation of these rules and regulations. One of the key observations regarding environmental protection in Sri Lanka is that there is a host of rules and regulations, however there are issues in actual implementation of these laws. While non-implementation can be caused by a number of reasons, one of the key causes that can be traced back to the statutes, is lack of proper mechanisms for coordination, information and responsibility sharing, and transparency. Therefore, it is necessary to evaluate the system of marine environmental protection in Sri Lanka by evaluating the institutional framework and the laws that set up the framework to analyse whether there are inherent issues in the legal structure that hinder effective maritime governance.

This research analyses the functions, duties, and powers of the government entities, namely the Coast Conservation Department (CCD),

11 Senaratne (n 3).
12 *Ibid.*
13 TG Puthucherril (n 4).
14 Oceans and the Law of the Sea, Report of Secretary General of the United Nations (22 March 2011) UN Doc A/66/70.

the Sri Lanka Coast Guard (SLCG), the Marine Environment Protection Authority (MEPA), the Sri Lanka Ports Authority (SLPA) and the Sri Lanka Navy (SL Navy),and whether they perform their responsibilities as expected.

Theoretical Framework

The theoretical background of the study is centredonthe public authorities'set up for marine environment protection,their roles and functions,and the legal framework governing the subject of marine pollution.

This paper isbased on the concept of *Integrated Ocean Governance*which was the outcome of the UNCLOS process and the UN Conference on Environment and Development.[15]Ocean governance is a framework that ensures sustainable utilisation of marine space and resources, by establishing a framework for integrated management through legal and institutional frameworks and a mechanism of implementation.[16] Since there is scarce literature focusing on marine environmental governance in Sri Lanka, this research will evaluate the legal and policy framework throughthe lens of sustainable development and good governance.

With the adoption of Sustainable Development Goals in 2015, and with the increasing understanding and acknowledgement of the scientific, legal and environmental communities on the importance of adhering to systems that would foster sustainable development, it is necessary to integrate the economic objectives and activities connected to the sea, with its conservation. However, as sustainable development is yet to find its status as a rule in international law, and with its criticisms ofbeing too vague and imprecise as to its content, this paper would focus on the concept of good governance as a lens through which to evaluate the marine environmental governancewhich enshrines rule of law as one of the main elements of good governance.[17]This is buttressed by the fact thatthe main components of good governance as recognised by the UN Department of Economic and Social Affairs include, among other things, the rule of law, participatory decision making and implementation, transparency,

15 EM Borgese, *Ocean Governance and the United Nations* (Halifax, Nova Scotia, 1995).

16 I Manikarachchi, 'State of Ocean Governance in Sri Lanka: The need of an Integrated National Ocean Policy' in Proceedings of the Emerging Scholars Symposium (Colombo, of Bandaranaike Centre for International Studies 2017) available at https://www.researchgate.net/publication/320945133_State_of_Ocean_Governance _in_Sri_Lanka_The_need_of_an_Integrated_National_Ocean_Policy; accessed 30 September 2019.

17 Chang (n 2).

accountability, equity, responsiveness, coherence and coordination.[18]For the purpose of this research, these main elements will be used as lenses to evaluate the marine governance system in Sri Lanka in evaluating the effectiveness in marine environmental protection. The reason for focusing on rule of law and environmental rule of law in particular is because, studies have indicated that the reason for non-implementation of a majority of laws related to environmental protection stems from issues related to rule of law. Further, the present study on how to integrate environmental rule of law would bolster the existing legal system on marine conservation in Sri Lanka, by enhancing the ability of the laws to be implemented and hold the necessary parties accountable.

This study also notes the importance of integrating the principles of international environmental law such as the Polluter-Pays Principle, Intergenerational Equity and Precautionary Principle in setting up systems to grapple with marine environmental pollution. Therefore, this research is based on the theoretical foundations of these key environmental principles in evaluating the system of marine environmental governance of Sri Lanka.

Hence, there is a dual theoretical framework involved in this research: concepts of good governance in marine governance, and the principles of environmental law as providing the trajectory for future development of marine governance to ensure effective protection of the marine ecosystem.

Research Problem, Research Methodology and Limitations

The main objective of this research is to evaluate the existing system of marine governance in Sri Lanka for the purpose of analysing whether the legal, policy, regulatory and institutional framework of Sri Lanka provides for adequate protection of marine environment and whether it can sustain the future challenges that Sri Lanka will face due to global issues such as climate change, resource depletion and marine pollution.

It should be noted that this research uses environmental rule of law as a lens to evaluate the governance framework related to marine environment, and therefore for the purposes of the research, the distinction between environmental rule of law and environmental governance as pointed out by the United Nations Environmental Programme (UNEP) is adopted, which postulates: '*While environmental rule of law and environmental governance are*

18 The Department of Economic and Social Affairs of the United Nations Secretariat, Responsive and Accountable Public Governance (2015) UN Doc ST/ESA/PAD/SER.E/187.

related, there are distinctions in objectives and scope. Environmental rule of law focuses on ensuring compliance with and enforcement of environmental laws. Environmental governance comprises a broader set of objectives and approaches related to making and implementing decisions related to the environment—with environmental rule of law speaking particularly to the implementation'.[19]

The study employs qualitative data grounded on primary sources and secondary sources. Legislation isbeing principally focused on under primary sources, while books, journal articles, web articles are concerned in terms of secondary bases. Data regarding the international law on marine governance is obtained through primary sources of law such as international treaties and documents, and national laws through statutes and policies. Since the research employs the legal research methodology, the concepts and theories related to international law of the sea and international environmental law will be analysed through the commentaries and opinions expressed by scholars in the field.

Data Analysis and Findings

The existence of policies itself does not resolve issues pertaining to maritime protection. The extent to which they could be enforced, practical complications encountered in such implementation, and performance of obligations by the public entities are critical factors which require further consideration.

The purpose of evaluating the international governance framework is to obtain normative guidance to address the issues that coastal states such as Sri Lanka face in the protection of marine environment and to evaluate how to integrate environmental rule of law in to the system of marine environmental protection.

It is necessary to employ a tool for measuring the success of marine governance. It is noted that in many instances environment-related laws and policies include vague and subjective aims leading to non-implementation of such tools and difficulty in measuring their success. Therefore, as recommended by scholars, this study recommends the SMART objective tool; that the objectives should be Specific, Measurable, Achievable, Relevant and

19 UNEP, 'Environmental Rule of Law: First Global Report' available athttps://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf; accessed 5 January 2020.

Time Bound, as developed by Ehler in 2014. This will guide the discussion related to the national laws and policies in evaluating their objectives.

The following analyses would be based on the elements of good governance that were noted above and the principles of environmental law. The following section comprises firstly of an evaluation ofthe international system set up for the purpose of marine environmental protection and secondly of an analysis of the governance system in Sri Lanka, by analysing the roles, powers and obligations of the institutions set up by the law, along with legal mechanisms set up to ensure effective marine governance.

Marine Governance in the International Sphere

It should be noted that until recently the focus of the international legal community was on coastal ecosystems and governance on areas that fall within national jurisdictions.[20] The issues related to deep sea, were not adequately addressed, mainly since the technical know-how for the exploration of deep sea emerged only in the past decade. However, despite the time lag in exploring the deep-sea resources, the technology has since caught up and the intensive rate at which the resources of deep sea is being exploited is causing numerous threats to the areas within the national jurisdictions of coastal states.

For a very long time the core proposition in law of the sea was that the resources of the sea are inexhaustible and they had the ability to assimilate and absorb all types of pollutants.[21] As Puthucherril notes, pollution and exploitation of resources of the sea were rights of the states, considered as freedoms that they enjoyed.[22]

In the development of law of the sea,states were concerned about the ocean spaces and resources which contributed towards marine environmental pollution, since states exercised control over their ocean spaces and resources under their direct national jurisdiction. This also meant that the states had an interest in ensuring optimum utilisation of the ocean resources while maintaining the environmental quality.

In customary international law, there are concepts such as *sic uteretuo* and good neighbourliness.[23]In the international treaty law, the initial stages

20 Puthucherril (n 4).
21 *Ibid.*
22 *Ibid.*
23 *Ibid;*Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-based Sources (Nairobi, 24 May 1985) UNEP (092)/E5.

focused on regulating the environmental pollution caused by oil spills. At the 1972 Stockholm Conference, recognition was given to the need to protect the marine environment, while laying down the basis for the development of international environmental law.[24]Principle 7 of the Stockholm Declaration obligates the states to take all necessary steps to prevent pollution of the seas.

One of the key developments in marine environmental protection was the adoption of Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter followed by the adoption of International Convention for Prevention of Pollution by Ships(MARPOL). MARPOL was adopted in 1973 followed by two protocols respectively in 1978 and in 1997, whichentered into force on 2ndOctober 1983. It is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. It is a combination of two treaties adopted in 1973 and 1978 respectively,and also includes the Protocol of 1997 (Annex VI). It has been updated by amendments through the years.

In 1982,at the 3rd UN Conference ondeveloping the law of the sea, the United Nations Convention on Law of the Sea (UNCLOS) was adopted and ithas now been established as the constitution for the oceans. UNCLOS lays down a very comprehensive legal and institutional structure for all aspects of marine governance including obligation for states to protect and preserve marine environment, which is stated as a positive obligation.[25]

As Puthucherrilnotes that '*states are called upon to protect the marine and other forms of environmental degradation … to adopt contingency plans for emergency response and to ensure that recourses are available for prompt and adequate compensation to redress damage caused to the marine environment and…states are enjoined to co-operate on global or regional competent international organizations in formulating rules, standards and recommended practices and procedures for marine environment.*.[26]

There have been certain incidents that led to the adoption of more precautionary measures while indicating the need for state cooperation, such as the *Torrey Canyon incident* which led to the signing of the regional convention on marine pollution: *The Agreement for Cooperation in Dealing with Pollution of North Sea by Oil and other Harmful Substances (Bonn Agreement)*.

24 Puthucherril (n 4).

25 Articles 192-237 of Part XII – Protection and preservation of the Marine Environment, United Nations Convention on Law of the Sea (adopted 10 December 1982, entered into force 16 Nov 1994) 1833 UNTS 3 (UNCLOS)

26 Puthucherril (n 4).

Thereafter the Oslo Convention was adopted to address the issue of pollution by dumping of wastes from ships and aircrafts. Since then, there have been a number of regional instruments that provided for marine environmental protection and control of pollution.

International legal instruments which regulate the activities of ships to ensure regulation of marine environmental protection include:*International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001*; *International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER),*adopted on 23 March 2001 and entered into force on 21 November 2008, whichwas adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers; and the *International Convention for the Control and Management of Ships' Ballast Water and Sediments*adopted in 2004.The*Convention for the Control and Management of Ships' Ballast Water and Sediments* is divided into 22 Articles; and the Annex to it which includes technical standards and requirementsis titled,*Regulations for the control and management of ships' ballast water and sediments.*

The regional instruments utilise a useful method for ensuring state cooperation in the event of accidents and marine pollution that cannot be addressed by the coastal state alone. They also follow the method of addressing specific issues, by establishing a Convention and thereafter adoption of Action Plans for the purpose of giving effect to the obligations under the regional instruments.

Apart from the international and regional instruments related to law of the sea, there is a number of internationalenvironmental law instruments that have recognised the need to protect marine environment. Among other documents, one of the key instruments is the Stockholm Declaration that was mentioned in the previous section.

Further, in the Rio Declaration, Chapter 17 of Agenda 21 deals with the protection of oceans, all kinds of seas including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources.[27] Chapter 17 identifies the need for new approaches for marine and coastal area management and development which integrate the precautionary approach and identified seven programme areas: (a) Integrated management and sustainable development of coastal areas, including exclusive

27 UN Conference on Environment and Development, Agenda 21: Programme for Action on Sustainable Development (Rio De Janeiro, 3 - 14 June 1992) A/Conf.151/26.

economic zones; (b) Marine environmental protection; (c) Sustainable use and conservation of marine living resources of the high seas; (d) Sustainable use and conservation of marine living resources under national jurisdiction; (e) Addressing critical uncertainties for the management of the marine environment and climate change; (f) Strengthening international, including regional, cooperation and coordination; (g) Sustainable development of small islands.[28]

At the Rio Conference, the *Convention on Biodiversity* adopted in 1992 failed to recognise the marine and coastal biodiversity protection, leading to the adoption of *Decision 11/10 on Conservation and Sustainable Use of Marine and Coastal Biological Diversity* (Jakarta Mandate). *World Summit on Sustainable Development* held in 2002 adopted the Johannesburg Plan of Implementation which dealt with oceans, seas, islands and coastal areas. It particularly addressed: (a) enhancing effective coordination and cooperation, at the global and regional levels; (b) achieving sustainable fisheries; (c) promoting conservation and management of the oceans; (d) advancing implementation of the Global Programme of Action for the Protection of Land-based Activities and the Montreal Declaration, on municipal wastewater, the physical alteration and nutrients; (e) enhancing maritime safety and protection of marine environment; (f) take into account the potential for environmental impacts of radioactive wastes; and (g) improve the scientific understanding and assessment of marine and coastal ecosystems as a fundamental basis for sound decision- making.

There are also other instruments that are relevant in addressing marine pollution prevention, however for the purposes of thisstudywhich is focusing on governance aspects, those instruments will not be addressed in this research.

Integration of Environmental Rule of Law to Governance System on Marine Environmental Protection.

It is necessary to note that the governance of the marine environment has occurred in an *ex post facto* basis whereby, different major incidents have given rise for the states to initiate a need for a system to regulate their activities.

For the purposes of the study, UN definition of rule of law is adopted, which encompasses three components: consistency with fundamental rights, developed through an inclusive process and accountability through compliance.

28 Declaration of the United Nations Conference on Environment and Development (Rio De Janeiro, 12 August 1992) A/CONF 151/26.

'*Environmental rule of law incorporates these components and applies them in the environmental context. As such, environmental rule of law holds all entities equally accountable to publicly promulgated, independently adjudicated laws that are consistent with international norms and standards for sustaining the planet. Environmental rule of law integrates critical environmental needs with the elements of rule of law, thus creating a foundation for environmental governance that protects rights and enforces fundamental obligations*'[29]Rule of law is recognized thus by the World Bank, Asian Development Bank and many other instruments.[30]According to the UNDP, rule of law ought to ensure that the '*legal frameworks should be fair and enforced impartially*'.

It is also necessary to bring in the discourse on environmental rule of law that has been underweight since 2013, which culminated in the IUCN World Declaration on Environmental Rule of Law drafted by the World Commission on Environmental Law in 2016. This declaration is not a formally negotiated outcome of a conference but sets out recommendations and principles to integrate rule of law to environmental decision making and governance. It is recognised that the environmental rule of law is a refinement of the traditional notions of rule of law and provides an additional framework of procedural and substantive rights and obligation incorporating the principles of ecologically sustainable development.[31]

The World Declaration on Environmental Rule of Law is premised on:

a. Development, enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality;
b. Respect for human rights, including the right to a safe, clean, healthy, and sustainable environment;
c. Measures to ensure effective compliance with laws, regulations, and policies, including adequate criminal, civil, and administrative enforcement, liability for environmental damage, and mechanisms for timely, impartial, and independent dispute resolution;
d. Effective rules on equal access to information, public participation in decision-making, and access to justice;

29 UNEP (n 19).
30 Chang (n 2).
31 IUCN World Declaration on Environmental Rule of Law (Rio de Janeiro, 26 - 29 April 2016).

e. Environmental auditing and reporting, together with other effective accountability, transparency, ethics, integrity and anti-corruption mechanisms; and

f. Use of best-available scientific knowledge.

The declaration recognises thirteen principles as central to the goal of promoting ecological justice through environmental rule of law, they are: Obligation to Protect Nature; Right to Nature and Rights of Nature; Right to Environment; Ecological Sustainability and Resilience; *In Dubio Pro Natura*; Ecological Functions of Property; Intra-generational Equity; Inter-generational Equity; Gender Equality; Participation of Minority and Vulnerable Groups; Indigenous and Tribal Peoples; Non-regression; Progression.[32]

It is also necessary to take note of the means of implementation proposed by the IUCN declaration recognising the importance of having mechanisms to address procedural as well assubstantive elements of law related to conservation.These recommendationsnon-exhaustively include:

a) Monitoring and reporting systems that enable accurate assessments of the state of the environment and the pressures on it,

b) Anti-corruption measures, including those that address unethical conduct and oversight,

c) Legally supported environmental management systems that take due consideration of environmental risk and the vulnerability of social and economic systems in the face of ecological deterioration,

d) Environmental assessment, incorporating multidimensional, polycentric perspectives and the complexity of social-ecological relationships,

e) Quantitative and qualitative modelling and visioning tools that enable planning based on best-available science and environmental ethics, enabling strategies and options that remain robust under multiple plausible futures,

f) Collaborative and adaptive management and governance that involves stakeholders from a range of socio-economic and cultural backgrounds, including local communities, indigenous peoples, women, the poor, and other traditionally marginalised and vulnerable groups,

g) Coordination mechanisms such as regional enforcement networks, intelligence sharing, and judicial cooperation,

32 *Ibid.*

h) Environmental legal education and capacity building for all people, and especially for women, girls, and traditional leaders of indigenous peoples, focusing on exchange of knowledge on best practices, taking into account the relevant legal, political, socioeconomic, cultural, and religious aspects, as well as recognizing common features founded on international norms and standards,

i) Harnessing new technologies and media for promoting environmental law education and access to information, as well as complementary tools that draw on and respect customary laws and practice,

j) Communication systems enabling the production and dissemination of guidelines, toolkits, checklists, and associated technical and legal implementation assistance,

k) Strengthening civil society, environmental law associations, and other non-state actors that fill gaps in state-based environmental governance systems,

l) Addressing environmental crimes in the context of other types of crimes such as money laundering, corruption, and organised crime,

m) Enabling public interest dispute resolution concerning environmental conservation and protection and upholding the rights of future generations, and

n) Strengthening the independence and capacity of courts in the effective application and interpretation of environmental law, and in acting as guarantors of the environmental rule of law.

United Nations Environmental Programme (UNEP) also has recognised the importance and role of environmental rule of law into the governance framework due to the fact that, despite majority of countries having enacted comprehensive environmental laws, there remain vast lacunae in terms of implementation. The recent report published by the UNEP states '*While environmental laws have become commonplace across the globe, too often they exist mostly on paper because government implementation and enforcement is irregular, incomplete, and ineffective. In many instances, the laws that have been enacted are lacking in ways that impede effective implementation (for example, by lacking clear standards or the necessary mandates). According to the fifth Global Environmental Outlook, considerable progress has been made toward meeting only 4 of the 90 most important environmental goals and objectives, and critical ecological thresholds upon which human well-being depend may*

soon be surpassed. Many developing countries prioritize macroeconomic development when allocating government funds and setting priorities. This results in environment ministries that are under resourced and politically weak in comparison to ministries for economic and naturalresource development'.[33] These are common problems associated with marine environmental laws as well. Among the problems unidentified by the UNEP report are: failure to represent the conditions, needs and priorities of the countries into which they are imported; inconsistencies in the laws and their implementation; funding-based priorities in implementation and lapse of funding causing the system of implementation to topple; ineffective coordination between the national and local authorities; lack of administrative capacities and financing; lack of knowledge and data; insufficient compliance assurance mechanisms and lack of integration and policy coherence.[34]

International environmental law instruments that were discussed indicate the usual features of the soft law instruments which provide for a framework to address specific problems. In addition to the adoption of Treaties and Declarations, environmental law also has a considerable normative impact through the principled approach to marine environmental protection,[35] such as permanent sovereignty over natural resources; the principle of precaution; inter and intra-generational equity; principle of good neighbourliness; equitable utilization and apportionment; prior information; consultation and early warning; the common heritage of mankind; duty to cooperate; environmental impact assessment; environmental ecosystem approach and integrated management; and common but differentiated responsibilities.

In this context, it is necessary to consider whether the Chapter XII of the Law of the Sea Convention affords adequate protection for the marine environment. Article 192 recognises that '*states have the obligation to protect and preserve the marine environment'*. This obligation is more specified in Article 194 and 197 which deal with state cooperation, and Articles 204-206 setting out the requirements on environmental impact assessment. Rather than the content of the articles, it is the interpretation by the International Tribunal on the Law of the Sea (ITLOS) and the interpretationof the Articles in light of the other international environmental law principles, that has expanded the content of these obligations. However, in terms of governance,

33 UNEP (n 19).
34 *Ibid.*
35 Puthucherril (n 4).

the implementation framework on international marine protection is not expansive. UNCLOS provides for the legal framework of the coastal countries in terms of their sovereignty, rights and responsibilities, for managing the marine environment and its resources and issues related to fisheries resources, safety of marine traffic, pollution control, protection and conservation of biodiversity, response to expected climate change etc.[36]

The international institutional framework on marine protection is comprised of two UN bodies: the Intergovernmental Oceanographic Commission (IOC) and the International Maritime Organization (IMO). There are other UN bodies that engage in ocean-related activities as a part of their mandate, including the UNEP, Food and Agriculture Organisation (FAO), with its subsidiary body,Committee on Fisheries (COFI), the World MeteorologicalOrganisation (WMO) dealing with global climate, theUnited Nations Educational, Scientific and CulturalOrganization (UNESCO) dealing with marine sciences,United Nations Conference on Trade and Development(UNCTAD) dealing with technology transfer, and the International Seabed Authority (ISBA) with responsibility for mineral resources of the seabed.IMO, FAO, WMO and UNESCO are specialized autonomous agencies with their own budgets and status, while UNEP is subordinate to the UN General Assembly, and theIOC is subordinate to UNESCO with budgets controlled bytheir mother organizations.[37]

In evaluating how these international instruments and principles can assist in establishing a system of marine environmental governance, the soft law and hard law is read together for the purpose of this research.

While the researcher is conscious of the fact that the recommendations in the soft law instruments might not have the legal force of a well-established principle such as a precautionary approach, for the purpose of looking into integrating rule of law into marine environmental governance, certain provisions of soft law instruments become useful. The Rio Declaration recommends the states to enact effective environmental legislation, standards, management objectives and priorities, reflecting environmental and development contexts to which they apply, which means that law should be open, stable, clear and general, along with a review system.[38]Hence, the

36 K Grip, 'International Marine Environmental Governance' available at https://doi.org/10.1007/s13280-016-0847-9; accessed 30 September 2019.

37 *Ibid.*

38 Chang (n 2).

Rio Declaration has incorporated the aspects of environmental rule of law identified above.

However, it is noted that even in the UN system of maritime governance, there are many coordination problems and inter-organisational conflicts. As Grip states '*each agency basically pursues its own programme and defends its mandate*'.[39] In the conservation field, such tensions and sometimes conflicts can be found between, for instance, UNEP/RSPs and FAO/Regional Fishery Organizations on environmental impact of fisheries and marine protected areas, and between UNEP/RSPs and IMO on environmental effects of shipping.[40]

Legal Framework on Marine Environmental Protection in the National Sphere

Sri Lanka is known as a biodiversity rich island and the coastal waters house more than 180 species of fish, 5 species of marine turtles and the beach contains more than 30 species of marine mammals.

Sri Lanka does not have only one authority mandated with marine environmental protection, and therefore rather than a specific institution-centric approach, the law adopts a more network-based, fragmented approach with multiple focal points to address different issues. Sri Lanka ratified UNCLOS in 1994. The Constitution of Sri Lanka being the supreme law, recognises in Article 27(14), that the State has a duty to preserve the environment for the benefit of the community and Article 28(f) provides that it is a fundamental duty of every person in Sri Lanka to protect nature and conserve its riches.

In terms of the legal framework, there is a host of laws and a wide-range of Ministries with the mandate on marine environmental issues. While the administrative institutions are set up by legal instruments and therefore carry a specific mandate, the political environment of the country creates instability in terms of the Ministerial portfolios. Therefore, it is necessary to maintain the stability in the institutional framework of the relevant line Ministries.

Agencies such as Central Environment Authority, Department of Coast Conservation, Department of Fisheries and Aquatic Resources, Marine Environment Protection Authority, Ceylon Fishery Harbours Cooperation, Ceylon Petroleum Cooperation, National Aquaculture Development

39 Grip (n 35).

40 SM Redpath, KA Wood and R Sidaway, 'An Introduction to Conservation Conflicts' in SM Redpath, RJ Gutierrez, KA Wood, J Young (eds) *Conflicts in Conservation* (Cambridge University Press, Cambridge, 2015) 3 – 18.

Authority, Department of Wildlife Conservation, Geological Survey and Mines Bureau and Ceylon Tourist Board, bear regulatory prerogatives of coastal and marine-related industrial, development and conservation activities.

Sri Lanka Police, Navy, Coast Guard and Customs are the major law enforcement bodies in local maritime domain. National Aquatic Resources Research and Development Agency is vested with the responsibility to carry out research on aquatic resources'.[41] Since this research deals with marine environmental protection, some of the key institutions relevant for the subject have beenidentified while there are other institutions that have an indirect mandate. For the purpose of the research, the institutions discussed are those with a direct mandate through law.

Sri Lankan legal system is far ahead compared to its neighbouring countries in terms of ratification of international legal instruments. Sri Lanka is a member of the IMO, FAO and the IOC.

However, there is a need for the country to comprehensively address the environmental risks related to shipping and to ratify the other relevant conventions as well. There is a number of challenges that the system faces in addressing marine protection due to increasing population, habitat loss, lack of awareness on ecosystems, and lack of finances. Further, there are institutional issues such as lack of a proper mandate, lack of mechanisms to ensure accountability, weak enforcement capacity, overlapping jurisdictions and mandates, lack of coordination and cooperation between institutions for data sharing and lack of resources and financing for technology.[42]

The following sections will evaluate selected institutions and their governance framework with reference to the components of environmental rule of law in marine environmental governance in Sri Lanka.

Ministry of Environment

Ministry of Environment was established in 2001 with the overall responsibility over the functions of the Central Environmental Authority which was established in 1981 under the provisions of the National Environmental Act, No. 47 of 1980. Through the Amendment Acts, No. 56 of 1988 and No. 53 of 2000 the CEA was given regulatory powers. The CEA has overall powers and authority in terms of environmental management, pollution control, environmental assessment and waste management.

41 Manikarachchi (n 16).
42 *Ibid.*

However, the extent to which the CEA gets involved with marine environmental protection is very limited. Therefore, in order to effectively integrate environmental rule of law, and to ensure that there is no duplication of functions of the other institutions, and that the functions mentioned above are carried out in a holistic manner, it is necessary to integrate the CEA in to marine environmental governance.

There is already a proposed action process through the UNEP for these purposes as elaborated in the text box below.

> Sri Lanka's National Programme for Action process for the Protection of the Marine Environment from Land-based Activities (UNEP, a Guide for National Action)
>
> *The NPA Programme Document*
>
> *In Sri Lanka a full NPA process was started with the production of an initial NPA programme document, published in December 2003 and officially launched in mid 2004 by the Ministry of Environment and Natural Resources:*
>
> *Part i: Present status of the coastal region and the critical land-based activities that affect the marine environment of Sri Lanka (45 pages):*
>
> *– Biophysical, climate and socio-economic features*
>
> *– Degradation of the marine environment (water pollution, coastal erosion, biodiversity and habitats, sites of special significance)*
>
> *– Management of the marine environment (policies and legislation)*
>
> *Part ii: The National Action Plan:*
>
> *– Identification and assessment of problems*
>
> *– Establishment of priorities for action related to main areas of concern*
>
> *– Setting goals, management objectives and policies for established priorities (control marine water pollution, coastal erosion, degradation of marine habitats and their biodiversity, and deterioration of sites of special significance)*
>
> *– Identification, evaluation and selection of strategies and actions*
>
> *– Identification of criteria for evaluation of effectiveness (targets/ indicators)*

– Socio-economic analysis of selected strategies and actions

– Programme support elements

– (Initiation of the) implementation of policies, strategies and actions (through a Committee on Environmental Policy and Management)

Part iii: Pilot project proposals:

– Solid waste management by a local authority in Gampaha district (5 yrs; us$510 000)

– Design of an appropriate sewerage system for new and improved settlements (5 yrs, us$510 000)

– Study on economic significance of the coastal regions of Sri Lanka (1 1 /2 yrs; us$22 000)

– Preparation of a zonal plan for development of aquaculture in Hambantota District (2 yrs; us$50 000)

– Control river sand mining in the Deduru Oya River Basin (5 yrs, us$510 000)

– Study of squatter settlements and links to coastal pollution on the West Coast (1 yr; us$12 850)

Follow-up activities

As with many of the NPA processes started so far, there was a need for strengthened institutional capacity, and above all increased financial resources, particularly after the country was hit by the December 2004 tsunami.

Meanwhile many activities were started in the context of rehabilitation after the Tsunami, which fit directly into the NPA process. Projects were also formulated before the tsunami, such as the NPA follow-up project developed with the GPA Coordination Office, which started at the end of 2005: Planning and developing market-based instruments for medium and long-term strategic planning of implementation of Sri Lanka's NPA (1 1 /2 yrs; us$ 66 000)

Source: UNEP, GPA: Protecting coastal and marine environments from land-based activities A guide for national action.

Ministry of Fisheries and AquaticResources and the Department of Fisheries and Aquatic Resources

The Department of Fisheries has an important role in terms of the Fisheries and Aquatic Resources Act, No. 2 of 1996, as amended subsequently by Acts No. 4 of 2000, 4 of 2004,22 of 2006,35 of 2013,2 of 2015,2 of 2016 and 11 of 2017. ThisAct provides for the management, regulation, conservation and development of fisheries and aquatic resources in Sri Lanka among its other objectives. The Act sets up the National Fisheries and Aquatic Resources Advisory Council which constitutes of a cross-sectoral participation of the relevant government institutions and persons nominated by the National Fisheries Federation of Fisheries Organisation and two persons nominated by the Multi-Day Fishing Boat Owners, and the President of the Fishery Products Exporters Association, two representatives of the women engaged in fishing and other members involved in the subject. The main methods employed by the law in regulating fishing activities is to require licensing for approved fishing activities, prohibition of harmful methods of fishing by creating offences punishable by law, and establishment of Fisheries Management Areas to ensure spatial protection of identified areas(Fisheries Act, 1996).

Further, the National Aquatic Resources Research and Development Agency (NARA) was established under the National Aquatic Resources Research and Development Agency Act, No. 54 of 1981 for the purpose of facing the challenges posed by the 200nm Exclusive Economic Zone. NARA is the principal national institute in charge ofcarrying out research, development and management activities on aquatic resources (NARA).

Currently, the fisheries sector is more focused on food security and livelihood development of the sector, and there is a need to integrate conservation and marine protection priorities and objectives into the sector. Due to the lack of any monitoring mechanism in the sector and the laws, there is a lack of implementation of the monitoring of certain prohibited fishing methods such as use of poisons, certain types of nets, bottom trawling, use of dynamite etc. Therefore, it is necessary to strengthen the implementation mechanisms within the Acts and regulations by introducing reporting and evaluation as an obligation of the relevant authorities, on their performance of the duties imposed on thembythe law.

Coast Conservation Department

Coastal regions of Sri Lankais the home to a large and increasing population of Sri Lanka, creating a high population density in certain areas due to the livelihood and economic benefits presented by the coastal resources from fishing, tourism and other maritime economic engagements. With the growth and expansion of the coastal zone activities there is a threat to the natural coastal environment, requiring regulation and management of the coastal zone activities.

Coast Conservation Act, No. 57 of 1981was introduced in this context with the purposes of surveying of the coastal zone and the preparation of a Coastal Zone Management Plan; and to regulate and control development activities within the coastal zone; to make provision for the formulation and execution of schemes of work for coast conservation within the coastal zone; to make consequential amendments to certain written laws; and to provide for matters connected therewith or incidental thereto (Coast Conservation Act, 1981).For these purposes, the Coast Conservation Division was upgraded to Coast Conservation Department (CCD) in 1984, and the administration, control, custody and management of the coastal zone have been vested with Director of Coast Conservation Department. In 1988, there was an Amendment to the Act- the Coast Conservation (Amendment) Act, No. 64 of 1988. The powers of the Department were further upgraded in July 2009, appointing the first Director General, Coast Conservation.

The Coast Conservation Act requires a survey of the Coastal Zone and the preparation of a Coastal Zone Management Plan (CZMP), prepared by the CCD. It was first adopted by the Government and implemented as the Coastal Zone Management Plan in 1990. The Resource Management Strategy for Sri Lanka provides for the direction of coastal resources management in Sri Lanka. CCD's objectives include improvement of the status of coastal environment; development and management of the shoreline; improvement of the living standards of coastal communities; promotion and facilitation economic development based upon coastal resource (CCD).

The Coast Conservation Act is one of the most powerful laws in environmental protection in Sri Lanka. The Act empowers the Director General to issue orders without a court order, and it supersedes the provisions of the Urban Development Authority Act, No. 41 of 1978.

The Department,and the Act itself provide for a comprehensive system for coastal management. However, issues in implementation and governance have created gaps in effective implementation of the law.

Sri Lanka Coast Guard

This functions under the Ministry of Defence and it is considered as the law enforcement agency at sea. The law provides that the Coast Guard be empowered with the necessary legal authority to search and arrest ships, craft, and personnel engaged in illegal activities in the maritime zone of Sri Lanka and constitute legal proceedings against the offenders.[43]

Their objectives also includeMaritime Law Enforcement, Maritime and Marine environment protection, Maritime safety and International Cooperation.[44]

One of the issues that came to light in the process of the research was lack of coordination, data and information sharing mechanisms between the Sri Lanka Coast Guard and the Marine Environment Protection Authority, which has resulted in duplication of some of the projects and work done by the two institutions in an individual basis. One of the legal issues that lead to this position is the lack of a mechanism or provision for data and information sharing, and lack of a legal requirement for cooperation. This indicates the need for integrating the principles of environmental rule of law into the marine environmental protection, since one of the core tenets is participation and accountability in implementation of the laws and policies.

Marine Environment Protection Authority

This is the core institution relevant for this research, established by the Marine Pollution Prevention Act, No. 35 of 2008,to take necessary action to minimize and prevent the pollution of the marine environment. With a view to further strengthening the hands of the Marine Environment Protection Authority (MEPA) to take action on incidence of pollution and to implement international conventions pertaining to the protection of marine environment, the Marine Pollution Prevention Act, No. 59 of 1981 was repealed bythe Marine Pollution Prevention Act No. 35 of 2008.

43 'Sri Lanka Coast Guard', available at http://www.coastguard.gov.lk/; accessed 5 January 2020.
44 *Ibid.*

Responsibilities and Functions of the Authority include:[45]

(1) To effectively and efficiently administer and implement the provisions of the Marine Pollution Prevention Act and the Regulations made thereunder.

(2) To formulate and execute a scheme of work for the prevention, reduction, control and management of pollution arising out of ship-based activity and shore-based maritime related activity in the territorial waters of Sri Lanka or any other maritime zone declared at a future date under such law, its foreshore and the coastal zone of Sri Lanka.

(3) To conduct research in collaboration with other departments, agencies and institutions for both the government and private sector for the purpose of prevention, reduction, control and management of pollution arising out of any ship-based activity or any other maritime zone declared at a future date under such law, its foreshore and the coastal zone of Sri Lanka.

(4) To take measures to manage, safeguard and preserve the territorial water of Sri Lanka or any other maritime zone declared at a future date under such law, its foreshore and the coastal zone of Sri Lanka.

(5) To provide adequate and effective reception facilities for oil, harmful substances or any other pollutant.

(6) To recommend adherence to all international conventions and relevant protocols in dealing with marine pollution, which the government of Sri Lanka has or may ratify, accept, accede or approve.

(7) To formulate and implement the national oil pollution contingency plan.

(8) To oversee, regulate and supervise the conduct of the contractors and persons conducting or engaged in exploration of natural resources, service, sub-contractors and persons conducting or engaged in exploration of natural resources including petroleum or related activities.

(9) To create awareness amongst the community of the need to preserve the marine environment.

(10) To do all such other acts or things as may be necessary for the discharge of all or any of the above functions.

45 'Marine Environment Protection Authority' available at http://www.mepa.gov.lk/web/; accessed 6 January 2020.

(11) To effectively safeguard and preserve the territorial waters of Sri Lanka or any other maritime zone declared under the maritime zones law or which may be declared at a future date under such law from any pollution arising out of any ship-based or shore-based maritime related activity.

(12) To conduct investigations and inquiries and to institute legal action in relation to any pollution, arising out of any ship-based activity or shore-based maritime related activity,

(13) To oversee all sea transport of oil, and bunkering operations that are carried out in the territorial waters of Sri Lanka or any other maritime zone declared under the maritime zones law or which may be declared at a future date under such law, for the purpose of prevention of pollution.

These functions indicate the overarching role played by MEPA in marine environmental protection. This role is supplemented by the Technical Division of the Authority, which is engaged in formulation of policy for the purpose of minimizing, controlling and managing marine pollution caused by land and sea-based activities and all technical operations required for the implementation of the policies. As a part of their activities, the Technical Division issue licenses to those involved in activities in the area in order ensure that they conform to the technical requirement and requirement of the law. MEPA plays a vital role in the internal marine environment protection as it is the apex body with the sole responsibility to prevent, control, and manage the pollution of Sri Lanka's marine environment.

Since August 2017, IUCN is working closely with many sector agencies and MEPA staff on the development of Policy Strategies and National Action plan for Marine Environment Protection in Sri Lanka. This project aims to incorporate the principles of sustainable development and works based on the sustainable development goals related marine environment.The said project was expected to be completed by January 2018. It is significant in observing whether this project was implemented as to meet the said objectives.

Objectives of the project:

Carry out detailed survey of existing problems and issues of coastal and marine environment pollution and protection.

Assess the root causes and remedies for the growing challenge of pollution in the urbanized coastal environment.

Assess the problems of marine pollution connected with ballast water discharges, invasive alien species and hydrocarbon extraction and propose mechanisms to provide rapid responses to protect the sensitive areas.

Assess the mechanisms for integration of the preceding objectives of the study with the national commitment to implementation of SDGs with particular consideration to SDG 14 'Life Below water'- Conserve and sustainably use the oceans, seas and marine resources for sustainable development.

Assess research and education needs at all levels of society to facilitate achievement of the strategic objective of 'prevention, control and management of coastal and marine pollution'.

Source: The International Union for Conservation of Nature

In addressing the issue of coastal and maritime waste management, MEPA also coordinates with the Sri Lanka Ports Authority and the Directorate of Merchant Shipping.

The institutional structure and the manner of implementation of the law creates overlaps between the CCD, the Coast Guard and the MEPA. In those instances there is a need for a proper coordination mechanism between these institutions with set targets, accountability mechanisms and specific objectives, which include marine environmental protection and climate change mitigation and adaptation, within the mandates of the CCD and the Coast Guard.

Sri Lanka Navy

Sri Lanka Navy is the naval arm of the Sri Lanka Armed Forces and is classed as the country's most vital defence force due to Sri Lanka'sisland geography, and it isresponsible for the maritime defence of the Sri Lankan nation and its interests.[46] The navy though mainly involved in maritime defence, they also playa significant role in incidentsof oil and chemical spills by ships, and implementation of prohibited methods of fishing.

One of the main issues revealed in this discussion of the relevant institutions, is the lack of coordination and information sharing between the institutions. Isolated actions by different organisations with overlapping jurisdictions rendered marine environmental protection initiatives ineffective. Therefore, it is necessary to consider an integrated marine environmental

46 'Sri Lanka Navy' available at navy.lk; accessed 6 January 2020.

protection policy that would act as an overarching and coordinating policy, binding these institutions together and establishing a system of coherence with the role of science, national security, environmental protection, law and technology clearly provided for, in a non-exhaustive manner.

Conclusions

'At a national level, most countries still lack a coherent integrated policy for marine and maritime affairs. In most governments, there is a strong sector-oriented division among the different ministries, where different inter-ministerial coordination problems also are reflected in the cooperation between subordinate sector-authorities.[47] *Weak cross-sector integration and conflicts at national level hamper a countries' ability to act coherently at the international level*'.[48]

Following recommendations can be made to ensure that national marine protection is effectively governed in the international level and in Sri Lanka:

- Need for more emphasis on international and mutual cooperation for marine environmental protection with the participation and collaboration of state and non-state actors. This also means that the laws should mandate the participation of the non-state actors while substantiating the normative framework of their participation in the decision-making and implementation processes. Such provisions would incorporate the norms of environmental rule of law into marine environmental protection.
- There needs to be effective regional arrangements for marine environmental protection, cooperation and coordination. Existing regional organizations such as South Asian Association for Regional Cooperation (SAARC), Indian Ocean Rim Association (IORA) and Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) can be used as platforms through which such an arrangement may be effected.

While the existing system has salutary features, it is necessary for the country to enact an integrated ocean policy and to secure the participation and contribution of governmental and non-governmental sectors in the decision-making and implementation stages. This would integrate the components of environmental rule of law into marine environment governance in the country.

47 H Browman and K Stergiou, 'Perspectives on ecosystem-based approaches to the management of marine resources' (2004) 274 Marine Ecology Press Series 269 – 303.
48 Grip (35).

COPYRIGHT PROTECTION OF SONGS IN SRI LANKA

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1. Introduction

A song is a short piece of music with words that are sung.[1] It is discernible from this very definition that a song comprises of two main components, namely: the music and the lyrics (words).[2] The music and the lyrics of a song are fruits of authorship, in that, the music has to be composed by a musician (whom we may call the author of the music), and the lyrics have to be written by a lyrics writer (whom we may call the author of the lyrics). As the object of copyright law is to protect works of authorship, this article intends to examine how the two main components of a song (the music and the lyrics) are protected under the copyright law of Sri Lanka from a judicial and practitioners' perspective.

2. Copyright Law in Sri Lanka

The *Intellectual Property Act No.36 of 2003* spells out the copyright law in Sri Lanka. Like its predecessors (*Code of Intellectual Property Act No.52 of 1979*, *Imperial Copyright Act 1911*, *Copyright Act 1908*, and *Imperial Copyright Act 1842*) the *Intellectual Property Act No.36 of 2003* too follows the copyright tradition in British law, although some of the provisions in the Act has been highly influenced by the copyright law in the United States.[3]

1 AS Hornby, *Oxford Advanced Learner's Dictionary of Current English* (7th ed, OUP, 2005) 1459.

2 See William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (South Asian Edition, Sweet & Maxwell, 2016) 441, where it is stated: 'It has long been accepted in UK law that where words are set to music, the two remain distinct works for copyright purposes.'

3 For instance, the fair use doctrine contained in section 11(1) of the *Intellectual Property Act No.36 of 2003* is almost a verbatim reproduction of section 107 of the US *Copyright Act 1976*: DM Karunaratna, *An Introduction to the Law of Copyright and Related Rights in Sri Lanka* (Sarvodaya Vishva Lekha Publication, 2006) 77; DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 178. Moreover, the US influence on the copyright provisions in the *Intellectual Property Act No.36 of 2003* is clearly noticeable from the usage of the term "copyrighted work" throughout the Act.

The objective of copyright protection in Sri Lanka is same as that of Great Britain. The primary basis of copyright protection under modern copyright law in Great Britain is premised on utilitarian and economic aspects rather than on the natural law theory. Same is the case in many commonwealth countries which follow the British copyright law tradition. For instance, as the Intellectual Property and Competition Review Committee of Australia has very clearly pointed out, '[t]he general objective of the system of intellectual property law in Australia is utilitarian, and more specifically economic, rather than moral in character'.[4] By and large, the situation in Sri Lanka appears to conform to this approach. In particular, as the Court of Appeal in Sri Lanka observed in the case of *Vasantha Obeysekera v. Anthony Christopher Alles*:[5]

> The granting of Copyright … is in the nature of a privilege granted by law to certain types of creative works. Its primary purpose is to foster originality in literary, artistic and scientific productions and to afford legal protection to the author. The goal of the provisions pertaining to Copyright seems to be to encourage creation of and facilitate public access to works of intellectual interest to society.[6]

3. Subject Matter Protected in Songs

As observed earlier, a song is a combination of two authorial creations – the lyrics and the music. These two creations fall under two separate categories of subject matter eligible for copyright protection in terms of the provisions of the *Intellectual Property Act No.36 of 2003*.[7]

The *Intellectual Property Act No.36 of 2003* affords copyright protection exclusively to "protected works". It classifies protected works as "original intellectual creations" in the "literary, artistic and scientific domain".[8] In particular, section 6(1) of the Act states:

4 Intellectual Property and Competition Review Committee, Review of Intellectual Property Legislation under the Competition Principles Agreement (Final Report, Commonwealth of Australia, September 2000) 22.

5 (Unreported) CA No 730/92(F) decided on 22 March 2000.

6 (Unreported) CA No 730/92(F) decided on 22 March 2000, at 11-12.

7 See for example *Fernando v. Gamlath* [2011] 1 Sri LR 273, where the Supreme Court of Sri Lanka construed a song as a combination of the lyrics and the musical composition which are separately and independently protected as works: [2011] 1 Sri LR 273, 282. However, a different construction appears to have been adopted by the Supreme Court of Sri Lanka in the recent case of *Mananage Susil Dharmapala v. OIC, Special Crimes Division, Colombo*, SC Appeal No.155/14, decided on 28 June 2021: SC Appeal No.155/14, decided on 28 June 2021, 16-17.

8 *Intellectual Property Act No.36 of 2003*, sec 6(1).

The following works shall be protected as literary, artistic or scientific work (hereinafter referred to as "works") which are original intellectual creations in the literary, artistic and scientific domain, including and in particular -

(a) books, pamphlets, articles, computer programs and other writings;

(b) speeches, lectures, addresses, sermons and other oral works;

(c) dramatic, dramatic-musical works, pantomimes, choreographic works and other works created for stage productions;

(d) stage production of works specified in paragraph (c) and expressions of folklore that are apt for such productions;

(e) musical works, with or without accompanying words;

(f) audio-visual works;

(g) works of architecture;

(h) works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine art;

(j) photographic works;[9]

(k) works of applied art;

(l) illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science.

Derivative works such as, translations, adaptations, arrangements, other transformations or modifications of works, collections of works and, collections of mere data, are also protected as works under the *Intellectual Property Act No.36 of 2003*.[10]

While the *Intellectual Property Act No.36 of 2003* defines a "[protected] work" as any literary, artistic or scientific work which is an original intellectual creation,[11] the Act does not define what is meant by the adjectives "literary, artistic or scientific" nor what is an "original intellectual creation". Therefore, in order to identify whether the lyrics and the music in a song would constitute protected works, one needs to first identify whether lyrics and music would fall under the "literary, artistic or scientific" domains and then ascertain whether they would qualify as "original intellectual creations".

9 Section 6(1) of the *Intellectual Property Act No.36 of 2003* does not contain a subsection numbered (i). Instead, just after subsection (h), section 6(1) lists down subsection (j).

10 *Intellectual Property Act No.36 of 2003*, sec 7.

11 *Intellectual Property Act No.36 of 2003*, sec 5.

3.1 Meaning of the Adjectives Literary, Artistic and Scientific

While the adjectives "literary, artistic and scientific" used in the *Intellectual Property Act No.36 of 2003* derive from the *Berne Convention for the Protection of Literary and Artistic Works* (the *Berne Convention*) and the pre-Berne bilateral copyright conventions, they have neither been defined in the *Intellectual Property Act No.36 of 2003* nor the *Berne Convention*. However, as Ricketson and Ginsburg have observed, these adjectives in the *Berne Convention* 'are not to be taken at their face value' due to two main reasons.[12] Firstly the term 'scientific production' used in the *Berne Convention* 'does not refer to such things as scientific discoveries, as the basic principle that copyright does not protect ideas but only the form in which they are expressed applies as much to the Berne Convention as it does to national laws.'[13] Thus, 'the adjective "scientific" in the context of "literary and artistic works" seems unnecessary, as works concerned with scientific matters will invariably be either literary productions (a written description of an experiment, process, device, or the like) or artistic productions (diagrams, drawings, illustrations).'[14] Secondly, 'the expression 'literary and artistic productions' is, on its face, a literally inaccurate description of many of the productions which the Convention expressly contemplates as falling within its scope.'[15] This is because, the list of works protected as 'literary and artistic productions' in the Convention include certain 'works that are intended to be represented or performed, rather than read or viewed, as is the case with usual kind of literary or artistic production.' [16] While it is still possible to fit them into the 'literary and artistic productions' category, since 'such works will usually be presented in some form of notation or as a visual image', nonetheless, 'such a classification exercise hardly seems necessary, given that the enumeration in article 2(1) makes it clear that they are to be regarded, in any event, as productions within the 'literary scientific and artistic domain'. [17] It is pertinent to note that the above observation is

12 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (2nd ed., Oxford, 2006) 406.

13 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (2nd ed., Oxford, 2006) 406.

14 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (2nd ed., Oxford, 2006) 406.

15 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (2nd ed., Oxford, 2006) 406.

16 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (2nd ed., Oxford, 2006) 406.

17 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (2nd ed., Oxford, 2006) 406.

equally applicable to the expression "literary, artistic and scientific" used in the *Intellectual Property Act No.36 of 2003*.

While the term "literary" generally covers an expression in words, print or writing which contains information, instruction or entertainment, the term "artistic" is usually concerned with visual image or appearance. As Ricketson and Ginsburg have further noted, 'the terms "literary" and "artistic" are themselves very vague.' [18] While the term "literary", in its ordinary sense, 'may be the more limited concept, referring to written or printed compositions,' the term "artistic" may refer to works of the visual arts as well as the 'arts in general, including here music, drama, and literature, as well as the fine arts'.[19] 'Accordingly, the scope of the composite expression "literary and artistic works" can be very widely drawn indeed.' [20]

As Karunaratna has observed, while there does not exist any reported judicial decision in Sri Lanka dealing with the meanings of the adjectives "literary, artistic and scientific" used in section 6(1) of the *Intellectual Property Act No.36 of 2003*, the meanings of these adjectives may not be so important if the categories of works specified under this section are considered to be an

18 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (2nd ed., Oxford, 2006) 406.

19 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (2nd ed., Oxford, 2006) 406.

20 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (2nd ed., Oxford, 2006) 406-407. Accordingly, in *University of London Press v. University Tutorial Press* [1916] 2 Ch 601, Peterson J observed that, '[t]he word literary seems to be used in a sense somewhat similar to the use of the word 'literature' in political or electioneering literature, and refers to written or printed matter.' [1916] 2 Ch 601, 608. As Cornish, Llewelyn and Aplin have noted, the term 'literary work' 'also covers secondary work on existing sources, provided that it in turn involves, literary "skill, labour and judgment". Thus, translations, editorial work that involves amendment, critical annotation or explanation, compilation, additions to incomplete manuscripts, selections and abridgements may suffice to constitute 'literary work'. William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (South Asian Edition, Sweet & Maxwell, 2016) 437.

Although the term 'artistic' is not defined in, the *Intellectual Property Act No.36 of 2003*, section 4(1) of the *Copyright, Designs and Patents Act 1988* of the United Kingdom defines what an 'artistic work' is. Accordingly, an 'artistic work' means:

a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality;

b) a work of architecture being a building or a model for a building; or

c) a work of artistic craftsmanship.

While 'artistic work category is a diverse one and includes numerous types of works', 'all the things falling within the artistic work category have one thing in common in that they are all static, non-moving.' David I Bainbridge, *Intellectual Property* (10th ed., Pearson Education Ltd, 2018) 89; Jacob LJ in *Nova Games Ltd v. Mazooma Productions Ltd,* [2007] RPC 25, para 16.

exhaustive list of protected works.[21] Yet, it is quite clear that these categories of works specified in section 6(1) are not an exhaustive list of protected works as this section states:

> The following works shall be protected as literary, artistic or scientific work (hereinafter referred to as "works") which are original intellectual creations in the literary, artistic and scientific domain, ***including*** and in particular …[22]

As stated in *Maxwell on The Interpretation of Statutes*, the word "include" is used in statutory provisions in order to 'enlarge the meaning of words and phrases' occurring in the body of the statutory provision.[23] When it is so used 'these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the [provision] declares that they shall include'.[24] Thus, the use of the word "including" in section 6(1) of the *Intellectual Property Act No.36 of 2003* makes the categories of works specified under 6(1)(a) to 6(1)(l) a non-exhaustive list of protected works.

Be that as it may, both the lyrics and musical composition of a song would constitute literary creations since they are either written, printed, or spoken words or compositions. Moreover, they would fall under the simple dictionary definition of the word "literary" as they are 'connected with literature' and are 'suitable for or typical of a work of literature'.[25]

3.2 Categories of Works Specified in Section 6(1)

For the most part, categories of works specified in section 6(1) of the *Intellectual Property Act No.36 of 2003* encapsulate lyrics and musical composition of a song. For instance, written words (lyrics) of a song are covered under the category listed in section 6(1)(a) of the Act (books, pamphlets, articles, computer programs and other writings). As Karunaratna has opined, all the writings including the lyrics for a song are eligible for copyright protection under this provision provided they meet with the other requisites for protection.[26] Similarly, the musical composition of a song is covered

21 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 105.
22 Emphasis added.
23 P St J Langan, *Maxwell on The Interpretation of Statues* (12th ed, NM Tripathi Pvt Ltd) 1980. 270
24 P St J Langan, *Maxwell on The Interpretation of Statues* (12th ed, NM Tripathi Pvt Ltd) 1980. 270
25 AS Hornby, *Oxford Advanced Learner's Dictionary of Current English* (7th ed, OUP, 2005) 898.
26 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 108.

under the category of works mentioned in section 6(1)(e) of the *Intellectual Property Act No.36 of 2003* (musical works, with or without accompanying words). As decided by the Supreme Court of Sri Lanka in the recent case of *Mananage Susil Dharmapala v. OIC, Special Crimes Division – Colombo*,[27] 'for the purposes of the application of the provisions of the [*Intellectual Property Act No.36 of 2003*], a song would be a protected "*work*", as it is a "*musical work with accompanying words in the artistic domain*" in terms of section 6(1)(e) of the Act.[28]

3.3 The British Approach

The British approach of affording copyright protection to songs is to construe a song as two separate works: the lyrics as a "literary work" and the music as a "musical work". As Bainbridge has observed, a 'song will, therefore, have two copyrights: one in the music and one in the words of the song, the latter being a literary work.'[29] Along similar lines, Bently, Sherman, Ganjee and Johnson have noted that 'words and the music of songs and similar works are treated as the subject matter of distinct copyrights. A song therefore consists of both a musical work and a literary work: the tune and lyrics, respectively.'[30]

Commenting on the history of protection of musical scores under the British law, the current authors of *Copinger and Skone James on Copyright* observe that '[m]usical scores were protected under early Copyright Acts only as literary works, and this only from unauthorised reproduction in printed or sheet music form.'[31] However, the *Copyright, Designs and Patents Act 1988*, which contains the present copyright law in Great Britain, makes a distinction between lyrics and music of song, in that, the lyrics would fall into the category of "literary works" whereas the music would fall into the category

27 SC Appeal No.155/14, decided on 28 June 2021

28 SC Appeal No.155/14, decided on 28 June 2021, 16. However, in *Fernando v. Gamlath* [2011] 1 Sri LR 273, the Supreme Court of Sri Lanka construed a song as a combination of the lyrics and the musical composition which are separately and independently protected as works: [2011] 1 Sri LR 273, 282. See DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 108, where it is stated that category of protected works covered under section 6(1)(a) of the *Intellectual Property Act No.36 of 2003* covers written lyrics for song. See also. William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (South Asian Edition, Sweet & Maxwell, 2016) 441, where it is stated: 'It has long been accepted in UK law that where words are set to music, the two remain distinct works for copyright purposes.

29 David I Bainbridge, *Intellectual Property* (10th ed., Pearson Education Ltd, 2018) 87.

30 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 71.

31 G Davies, N Caddick and G Harbottle, *Copinger and Skone James on Copyright*, vol 1 (South Asian Edition, Thomson Reuters 2019) 147.

of "musical works". While the Act defines a "literary work' as 'any work, other than a dramatic or musical work, which is written, spoken or sung', it defines a "musical work" as 'a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music'.[32] Yet, these definitions provide very little help in determining what sort of lyrics would constitute literary works and what sort of music would constitute musical works.

As Bently, Sherman, Ganjee and Johnson have noted, the types of things that will be protected as a literary work under the *Copyright, Designs and Patents Act 1988* include song lyrics.[33] However, this does not mean that all types of song lyrics are protected as literary works. In deciding the question whether what type of song lyrics would constitute literary works, the British Courts have tended to rely on the test in *Hollinrake v. Trustwell*,[34] that 'the creation must afford "either information and instruction, or pleasure, in the form of literary enjoyment"'.[35] While creations which are meaningless or gibberish have been held not to provide information or instruction, the 'requirement of "literary enjoyment" seems to suggest a qualitative test'.[36]

The meaning of music was discussed in *Sawkins v. Hyperion Records*.[37] According to Mummery LJ, the 'essence of music is combining sounds for listening to.'[38] While '[m]usic is not the same as mere noise', the 'sound of music is intended to produce effects of some kind on the listener's emotions and intellect.' [39] Thus, 'an essential ingredient of a musical work is obviously that it be capable of being sensed by the human ear, mere sounds are not necessarily music'.[40]

3.4 Original Intellectual Creations

Copyright protection under the *Intellectual Property Act No.36 of 2003* is conferred to "original intellectual creations".[41] While the Act does not

32 *Copyright, Designs and Patents Act 1988* (United Kingdom) sec 3(1).
33 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 62.
34 (1894) 3 Ch 420.
35 L *B*ently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 62.
36 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 64.
37 [2005] 1 WLR 3281.
38 [2005] 1 WLR 3281, 3296
39 [2005] 1 WLR 3281, 3296
40 G Davies, N Caddick and G Harbottle, *Copinger and Skone James on Copyright*, vol 1 (South Asian Edition, Thomson Reuters 2019) 148.
41 *Intellectual Property Act No.36 of 2003*, sec 6(1).

define what would constitute an "original intellectual creation", it has been a precondition for copyright-protection from the inception of the conception of copyright. Yet, determining originality has been one of the vexatious questions in copyright law ever since. As Bently, Sherman, Gangjee and Johnson have identified, '[w]hile the originality requirement has been a general statutory requirement since 1911, it is very difficult to state with any precision what copyright law means when it demands that works be "original"'.[42] Be that as it may, there are two main characteristics of originality. They are:

(i) Originality is concerned with the relationship between an author or creator and the work.

(ii) Originality is concerned with expression.

Originality 'is concerned with the relationship between an author or creator and the work'.[43] As such, it 'is not concerned with whether the work is inventive, novel or unique.' [44] This has been made quite explicit in the *Intellectual Property Act No.36 of 2003*, when it states that works 'shall be protected by the sole fact of their creation and irrespective of their mode or form of expression, as well as of their content, quality and purpose.' [45]

The originality requirement in copyright law is concerned with expression rather than ideas. That is, it 'is concerned with the manner in which the work is expressed'.[46]As Peterson J observed in the English case of *University of London Press Ltd v. University Tutorial Press Ltd*:[47]

The word 'original' does not in this connection mean that the work must be an expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of a 'literary work', with the expression of thought in print or writing. The originality which is required related to the expression of thought.[48]

Sri Lankan Courts have adopted the British approach to determining originality in a series of cases including *Wijesinghe Mahanamahewa and*

42 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 93.

43 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 93.

44 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 93.

45 *Intellectual Property Act No.36 of 2003*, sec 6(2).

46 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 94.

47 [1916] 2 Ch 601.

48 [1916] 2 Ch 601, 608-609.

Another v. Austin Canter,[49] *Vasantha Obeysekera v. Anthony Christopher Alles*,[50] *Fernando v Gamlath*,[51] and *MTK Nagodawithana and Others v. C Aloy W Fernando and Others*.[52] In Great Britain - the mother country of modern copyright which is followed in Sri Lanka, 'originality threshold has been set at a very low level.' [53] While 'it is very difficult to explain the traditional British approach to originality in terms of any overarching principles or rules', yet 'two characterizations have tended to be deployed' in determining originality: [54]

(i) A work is original if it originates with the author and is not copied.

(ii) A work is original if an author has exercised the requisite labour, skill, or judgement in producing the work. [55]

The first characterization mentioned above was neatly articulated by Peterson J in the case of *University of London Press*.[56] According to him, 'the [Copyright] Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author'. [57] 'While this highlights the fact that "originality" is linked to "origination", it unfortunately tells the reader very little about when we can say that a work originates with an author.' [58] Thus, as Bently, Sherman, Gangjee and Johnson have said, the 'second characterization has tended to be found to be more valuable: a work is original if an author has exercised the requisite labour, skill, or judgement in producing the work.' [59]

The second characterization of the originality standard mentioned above is discernible from the cases of *Walter v. Lane*,[60] *Ladbroke (Football) v Williams*

49 [1986] 2 Sri LR 154.

50 (Unreported) CA No 730/92(F) decided on 22 March 2000.

51 [2011] 1 SRI LR 273.

52 SC/CHC/Appeal/30/2006 decided on 10 September 2018. See also, DM Karunaratna, *An Introduction to the Law of Copyright and Related Rights in Sri Lanka* (Sarvodaya Vishva Lekha Publishers, 2006) 36.

53 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 94; G Davies, N Caddick and G Harbottle, *Copinger and Skone James on Copyright*, vol 1 (South Asian Edition, Thomson Reuters 2019) 195

54 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 97.

55 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 97.

56 [1916] 2 Ch 601.

57 [1916] 2 Ch 601, 609.

58 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 97.

59 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 97.

60 [1900] AC 539.

Hill,[61] and *Sawkins v. Hyperian Records*.[62] In *Walter v. Lane*,[63] the House of Lords held that a newspaper report of an oral speech given by Lord Rosebery, transcribed by a reporter from the talk satisfied the test of originality as the reporter had exercised considerable labour, skill, and judgement in producing a verbatim transcript of the speech.[64] In *Ladbroke (Football) v Williams Hill*,[65] 'the claimant-respondents ran a weekly football pool competition by sending out coupons for competition by participants. They alleged that the defendant-appellants had copied the standard forms of their coupon into a rival version.[66] The House of Lords treated these 'football pools coupons as original compilations because the labour, skill, and judgement that had gone into devising the betting system that informed the coupon'.[67]

In the case of S*awkins v. Hyperion Records*,[68] the claimant, a musicologist, prepared performing editions based upon works of Lalande, a French composer at the courts of King Louis XIV and King Louis XV. As the existing sources of Lalande's music were not in a form that could be played by an orchestra, to make this possible, the claimant had to transpose the source material into conventional modern notation, make extensive corrections, and complete several missing sections, all of which involved a great level of skill, labour, and judgment.[69] However, the claimant did not compose a single new note of music. While observing that the essential elements of originality that were expounded by the House of Lords over a century ago in *Walter v. Lane*,[70] remained good law, Mummery LJ in the Court of Appeal held that on the application of the principle laid down in that case, the effort, skill, and time which the claimant had spent in making the performing editions were sufficient to satisfy the requirement of originality as required by the British Copyright law. Moreover, Jacob LJ observed that the required question that needed to be asked when considering originality was whether what the claimant did went beyond "mere servile copying"? [71]

61 [1964] 1 All ER 465.
62 [2005] EWCA Civ 565.
63 [1900] AC 539.
64 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 114.
65 [1964] 1 All ER 465.
66 William Cornish, *Cases and Materials on Intellectual Property* (5th ed., Sweet & Maxwell, 2006) 246.
67 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 97.
68 [2005] EWCA Civ 565.
69 Cited in *Fernando v. Gamlath* [2011] 1 Sri LR 273, 278.
70 [1900] AC 539.
71 [2005] EWCA Civ 565, [85].

The decision in S*awkins v. Hyperion Records*,[72] was cited with approval by the Supreme Court of Sri Lanka in the case of *Fernando v Gamlath*.[73] In that case, the plaintiff, who was the wife of the famous Sri Lankan singer and music composer CT Fernando, claimed that her husband had done a musical composition for the song "*Pinsuduwanne*" (where he was its singer as well) and the defendant had violated copyrights therein by including the said song in a teledrama titled "*Mal Kekulak*" without permission. Commenting on the question of originality required for copyright protection, the Supreme Court accepted the principles laid down in S*awkins v. Hyperion Records*,[74] and *University of London Press Ltd v. University Tutorial Press Ltd*.[75] In the subsequent case of *MTK Nagodawithana and Others v. C Aloy W Fernando and Others*,[76] too the Supreme Court of Sri Lanka cited the decision in *University of London Press Ltd v. University Tutorial Press Ltd*,[77] with approval. Echoing the line of thought of the House of Lords in *Ladbroke (Football) v Williams Hill*,[78] it was emphatically stated by the Supreme Court that 'a novel composition of pre-existing information by exercising skill, knowledge and decisions involving choice of language and style satisfies the requirement of originality.'[79]

While the two characterizations mentioned above (i.e., that the work should originate with the author and, he should exercise the requisite labour, skill, or judgement in producing the work) constitute the test deployed to determine originality in copyright laws of both Great Britain and Sri Lanka, nonetheless, it 'must depend largely on the facts of the case and must in each case be very much a question of degree'.[80] As Bently, Sherman, Gangjee and Johnson have aptly noted, '[w]hatever test is applied, the question of whether a work is original inevitably depends on the particular cultural, social, and political context in which the judgement is made.'[81]

At the same time, it is also important to note that not all amounts and all kinds of 'labour, skill, or judgement' expended by the author would

72 [2005] EWCA Civ 565.
73 [2011] 1 SRI LR 273.
74 [2005] EWCA Civ 565.
75 [1916] 2 Ch 601.
76 SC/CHC/Appeal/30/2006 decided on 10 September 2018.
77 [1916] 2 Ch 601.
78 [1964] 1 All ER 465.
79 SC/CHC/Appeal/30/2006 decided on 10 September 2018, 12.
80 *Macmillan v. Cooper* (1923) 93 *LJPC* 113.
81 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 94.

satisfy the originality test. On the question of required amount of labour, skill, or judgement, Bainbridge has noted that 'it would be ridiculous to afford copyright protection to works that are trivial in the extreme or so small as to be entirely significant.'[82] Thus, while 'British law has always declined to recognise originality where labour is trivial or insignificant and the result is trivial or insignificant', it has been acknowledged that only certain kinds of skill, labour and judgement can confer originality.[83] Accordingly, 'a person may exercise a considerable amount of labour, yet the resulting work will not be original if the labour is of the wrong kind. This would be the case, for example, where there is a direct or slavish copy of another work.'[84] In general, however, the lyrics and the musical composition of a song would satisfy the test of originality in Sri Lanka, if they have originated with their authors, have not been copied, and the authors have exercised the requisite labour, skill, or judgement in producing them.[85]

3.5 Fixation

The *Intellectual Property Act No.36 of 2003* does not require the fixation of a work as a prerequisite to copyright protection. This is implicit in the provisions of section 6(2) of the *Intellectual Property Act*, which state that works 'shall be protected by the sole fact of their creation and irrespective of their mode or form of expression'. As Karunaratna has observed, 'it appears that the fixation of a work in "a material form" is not a requirement of copyright protection in Sri Lanka.'[86]

In contrast to the position in Sri Lanka, the copyright laws in both the United Kingdom and United States require fixation of a work as a prerequisite to copyright protection. While the *Copyright, Designs and Patent Act 1988* in the United Kingdom provides that, '[c]opyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise',[87] the *Copyright Act 1976* in the United States stipulates that, '[c]opyright protection subsists … in original works of authorship fixed in any

82 David I Bainbridge, *Intellectual Property* (10th ed., Pearson Education Ltd, 2018) 81.

83 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 97.

84 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 97.

85 See L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 97.

86 DM Karunaratna, *An Introduction to the Law of Copyright and Related Rights in Sri Lanka* (Sarvodaya Vishva Lekha Publishers, 2006) 39.

87 *Copyright, Designs and Patent Act 1988* (United Kingdom), sec 3(2).

tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.'[88]

Because fixation of a work in a material form is not a requirement of copyright protection under the *Intellectual Property Act No.36 of 2003*, even without incorporating the lyrics or the musical composition of a song in a material form, such as writing or recording, those creations would become eligible for copyright protection in Sri Lanka provided that they are original intellectual creations in the literary, artistic, and scientific domain. Thus, mere expression of the lyrics or the musical composition of a song, such as reciting or singing the lyrics and playing the music would be sufficient for copyright protection of those expressions in Sri Lanka, provided the other criteria for copyright protection mentioned earlier are satisfied.

3.6 Computer Generated Songs

The modern technology has paved the way for creation of songs or constituent parts of a song such as musical compositions or lyrics, through computers in circumstances such that there is no direct human author identifiable for these creations. In such circumstances, the issue arises as to whether such musical compositions and lyrics would receive copyright protection under the *Intellectual Property Act No.36 of 2003*. While the Act seems to require a protected work to be originated from a mind of a human and the author of a work to be a human being,[89] there are no reported judicial pronouncements in Sri Lanka that further clarifies this matter. Yet, referring to the British Copyright law, Bainbridge has observed that 'works produced using a computer should not be denied the protection of copyright on the basis that the direct human contribution required to make the work is small or negligible.' [90] He further submits:

> All works generated by computer owe their creation to a human being, although the human element may be indirect, such as where a computer program or app contains all the instructions necessary for the creation of the work and the direct human involvement consists of nothing more than switching on the computer and running the program or app.[91]

88 *Copyright Act 1976* (United States), sec 102(a).
89 *Intellectual Property Act No.36 of 2003*, secs 5 and 6.
90 David I Bainbridge, *Intellectual Property* (10th ed., Pearson Education Ltd, 2018) 119.
91 David I Bainbridge, *Intellectual Property* (10th ed., Pearson Education Ltd, 2018) 119.

The British Courts have recognised indirect human authorship for copyright protection even prior to the *Copyright, Designs and Patent Act 1988*. For instance, in *Express Newspapers plc v. Liverpool Daily Post & Echo PLC*,[92] the court rejected the defendant's claim that grids of letters produced by computer for a newspaper competition were not protected by copyright because they had no human author.[93] The court further stated that 'the computer was no more than a tool with which the winning sequences of letters were produced using the instructions of a programmer' and that 'the defence submission that there was no human author was as unrealistic as saying that a pen was the author of a work of literature.' [94]

4. Protected Rights

The *Intellectual Property Act No.36 of 2003* protects both moral rights and economic rights of the copyright owner. While moral rights mean rights referred to in section 10 of the Act, economic rights mean the rights referred to in section 9 of the Act.[95] Moral rights are granted to an author of a work,[96] whereas economic rights are granted on the copyright owner of a work.[97] According to the *Intellectual Property Act No.36 of 2003*, an author means the physical person who has created the work.[98] Therefore, both the lyrics writer and the music composer of a song become entitled to moral rights since they are authors of those works and, they can exercise economic rights as long as they hold the copyright of the lyrics and the musical composition of the song.

4.1 Moral Rights

Under moral rights, the lyrics writer, and the music composer as authors of their respective works - lyrics and the music, have three main rights, namely: the right to be identified with their respective work, the right to use a pseudonym and not to have their name indicated on the work, and the right to object to a derogatory treatment.

4.1.1 Right to be Identified

In terms of the *Intellectual Property Act No.36 of 2003*, both the lyrics writer and the music composer of a song are vested with the right to have

92 [1985] 1 WLR 1089.
93 David I Bainbridge, *Intellectual Property* (10th ed., Pearson Education Ltd, 2018) 120.
94 David I Bainbridge, *Intellectual Property* (10th ed., Pearson Education Ltd, 2018) 120.
95 *Intellectual Property Act No.36 of 2003*, sec 5.
96 *Intellectual Property Act No.36 of 2003*, sec 10.
97 *Intellectual Property Act No.36 of 2003*, sec 9.
98 *Intellectual Property Act No.36 of 2003*, sec 5.

their names indicated prominently on the copies of their respective works (the lyrics and the music) and in connection with any public use of those works, as far as practicable.[99] Thus, a broadcaster is bound to indicate as far as practicable the names of the lyrics writer and the music composer of a song, when broadcasting that song to the public.[100]

4.1.2 Right to use a Pseudonym

Under the *Intellectual Property Act No.36 of 2003*, both the lyrics writer and the music composer of a song have the right to use a pseudonym and not to have their names indicated on the copies of their respective works (the lyrics and the music) and in connection with any public use of those works.[101]

4.1.3 Right to Object to a Derogatory Treatment

The *Intellectual Property Act No.36 of 2003* confers on the lyrics writer and the music composer of a song the right to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, their respective works (the lyrics and the music) which would be prejudicial to their honour or reputation.[102] However, as Karunaratna has aptly observed, this right is exercisable only where the distortion, mutilation, modification or derogatory action results in prejudicing the honour or reputation of the lyrics writer or the music composer. As such, the mere fact that they were aggrieved is not sufficient.[103] This position was upheld in the case of *Fernando v Gamlath*,[104] where the Supreme Court of Sri Lanka observed that '[w]hen considering the moral rights such as the right to object to the derogatory treatment of a work[,] the main issue would be to consider whether there has been evidence put forward to the court to be able to consider whether a distortion or a mutilation of the work has occurred which has caused the author dishonour or disrepute'.[105] In this connection, the Supreme Court cited with approval the decision in the case of *Confetti Records v. Warner Music UK Ltd*.[106] In that case, one of the claimants composed a garage track entitled "Burnin", which consisted of an insistent instrumental beat accompanied by

99 *Intellectual Property Act No.36 of 2003*, sec 10(1)(a).
100 DM Karunaratna, *An Introduction to the Law Relating to Literary and Artistic Creations in Sri Lanka* (Sarasavi , 2019) 193.
101 *Intellectual Property Act No.36 of 2003*, sec 10(1)(b).
102 *Intellectual Property Act No.36 of 2003*, sec 10(1)(c).
103 DM Karunaratna, *An Introduction to the Law Relating to Literary and Artistic Creations in Sri Lanka* (Sarasavi, 2019) 193.
104 [2011] 1 SRI LR 273.
105 [2011] 1 SRI LR 273, 280.
106 [2003] EWCh 1274 (Ch).

the vocal repetition of the word "burning" or variants of it. The defendant released a version of the track "Burnin" with the addition of a rap line. The claimant alleged that the rap was a derogatory treatment of his work because it allegedly included reference to drugs and violence. While it was accepted by the defendant that the addition of the rap line was a "treatment" of the work, the issue was whether the treatment was "derogatory".[107] The court held that according to the Copyright Act of the United Kingdom, distortion or mutilation is only derogatory if it is prejudicial to the author's honour or reputation' and that 'the fundamental weakness in the case was that there was no evidence about the author's honour or reputation, or of any prejudice to either of them.'[108]

The respective moral rights of the lyrics writer and the music composer exist independently of their economic rights and even where they are no longer the owners of the economic rights in respect of their works (the lyrics and the music).[109] As the physical persons who had created the lyrics and the music of a song, the lyrics writer and the music composer would normally have both economic and moral rights of their respective works.[110]

4.2 Economic Rights

The economic rights of a lyrics writer and music composer of a song include the exclusive rights to carry out or authorize the bundle of acts specified in section 9(1) of the *Intellectual Property Act No.36 of 2003* in relation to their respective protected works. These economic rights apply to both the entire work as well as a substantial part thereof.[111] While these economic rights are subject to the important exception of fair use recognised under the *Intellectual Property Act No.36 of 2003*,[112] the examination of that exception is outside the scope of this article.

4.2.1 Right to Reproduction

In terms of the *Intellectual Property Act No.36 of 2003*, the lyrics writer and the music composer of a song have the exclusive rights to carry out or authorize the reproduction their respective copyright protected lyrics and

107 Cited in *Fernando v. Gamlath* [2011] 1 SRI LR 273, 280.
108 Cited in *Fernando v. Gamlath* [2011] 1 SRI LR 273, 280.
109 *Intellectual Property Act No.36 of 2003*, sec 10(1).
110 *Mananage Susil Dharmapala v. OIC, Special Crimes Division, Colombo*, SC Appeal No.155/14, decided on 28 June 2021, 16.
111 *Intellectual Property Act No.36 of 2003*, sec 9(2).
112 *Intellectual Property Act No.36 of 2003*, secs 11 and 12.

musical composition.[113] Reproduction, according to the *Intellectual Property Act No.36 of 2003*, means 'the making of one or more copies of a work or sound recording in any material form, including any permanent or temporary storage of a work or sound recording in electronic form.'[114] As Karunaratna has observed, the scope of reproduction under the *Intellectual Property Act No.36 of 2003* is very broad, in that, it covers 'the making of copies in any material form – traditional forms as well as novel forms including those emerged with the development of new technologies.'[115] At the same time, the scope of reproduction in the Act covers both permanent and temporary reproduction, as a result of which, printing, photocopying or digitizing the lyrics or the musical composition of a song, as well as any 'copies [thereof] produced by a computer or by transmitting or downloading of material from e-mail notice boards or Internet websites also fall within "reproduction"'.[116]

4.2.2 Right of Translation

The right to translate, or to authorize the translation of a work under section 9(1)(b) of the *Intellectual Property Act No.36 of 2003* covers the translation of the copyright protected lyrics and musical composition of a song into any language including a technical language.'[117] The translation right gives the lyrics writer and the music composer (as the copyright owners of the lyrics and the music) the right to exclude or prohibit others from translating those works. This means that persons who want to translate those should obtain permission from the lyrics writer and the music composer for such translation.

4.2.3 Right of Adaptation, Arrangement or Other Transformation

According to section 9(1)(c) of the *Intellectual Property Act No.36 of 2003*, the right to carry out, or to authorise to carry out, the adaptation, arrangement or other transformation of the copyright protected lyrics and musical composition of a song is vested in the copyright owners of those works. Infringement of the right of adaptation, arrangement or other transformation may occur, for example, when those lyrics or the musical composition are

113 *Intellectual Property Act No.36 of 2003*, sec 9(1)(a).
114 *Intellectual Property Act No.36 of 2003*, sec 5.
115 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 137.
116 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 137.
117 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 141.

modified or altered without the authorisation or consent of their copyright owners who would usually be the writer of the lyrics and the composer of the music.

4.2.4 Right of Public Distribution

The right to public distribution recognised under section 9(1)(d) of the *Intellectual Property Act No.36 of 2003* confers on the copyright owner of any lyrics or musical composition of a song the exclusive monopoly to carry out or to authorise to carry out the public distribution of the original or copies of those works by sale, rental, export or otherwise. As Karunaratna has observed, the right of public distribution under the *Intellectual Property Act No.36 of 2003* 'covers a broader marketing spectrum embracing the acts that make the original of a work or its copies available to the public by sale, rental or otherwise'.[118] While the Act does not define the term "public", this term does not necessarily mean the "general public" or the entire population in the country. Accordingly, a section or a group of people outside the normal family circle or closest acquaintances could constitute "public" for the purposes of this right. Consequently, what constitutes "distribution to the public" of a work would largely depend on the facts and circumstances of each individual case.[119]

According to the wording of section 9(1)(d) of the *Intellectual Property Act No.36 of 2003*, it appears that the right of public distribution extends only to disposing of a work or a copy thereof by "sale, rental or otherwise". Thus, it appears that free distribution of a work or a copy thereof among the public, for example free distribution of copyright protected lyrics or musical composition of a song, would fall outside the scope of this right as the term "otherwise" in section 9(1)(d) would have to be interpreted with the aid of the *ejusdem generis* rule.[120]

An important aspect of the right of public distribution is that it is exhausted in relation to a particular work or a copy thereof by the first sale of that work or copy thereof by the copyright owner or with his consent.[121]

118 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 142.

119 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 142.

120 See, P St J Langan, *Maxwell on the Interpretation of Statutes* (12th ed, NM Tripathi Pvt Ltd, 1980) 297-303.

121 G Davies, N Caddick and G Harbottle, *Copinger and Skone James on Copyright*, vol 1 (South Asian Edition, Thomson Reuters 2019) 613.

This aspect which is referred to as the "doctrine of first sale" is recognised in section 9(4) of the *Intellectual Property Act No.36 of 2003*.[122] Thus, the sale or disposal of a book, CD or cassette containing the copyright protected lyrics and musical composition of a song by the owner of such book, CD or cassette does not require the consent and authorisation of the copyright owner of the lyrics and the musical composition provided that the book, CD or cassette has been lawfully made. However, the doctrine of first sale in Sri Lanka has certain limitations, in that, it does not extend to works or copies imported to Sri Lanka from other countries other than for private use.[123]

4.2.5 Right of Rental

Section 9(1)(e) of the *Intellectual Property Act No.36 of 2003* grants an exclusive right on the copyright owner of the lyrics and the musical composition to carry out or to authorise the rental of the original or copy of their respective works embodied in a sound recording, a computer program, a database, or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned. Under the *Intellectual Property Act No.36 of 2003*, rental means the transfer of the possession of the original or a copy of a work or sound recording for a limited period of time for profit making purposes.[124] Accordingly, the right of rental does not extend to non-profit making activities. At the same time, the *Intellectual Property Act No.36 of 2003* provides that the right to rental in terms of section 9(1)(e) does not apply to computer programs where the program itself is not the essential object of the rental.[125] As Karunaratna has opined, since the right of public distribution covers rental as a part of distribution in general, the specific right of rental recognised in section 9(1)(e) encapsulates certain specific works only. [126]

4.2.6 Right to Import

According to section 9(1)(f) of the *Intellectual Property Act No.36 of 2003*, exclusive right to carry out or to authorize the importation of copies of copyright protected lyrics and musical compositions (even where the imported copies have been made with the authorization of the owner of copyright)

122 Section 9(4) of the *Intellectual Property Act No.36 of 2003* states: 'Notwithstanding the provisions of paragraph (d) of subsection (1), the owner of a work or a copy of a work lawfully made or any person authorized in that behalf by such owner, is entitled without the authority of the owner of the copyright, to sell or otherwise dispose of that copy.'

123 *Intellectual Property Act No.36 of 2003*, secs 9(1)(f) and 12(8).

124 *Intellectual Property Act No.36 of 2003*, sec 5.

125 *Intellectual Property Act No.36 of 2003*, sec 9(3).

126 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 142-146.

is vested in the copyright owner of those lyrics and musical compositions. Clearly, this right excludes the doctrine of first sale or exhaustion of rights. As such, parallel importation of copies of copyright protected lyrics and musical compositions of songs made available in foreign jurisdictions constitutes copyright infringement even though such copies have been made available with the consent of the copyright owners thereof and lawfully purchased by the importer. The only exception to this is when importation of a copy of such works is done by a physical person for his own personal purposes under section 12(8) of the *Intellectual Property Act No.36 of 2003*.

4.2.7 Right of Public Display

Section 9(1)(g) of the *Intellectual Property Act No.36 of 2003* provides for an exclusive right on the copyright owner of lyrics and musical composition of a song to carry out or to authorise the public display of the original or a copy of those works. Public display means the showing of the original or a copy of a work directly; by means of a film, slide, television image or otherwise on screen; by means of any other device or process; or in the case of an audiovisual work, the showing of individual images nonsequentially at a place or places where persons outside the normal circle of a family and its closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and time or at different places or times, and where the work can be displayed without communication to the public within the meaning of the definition of the expression "Communication to the Public."[127]

However, this right does not extend to public display of originals or copies of copyright protected lyrics and musical composition of a song made other than by means of a film, slide, television image or otherwise on screen or by means of any other device or process, provided that those works have been published or the original or the copy displayed has been sold, given away, or otherwise transferred to another person by the author or his successor in title.[128] As such, a lawful owner of a book, CD or cassette containing the lyrics or musical composition of a song can directly exhibit the same without infringing the right of public display of the copyright owner.[129] Also, the copyright owner's right of public display does not extend to a situation where

127 *Intellectual Property Act No.36 of 2003*, sec 5.

128 *Intellectual Property Act No.36 of 2003*, sec 12(9).

129 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 142-148.

a work is displayed for educational or teaching purposes by government or non-profit educational institutions, in classrooms or similar places devoted for education when the display of individual images is made from a lawfully made copy. [130]

4.2.8 Right of Public Performance

A copyright owner of lyrics and musical composition of a song is vested with the exclusive right to carry out or to authorize the public performance of those works in terms of section 9(1)(h) of the *Intellectual Property Act No.36 of 2003*. The term "public performance" under the Act connotes different meanings depending on whether the protected work is an audiovisual work or not. In the case of an audiovisual work, public performance means the showing of images in sequence or the making of accompanying sound audible in public.[131] In the case of a work other than an audiovisual work, public performance means the recitation, playing, dancing, acting or otherwise performing the work in public either directly or by means of any device or process.[132]

The right of public performance of the copyright owner does not extend to an instance where a work is performed for educational or teaching purposes by government or non-profit educational institutions, in classrooms or similar places devoted for education, provided that in the case of an audiovisual work, such performance is made from a lawfully made copy.[133] As such, copyright protected lyrics and musical composition of a song can be legally performed without the consent or authorisation of their copyright owners for educational or teaching purposes by government or non-profit educational institutions, in classrooms or similar places devoted for education.

4.2.9 Right of Broadcasting

Section 9(1)(j)[134] of the *Intellectual Property Act No.36 of 2003* provides for an exclusive right on the copyright owner of lyrics and musical composition of a song to carry out or to authorise the broadcasting of their respective works. Broadcasting means the communication of a work, a performance of a sound recording to the public by "wireless transmission", including transmission by satellite.[135] As Karunaratna has observed, the definition of broadcasting under

130 *Intellectual Property Act No.36 of 2003*, sec 12(10)(a).
131 *Intellectual Property Act No.36 of 2003*, sec 5.
132 *Intellectual Property Act No.36 of 2003*, sec 5.
133 *Intellectual Property Act No.36 of 2003*, sec 12(10)(a).
134 Section 9(1) of the *Intellectual Property Act No.36 of 2003* does not contain a subsection numbered (i). Instead, just after subsection (h), section 9(1) lists down subsection (j).
135 *Intellectual Property Act No.36 of 2003*, sec 5.

the Act is wide and it embraces the communication of a work to the public using any form of wireless transmission including radio and television.[136] It also covers terrestrial broadcasting and satellite broadcasting. The right of broadcasting extends to rebroadcasting of a broadcast of work by the original or another broadcaster.[137]

4.2.10 Right of Communication to the Public

The *Intellectual Property Act No.36 of 2003* confers on the copyright owners of lyrics and musical compositions of songs an exclusive right to carry out or to authorize "other communication" to the public their respective works.[138] Communication to the public under the Act means the "transmission to the public" by wire or without wire of the images or sounds, or both of a work, a performance or a sound recording.[139] This includes the making available to the public of a work, performance or sound recording in such a way that members of the public may access them from a place and at a time individually chosen by them.[140]

The right of communication to the public expands the scope of the copyright owners' monopoly to communicate their works to the public beyond the instances encapsulated under the right of public display, right of public performance and right of broadcasting.[141] While the concept of "communication to the public" comprises of two fundamental ingredients namely, "act of communication" and "communication to the public", under the right of communication to the public provided for in section 9(1)(k) of the *Intellectual Property Act No.36 of 2003*, it is the "transmission" which forms the core and essential component of "communication".[142] Thus, it is the "transmission to the public" which constitutes the "communication to the public" under this right. Such transmission is technologically neutral and could occur with or without wire.[143]

136 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 150.

137 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 150.

138 *Intellectual Property Act No.36 of 2003*, sec 9(1)(k).

139 *Intellectual Property Act No.36 of 2003*, sec 5.

140 *Intellectual Property Act No.36 of 2003*, sec 5.

141 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 152.

142 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 152.

143 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 152.

As Katunaratna has identified, the right of communication to the public is 'act based', because whether or not the public actually receive or have actual access to what is transmitted is immaterial to infringe this right.[144] What is required is that the transmission at the starting point should be made to the "public", which (in the absence of s statutory definition in the *Intellectual Property Act No.36 of 2003*) generally and reasonably means transmission to persons outside the normal family circle and its closest acquaintances.[145] Thus, transmission of signals through televisions sets by a hotel to its customers staying in its rooms could constitute communication to the public, which in turn may infringe this right.[146] However, as the *Intellectual Property Act No.36 of 2003* has recognised, the communication of a transmission embodying a performance or display of a work (such as lyrics or musical composition of a song) by the public reception of the transmission on a single receiving apparatus, of a kind commonly used in private homes, is outside the scope of the right of communication to the public, provided that a direct charge is not made to see or hear the transmission and the transmission thus received is not further transmitted to the public.[147]

5. Ownership of Economic Rights

As the *Intellectual Property Act No.36 of 2003* provides, the author who created the work is the original owner of economic rights.[148] Thus, economic rights of copyright protected lyrics and musical composition of a song belong to the author (lyrics writer and music composer) who has created those works. As observed before, the *Intellectual Property Act No.36 of 2003* requires an author to be a physical person.[149]

In respect of a "work of joint authorship",[150] the co-authors are the original owners of the economic rights. However, if a work of "joint authorship" consists of parts that can be used separately and the author of each part can be identified, the author of each part is the original owner of the economic rights

144 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 153.

145 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 166.

146 DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 155.

147 *Intellectual Property Act No.36 of 2003*, sec 12(10)(b).

148 *Intellectual Property Act No.36 of 2003*, sec 14(1).

149 *Intellectual Property Act No.36 of 2003*, sec 5.

150 See section 5 of the *Intellectual Property Act No.36 of 2003* for the definition of a "work of joint authorship."

in respect of the part that he has created.[151] Consequently, when the lyrics or the musical composition have been the outcome of joint authorship (that is, the lyrics or the musical composition have been written jointly by two or more persons) the result of which is that their contributions have 'merged in such a way that no single author is able to point to a substantial part of the work and say "[this] is mine",[152] all those contributing authors are entitled to economic rights as joint authors. Yet, when lyrics or the musical composition consist of parts that can be used separately, in that, the respective contributions of authors thereof are not 'merged to form an integrated whole', but are 'distinct and sperate from each other',[153] and the author of each part can be identified, the author of each part becomes the original owner of the economic rights in respect of the part that he has created. Be that as it may, in the English case of *Beckingham v. Hodgens*,[154] 'it has been held that where one person added an introduction to the music of a song, this introduction was not "distinct" because it was "heavily dependent" on the rest of the tune and because, by itself, it would "sound odd and lose meaning"'.[155]

When the work is a "collective work",[156] the *Intellectual Property Act No.36 of 2003* states that the physical person or legal entity at the initiative, and under the direction, of whom or which the work has been created shall be the original owner of the economic rights.[157] Accordingly, when the lyrics or the musical composition have been the result of a collective work, the physical person or legal entity at the initiative, and under the direction, of whom the lyrics or the musical composition have been created becomes the original owner of economic rights of those works.[158]

Since a song *perse* is not a "work" in terms of the provisions of the *Intellectual Property Act No.36 of 2003*, it cannot constitute a "work of joint authorship" or a "collective work", although lyrics or musical composition of a song - as separate and distinct works - can constitute works of joint authorship

151 *Intellectual Property Act No.36 of 2003*, sec 14(2).
152 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 133.
153 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 132.
154 [2003] FSR 238.
155 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 133.
156 See section 5 of the *Intellectual Property Act No.36 of 2003* for the definition of a "collective work".
157 *Intellectual Property Act No.36 of 2003*, sec 14(3).
158 *Intellectual Property Act No.36 of 2003*, sec 14(3).

or collective works. This is particularly because the *Intellectual Property Act No.36 of 2003* defines a "work" as 'any literary, artistic or scientific work referred to in section 6',[159] which in other words mean a "protected work", that is, "original intellectual creation in the literary artistic and scientific domain".[160] Also, the Act defines a "work of joint authorship" to mean 'a work to the creation of which two or more authors have contributed, provided the work does not qualify as "a collective work"', and it defines a "collective work" to mean 'a work created by two or more physical persons at the initiative and under the direction of a physical person or legal entity, with the understanding that it will be disclosed by the latter person or entity under his or its own name and that the identity of the contributing physical persons will not be indicated'.[161]

However, a different opinion to the above mentioned position was expressed in the case of *Mananage Susil Dharmapala v. OIC, Special Crimes Division, Colombo*,[162] where the Supreme Court of Sri Lanka observed that 'for the purposes of the application of the provisions of the [Intellectual Property] Act, a song would be a protected "*work*"', [163] and that '[t]he lyricist, music composer and the producer of a song jointly have economic rights to *inter alia* authorise the reproduction of the song'.[164] In contrast, in the case of *Fernando v Gamlath*,[165] the Supreme Court of Sri Lanka construed song as a combination of two protected works, namely, the lyrics and the musical composition, whereas the copyright in lyrics was held to be owned by a different individual who was not a party to the case, and copyright in the musical composition was held to be owned by the plaintiff in that case.[166] Be that as it may, as Bently, Sherman, Gangjee and Johnson have noted, 'a song that comprises music and

159 *Intellectual Property Act No.36 of 2003*, sec 5.
160 *Intellectual Property Act No.36 of 2003*, sec 6.
161 *Intellectual Property Act No.36 of 2003*, sec 5.
162 SC Appeal No.155/14, decided on 28 June 2021.
163 SC Appeal No.155/14, decided on 28 June 2021, 16.
164 SC Appeal No.155/14, decided on 28 June 2021, 17.
165 [2011] 1 SRI LR 273.
166 [2011] 1 SRI LR 273, 282. See DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 108, where it is stated that category of protected works covered under section 6(1)(a) of the *Intellectual Property Act No.36 of 2003* covers written lyrics for song. See also. William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (South Asian Edition, Sweet & Maxwell, 2016) 441, where it is stated: 'It has long been accepted in UK law that where words are set to music, the two remain distinct works for copyright purposes. If there is copyright in each, and lyric writer and composer are not the same person, the two copyrights will usually expire on different dates.

lyrics is not a work of joint authorship if one author writes the lyrics, while the other composes the music; the music and lyrics are distinct works, each of which has a single author.'[167] Similarly, 'a contribution to the words of a song will normally give rise to joint authorship of the literary work, but not of the music'. [168]

According to the *Intellectual Property Act No.36 of 2003*, in the case of a work created by an author "employed" by a physical person or legal entity "in the course of his employment", the original owner of the economic rights shall, unless provided otherwise by way of a contract, be the employer. [169] If the work is created pursuant to a commission, the original owner of economic rights shall be, unless otherwise provided in a contract, the person who commissioned the work.[170] As such, when lyrics or musical compositions of songs are authored by an "employee" "in the course of his employment", the original owner of the economic rights of those lyrics and the musical compositions is his employer, provided that there is no contractual provision to the contrary. Similarly, when the lyrics and the musical composition of a song are authored by a person pursuant to a commission, the original owner of economic rights is the person who commissioned the work, provided that there is no contractual provision which would stipulate otherwise.

Section 14(5) of the *Intellectual Property Act No.36 of 2003* provides that, in respect of an audiovisual work, the original owner of the economic rights shall be the producer, unless otherwise provided in the contract. However, the co-authors of the audiovisual work and the authors of the pre-existing works, included in, or adapted for, the making of the audiovisual work shall maintain their economic rights in their contributions or pre-existing works, respectively, to the extent that those contributions or pre-existing works can be the subject of acts covered by their economic rights separately from the audiovisual work. While the *Intellectual Property Act No.36 of 2003* defines an audiovisual work to mean a work that consists of a series of related images which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible, and where accompanied by sounds susceptible of being

167 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 133.

168 L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th ed., Oxford University Press, 2018) 132.

169 *Intellectual Property Act No.36 of 2003*, sec 14(4).

170 *Intellectual Property Act No.36 of 2003*, sec 14(4).

made audible,[171] a film constitutes an audiovisual work for the purposes of the Act. It is important to note than an audiovisual work is a "protected work" in terms of section 6(1)(f) of the Act. Accordingly, in the case of a film incorporating one or more songs, the economic rights pertaining to the film, including the lyrics and musical compositions of those songs incorporated into that film, belong to the producer of the film. As observed by the Supreme Court of Sri Lanka in the case of *Mananage Susil Dharmapala v. OIC, Special Crimes Division, Colombo*:[172]

> If a song is made for the purpose of an 'audio-visual work' (such as a film) and integrated into such film, unless otherwise provided, the producer of the film will be vested with the economic … rights of the film, which would include such rights in respect of components of the film including the song included in the film. Therefore, when a song is embedded in a film, unless specifically protected through agreement, the lyricist, music composer and the producer of the song would lose economic rights in respect of the song. Thus, right to authorize copying of the song into a media (such as a compact disk) will be vested with the producer of the film.[173]

However, when the lyrics and the musical composition of a song are pre-existing works, in that, they have existed as independent and separate works before the film which incorporated that song was produced, the lyrics writer and the music composer (as the authors of the respective lyrics and the musical composition) will continue to retain and maintain their economic rights therein separately from the respective film in concern.

6. Duration of Rights

The *Intellectual Property Act No.36 of 2003*, as a general rule, provides for protection of economic and moral rights for the lifetime of the author and for a further period of seventy years from the date of his death.[174] Thus, in general, the economic and moral rights in respect of copyright protected lyrics or musical composition of a song are protected for the lifetime of the author of the respective work and for a further period of seventy years from the date of his death. As Cornish, Llewelyn and Aplin have noted, since '[i]t

171 *Intellectual Property Act No.36 of 2003*, sec 5.
172 SC Appeal No.155/14, decided on 28 June 2021, 16.
173 SC Appeal No.155/14, decided on 28 June 2021.
174 *Intellectual Property Act No.36 of 2003,* sec 13(1).

has long been accepted in UK law that where words are set to music, the two remain distinct works for copyright purposes', '[i]f there is copyright in each, and lyric writer and composer are not the same person, the two copyrights will usually expire on different dates.'[175] However, this position may differ if the respective copyright protected lyrics or musical composition constitute a work of joint authorship, a collective work or a work published anonymously or under a pseudonym.[176]

7. Judicial Remedies for Copyright Infringement

The *Intellectual Property Act No.36 of 2003* provides for both civil and criminal judicial remedies in the event of copyright infringement. While the jurisdiction in respect of these civil remedies is currently exercised by the High Court of the Western Province Exercising Civil Jurisdiction (Commercial High Court),[177] the jurisdiction in respect of these criminal remedies is vested with the Magistrate's Courts. As the *Intellectual Property Act No.36 of 2003* defines "infringement" to mean an act that violates any right protected under Part II therein,[178] violation of economic and moral rights (mentioned in Part II of the Act) in relation to copyright protected lyrics and musical composition of a song, constitutes copyright infringement.

While this article does not intend to delve into the concept of copyright infringement, it suffices to state here that infringement of moral rights in relation to the lyrics and musical composition of a song may occur:

(i) when the names of the lyrics writer or the music composer are not indicated prominently on the respective copies of their lyrics or musical composition and in connection with any public use of those works.

(ii) when there has been a violation of the right of the lyrics writer or the music composer to use a pseudonym and not have their names indicated on the respective copies of the lyrics or musical composition and in connection with any public use of those works.

(iii) when there has been a violation of the right of the lyrics writer or the music composer to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the respective

175 William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (South Asian Edition, Sweet & Maxwell, 2016) 441.

176 *Intellectual Property Act No.36 of 2003,* secs 13(2), 13(3) and 13(4).

177 *Intellectual Property Act No.36 of 2003,* sec 205; DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 293.

178 *Intellectual Property Act No.36 of 2003,* sec 5.

lyrics or musical composition which would be prejudicial to their honour and reputation.

The infringement of economic rights in relation to the lyrics and musical composition of a song may occur when any of those rights are violated in relation to the entire work as well as a substantial part thereof.[179] Thus, unauthorised reproduction, translation, adaptation, arrangement, transformation, public distribution, rental, importation, public display, public performance, broadcasting or other communication of lyrics of a song or musical composition in their entirety or substantial part would constitute copyright infringement. However, this would be subject to the concept of fair use as recognised in the *Intellectual Property Act No.36 of 2003*.[180]

7.1 Civil Judicial Remedies

Under civil judicial remedies provided in the *Intellectual Property Act No.36 of 2003*, the respective owner of copyright in the lyrics or musical composition of a song could prohibit any person from infringing any of the moral or economic rights in those works by way of an injunction obtained from the Commercial High Court.[181] While such copyright owner could claim damages from such infringer for the award of which the Commercial High Court has the power and jurisdiction,[182] such owner is also entitled to seek such other remedy against the infringer which the Commercial High Court may deem fit under section 22(1) of the *Intellectual Property Act No.36 of 2003*. Apart from the power and jurisdiction to grant injunctions to prohibit the commission of any act of infringement or the continued commission of such acts of infringement of copyright in the lyrics or musical composition of a song, the Commercial High Court also has the power and jurisdiction to order the impounding of copies of those works suspected of being made sold, rented, or imported without the authorization of the respective copyright owner.[183]

According to section 22(2)(b) of the *Intellectual Property Act No.36 of 2003*, the Commercial High Court has the jurisdiction to order the payment by the infringer, of damages for the loss suffered as a consequence of the act of infringement, as well as, the payment of expenses caused by the infringement,

179 *Intellectual Property Act No.36 of 2003, sec 9(2).*
180 *Intellectual Property Act No.36 of 2003,* secs 11 and 12.
181 *Intellectual Property Act No.36 of 2003,* secs 22(1) and 22(2).
182 *Intellectual Property Act No.36 of 2003,* sec 22(1).
183 *Intellectual Property Act No.36 of 2003,* sec 22(2)(a).

including legal costs. The quantum of damages is to be fixed by taking into account, *inter alia*, the importance of the material and moral prejudice suffered by the owner of the copyright, as well as the importance of the infringer's profits attributable to the infringement. Where the infringer did not know or had no reasonable cause to know that he or it was engaged in infringing activity, the court may limit damages to the profits of the infringer attributable to the infringement or to pre-established damages.

In terms of section 22(2)(c) of the *Intellectual Property Act No.36 of 2003*, the Commercial High Court has the authority to order the destruction or other reasonable manner of disposing of copies made in infringement of copyright in lyrics or musical composition of a song and their packaging outside the channels of commerce in such a manner as would avoid harm to the respective owner of the copyright, unless he requests otherwise. However, the provisions of this section do not apply to copies and their packaging which were acquired by a third party in good faith.

Moreover, in terms of section 170(1) of *Intellectual Property Act No.36 of 2003*, where the respective owner of copyright in the lyrics or musical composition of a song proves to the satisfaction of the Commercial High Court that any person is threatening to infringe or has infringed his rights or is performing acts which make it likely to infringe his rights, will occur, the Court may grant an injunction restraining any such person from commencing or continuing such infringement or performing such acts and may order damages and such other relief as the Court may deem just and equitable. The injunction may be granted along with an award of damages and shall not be denied only for the reason that the applicant is entitled to damages.

7.2 Criminal Judicial Remedies

Section 22(2)(g) of the *Intellectual Property Act No.36 of 2003* makes infringement (or attempted infringement) of copyright in the lyrics or musical composition of a song a punishable offence. Apart from that, according to section 178(1) of the *Intellectual Property Act No.36 of 2003*, any person who wilfully infringes copyright in the lyrics or musical composition of a song is guilty of an offence. Also, in terms of section 178(2), any person knowingly or having reason to believe that copies have been made in infringement of the copyright in the lyrics or musical composition of a song, sells, displays for sale, or has in his possession for sale or rental or for any other purpose of trade

any such copies, shall be guilty of an offence. The first instance jurisdiction in respect of the said offences is vested with the Magistrate's Court.[184]

8. Conclusion

A song comprises of two components eligible for copyright protection in Sri Lanka: the lyrics and the musical composition. While both the lyrics and musical composition would constitute intellectual creations in the literary, artistic, and scientific domain, they would receive copyright protection provided they satisfy the test of originality. The lyrics and the musical composition would satisfy the test of originality when they have originated with their authors, have not been copied, and the authors have exercised the requisite labour, skill, or judgement in producing them. The Sri Lankan Copyright law does not require the relevant lyrics or the musical composition to be fixed in a material form, the result of which is that the mere expression of those works would be sufficient for copyright protection.

When the lyrics and the musical composition of a song receive copyright protection, the original authors thereof are conferred with moral rights and usually the economic rights over their respective works. The moral rights of the author encapsulate three main rights, namely: (i) the right to have his name indicated prominently on the copies and in connection with any public use of his work, as far as practicable; (ii) the right to use a pseudonym and not to have his name indicated on the copies and in connection with any public use of the work; and (iii) the right object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work which would be prejudicial to his honour or reputation. The economic rights comprise of: (i) the right of reproduction of the work; (ii) the right of translation of the work; (iii) the right of adaptation, arrangement or other transformation of the work; (iv) the right of public distribution of the original and each copy of the work by sale, rental, export or otherwise; (v) the right of rental of the original or a copy of the work embodied in a sound recording, a computer program, a data base or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned; (vi) the right of importation of copies of the work, (vii) the right of public display of the original or a copy of the work; (viii) the right of public performance of the work; (ix) the right

184 *Intellectual Property Act No.36 of 2003,* secs 22(2)(g) and 178; DM Karunaratna, *An Introduction to the Law Relating to Literary & Artistic Creations in Sri Lanka* (Sarasavi, 2019) 310.

of broadcasting of the work; and (x) the right of other communication to the public of the work. The respective moral rights of the lyrics writer and the music composer exist independently of their economic rights and even where they are no longer the owners of the economic rights in respect of their works.

As a general rule, the economic and moral rights in respect of copyright protected lyrics and musical composition of a song exist for the lifetime of the author and for a further period of seventy years from the date of his death.

Generally, the author who has created the copyright protected lyrics or the musical composition of a song is the original owner of economic rights therein. However, when the lyrics or the musical composition are the result of joint authorship, the joint authors become the original owners of economic rights. Yet, when the lyrics or the musical composition consist of parts that can be used separately, in that, the respective contributions of authors thereof are not merged to form an integrated whole but, distinct and sperate from each other, and the author of each part can be identified, the author of each part becomes the original owner of the economic rights in respect of the part that he has created. In a situation where the copyright protected lyrics or the musical composition have been the result of a collective work, the physical person or legal entity at the initiative, and under the direction, of whom the lyrics or the musical composition have been created becomes the original owner of economic rights of those works.

A violation of any of the economic and moral rights in respect of copyright protected lyrics or musical composition of a song constitutes copyright infringement. In the case of such infringement, the respective right holder could resort to both civil and criminal judicial remedies. Infringement entails civil remedies of injunction, damages and such other relief as the court may deem just and equitable. Also, in certain situations, copyright infringement constitutes an offence. While it is the High Court of the Western Province Exercising Civil Jurisdiction (Commercial High Court) which presently exercises the jurisdiction in respect of civil remedies, the jurisdiction in respect of criminal remedies is exercised by the Magistrate's Courts.

Part - II

SEDUCED (Plaintiff)

vs.

SEDUCER (Defendant)

SRI LANKAN LEGAL FRAMEWORK WITH REGARD TO SEDUCTION

Chinthaka Srinath Gunasekara,
(L.LB, LL.M- Colombo), District Judge, Rathnapura.

Introduction

The crimes affiliated with smart technology through electronic devices and social media are increasing day by day, creating new offences which have not been identified even by the statutes so far. Women, Children are vulnerable to sexual activities even through the online system. It is not secret that in society, so many sad stories about seduced women. A considerable amount of such victims can be traced around plantation estate areas and garment factories. Though it is difficult to maintain a database, how many women come for maintenance cases with a child but no marriage? How many natural mothers give their children for adoption and also hand them over to children's homes? With or without consent, many of them have been seduced. How many hidden cases with or without children? How many abortion cases? This is an endless story with a big social problem.

A remedial measure for such women is **an action for recovery of damages**. The pathetic situation is that women are reluctant to go through the legal process due to poorness, lack of knowledge, un tolerable delay to get an outcome, secondary victimization in the court process, the difficulty of burden, etc…resulting in some of them have to stay at streets with a child. It reflects that the existing mechanism should be understood and the court process should be expedited.

It is observed that amount of filing cases is too small and also, no one tends to go to higher forums. It is evident that very little number of authorities are available on this topic and those are quite old. Furthermore, the country depends on Roman-Dutch Law (RDL) principles. This article expects to revisit the existing law on seduction and see whether it is adequate in the

present context. On the other hand, if the court can expedite such cases, it will be a great relief for all parties. Seduction is probably affiliated with the legal concept of breaking of marriage promise. But here, it is not expected to focus on breaking marriage promises.

What is seduction?

Seduction has several meanings, but for the purpose of law, Seduction is considered as an actionable civil wrong which deviates from a crime. A man who has seduced a girl is liable to compensate her in damages for the loss of her virginity and the consequent impairment of her marriage prospects.[1]. R.G Mckerron has quoted this after referring the cases thus, ***Carels vs Estate De Vries[2], Spies" Executors v Beyors*** and also based on writings of eminent legal writers Grotius and Voet.

Under the Law of Delict, which is a high value part of RDL, if somebody wants to get damages for a civil wrong, there must be *injuria*. If the seduction is committed with the consent of the girl, it is not considered as injuria. This is an exemption to *injuria*. Anyway, seduction is actionable wrong under the English law and also under the Roman-Dutch law with different contexts. According to the Mckerron, this action was probably not derived from the Roman law, but was taken over from the customs of the Germans and the canons of the church. That may be because seduction is not tantamount to a criminal offence but a wrong against chastity and the marriage relationship. In that context, Roman-Dutch Law is very liberal on the topic, whilst English Law is completely different in many ways.

In English Law, no action lies at the instance of an employer or master or father. The father as head of the household, is regarded as the master and the daughter as his servant on the footing that she rendered service to him of which he was deprived by the seduction[3]. It is seen that under English Law, a victimized girl cannot sue against the seducer. This situation will be badly

1 R.G.McKERRON, THE LAW OF DELICT, 7th Edition, 162.

2 *Carelse v Estate De Vries*, (1906) 23 SC 532, an important case in South African succession law, Carelse was seduced, on the promise of marriage, by the deceased (who was already married with children). Carelse and the deceased continued their relationship, which produced seven children, before the deceased died intestate.
At that time, the Intestate succession Act said that illegitimate children could not inherit from their deceased parents. The court held, however, that this was no longer the proper position and awarded maintenance to the children. Although the deceased died intestate, the principle is the same for persons who die testate.

3 U.L. Abdul Majeed, Modern Treatise on THE LAW OF DELICT(TORT),457

affected where there are no parents living with the girl. This situation has somewhat relaxed with limitations. Then it is seen that Roman-Dutch Law is more conversant with personal rights in vast area compared to English Law. Further, it seems that under both laws, there are separate actions with separate proving methods.

Under English Law, Plaintiff must show loss of service. Damages include expenses of the girl's illness in addition to the value of the service lost. Seduction has been explained as an enticement to have sexual intercourse. Until 1971 parents could sue a seducer for loss of service of their child. But this has now been abolished. It is an offence for a parent to cause or encourage the seduction of a daughter under the age of consent.[4]. Further, it seems that English law has focused on the action basically insight of contractual relationship. Then it should be very cautious when interpreting the situations under English Law and Roman-Dutch law. With the cultural background on parent-children relationship, RDL is much democratic and appreciated by the Sri Lankans and also, since the common law of the country is the RDL, it applies here.

Applicability in Sri Lanka

The nature of the action for seduction has been discussed by the court in the case of ***Levo Nona vs Elenis***[5] and clearly mentioned that action still exists here.

> This is an action for seduction under the Roman-Dutch Law, which in this respect is, to my mind, superior to the English Law. By the Roman-Dutch Law, if a girl of previous good character is seduced by a man, she has the right to sue him and to require that he must do one of two things-either marry her, or, if unwilling or unable to do that, provide her with a dowry suitable to her condition in life. The object of this is, that the woman may not be turned out on the streets penniless to swell the ranks of prostitutes, but that some provision may be made for her in order that she may either support herself or induce some other man to marry her. As I have already observed, the English Law in this respect affords a much less satisfactory remedy for the injury done to the girl. The English Law does not look to the interests of the girl.

4 Oxford Dictionary of Law, 5th Edition,452
5 2 NLR 173

> The girl herself cannot bring an action. It is the father or the master who does that. The right to bring an action is based on the fiction that he has lost the value of her services. The interests of the girl are not regarded, for the parent or master may recover heavy damages against the seducer and then turn the girl on the streets.
>
> It has been suggested by two eminent Judges of this Court- Chief Justice Phear and Chief Justice Burnside-that this action was abolished by section 30 of Ordinance No. 6 of 1847. If it were so, it would be a most unfortunate thing. But in my opinion, as at present advised, it is not necessary to come to that conclusion; and even if I were of that opinion, I am bound by the decision of this Court in the case of *M. A. Sadrishamy v. K. Subehamy,* reported *5 8, C. C. p. 38,* where the matter was fully argued, and it was held that this action still existed.[6].

The above case was reported in 1902 (before 119 years), and after that, a line of cases has been applied the same law. In the above case, it has been discussed the difference between RDL and English Law, necessity of such an action in a positive manner. In the case of ***Sopi Nona Abeydeera vs Podisigngno***[7] it has been mentioned that, in Sri Lanka, there is no doubt that an action for seduction lies and the law governing seduction is the Roman-Dutch Law. Then it is very clear that this action is a part of Sri Lankan Law.

Nature and the scope of the action

In the case of *Abeydeera vs Podisigngno* (supra), it has been further mentioned that in modern law, action for damages is the only remedy and the no power to order specific performance. The ultimate remedial measure has been limited in granting monetary relief. In the past, specific performance was available. It means an order could be given to the seducer to marry the girl. This has been clearly elaborated in the case of ***Lucinahamy vs Diashamy***[8] thus, an action for seduction lies in Ceylon[9] at the instance of the party seduced, notwithstanding that the Court has no power to order the specific performance of a promise to marry or to marriage as an alternative course by reason of seduction. Anyway, specific performance of marriage has been prohibited by the Marriage Registration Ordinance.[10]Then one and only remedy is monetary relief unless the seducer marries the girl voluntarily.

6 Per Bonser C.J
7 28 NLR 158
8 11 NLR 242
9 then
10 Section 20(1)

Even in South Africa, Specific performance of a promise to marry was abolished by statute over the course of the nineteenth century, leaving only the possibility of a monetary claim for loss of virginity and the consequent impairment of marriage prospects as well as the costs associated with a resulting pregnancy[11].

For the maintainability of the action, the woman should be a virgin at the time of seduction. It implies that after a sexual intercourse with a man at first time or very first occasion, action must be filed. In another words, if the woman has previous intercourse before the alleged sexual intercourse, this action cannot maintain. Then it is considered that a married woman or widow cannot maintain the action. But the woman who has had sexual intercourse with some other men after the seduction will not bar the action. This has been decided in the South African case of ***De Stadler vs Cramer***[12] which based on RDL principles; it is said that arriving at this decision court has rejected the contrary view of Voet. Then the action for seduction under RDL is the defloration of a *Virgo intacta*[13] and action must be brought at once on the completion of the first act of intercourse. In the case of *Lucinahamy(supra*) it has further mentioned that the essence of the action for seduction under the Roman-Dutch Law is the defloration of a *virgo intacta*, and the action might be brought at once on the completion of the first act of intercourse.

According to Voet, the action will fail if it is proved that the woman herself was the seducing party or that she stipulated for or accepted payment or reward as the price of her virginity. If she continued to have intercourse with the defendant instead of immediately severing her association with him and instituting the action.[14] It seems that the rationale behind this is to compensate for loss of her virginity of and the consequent impairment of her marriage prospects. Once she accepts money or any gratification as a sufficient compensation (not mere acceptance of some money) purpose of suing is completed.

In the case of an unmarried woman or a spinster, there is a presumption in favour of her virginity, so that the onus is on the defendant to prove that she was not a virgin. This has been mentioned in the South African case of ***De Wit***

11 Francois Du Bois, Punishment, reparation and the evolution of private law: The *actio iniuriarum* in a changing world, p.267, https://www.researchgate.net, (searched on 19.11.2021)

12 1922 CPD 16 (CPD-CAPE PROVINCIAL DIVISION)

13 *Virgo intacta*-Woman who has had no sexual intercourse

14 McKERRON, THE LAW OF DELICT,p.164

Vs Uys[15]. Voet was also of the same opinion. He has said that the defendant must prove that she has had sexual intercourse with another man.

In the case of ***Meenadchipillai vs. Sanmugam***[16], it has been mentioned that a seduced girl who knew at the time that the seducer was a married man cannot maintain an action for damages for seduction.

Burden of proof

The elements which should be proved in action on seduction are first; there must be a sexual intercourse between the parties; secondly, the woman must have been seduced and thirdly that she must have virgin up to the alleged date of seduction. These elements must be proved by the plaintiff (subjected to the above presumptions).

With regard to the burden of proof, Mckerron says that the onus of establishing seduction rests, of course, on the woman but where the court is satisfied from the evidence that she fell as a result of the man's seductive efforts. If intercourse is not denied, the court may act upon the uncorroborated evidence. But it is otherwise if the defendant denies intercourse. But the Modern view is not that in the absence of corroboration, the woman must be disbelieved, but that as a matter of law, she is not entitled to judgement unless there is corroboration.[17]

The quantum of proof and the expected corroboration has been elaborated in the case of ***Jonathan Joseph vs June de silva***[18]thus,

> A seduction case must be decided on the preponderance of evidence. The failure of the defendant to refute on oath the testimony of the plaintiff given on oath can be treated as corroboration depending on the circumstance of the particular case.

This is a very material point to consider here. The allegation of seduction is a very severe one. Series of Judgments have discussed that false allegations also could be made against some men due to various reasons. As a result of that, some sort of corroboration evidence has been required to establish sexual offences under the criminal law. In that context, in seduction cases, corroboration evidence is required, but it depends on the circumstances in each case. Then it will be prevented false allegations. It seems that the action

15 1913 CPD 653, U.L. Abdul Majeed, Modern Treatise on THE LAW OF DELICT(TORT),463
16 19NLR 209
17 Mckerron , THE LAW OF DELICT, p. 163
18 90(2) SLR 175

for seduction also focuses on the principle that it is better to release the wrongdoer rather than penalising an innocent even under a civil action.

According to Grotius, in a contested action for damages on the ground of seduction, the rule is that when the oath of the plaintiff is contradicted by that of the defendant and there is no evidence *aliunde*[19] , there must be judgement for the defendant.[20]Then it is pertinent to say that in such a situation plaintiff's version of seduction wholly depend with corroboration. This may be the material part of a case. The necessity of corroborative evidence and when it is necessary, has been further discussed in the case of ***Jonathan Joseph vs June De silva*** (supra); thus, the plaintiff claimed that the defendant deflowered her on the promise of marriage but failed to marry her. She was a virgin at the time of such defloration. The defendant failed to give evidence. The question was raised, apart from other defences, that it was not open to treat the failure to give evidence as corroboration.

Whether a fact is considered proved or not is dependent upon the belief of evidence. Where on the uncorroborated evidence of the plaintiff if the Court is satisfied, she is speaking the truth, and the allegation of sexual intimacy seems probable such as to make it prudent to accept its existence, it can be held to be proved depending on the circumstances of the case.[21] Honourable Judges' attention was also drawn to the South African case of *Jagadamba v. Boya* and quoted the following passage from it.

> "A seduction case is a civil case. Therefore, it must be decided upon the balance of probabilities, but the special rule that the evidence of the plaintiff requires corroboration applies. The process of balancing the probabilities takes place after all the evidence has been led. If the balance is against the plaintiff, she loses the case. If it is in her favour and there is no corroboration she also loses. If it is in her favour and there is corroboration she wins".

After the analysis, the court has decided that being a civil case where the process of balancing of probabilities after all the evidence had been led had to take place, that the failure of the defendant to refute on oath the testimony of the plaintiff given on oath regarding sexual intimacy between them had the effect of sustaining the case of the plaintiff sufficiently, so that the District Judge (original court) was correct in placing the emphasis he did upon that

19 Corroborative evidence
20 U.L. Abdul Majeed, Modern Treatise on THE LAW OF DELICT(TORT), (*ibid)*465
21 As per S.B. Goonewardene J, President of Court of Appeal (as he was then)

aspect of the matter and coming to the conclusion that case of the **plaintiff had been proved as required by law upon a 'preponderance of evidence', which expression, perhaps, rather than the alternative one of 'balance of probabilities', would highlight the significance of the absence of the defendant's evidence on oath of denial of intimacy[22].**

Generally, a civil action must be proved on the balance of probabilities, but civil wrong of seduction has been considered as an exemption as per the above case based on the reasons given. When it comes to the plaintiff's claim, she must make an oath that she never had a carnal connection with any other men. Even before the case of *Jonathan Silva* (supra) case, the line of cases has elaborated the necessity of corroborative evidence in a seduction case and when it arises.

In the case of ***Grange vs perera***[23] it was held that under Roman-Dutch law, action for seduction, where the seduction was denied on oath by the defendant, cannot succeed unless the plaintiff's evidence is corroborated. It has been quoted following passage from Nathan's Common Law of South Africa[24],

> 'In cases of seduction, where the defendant alleges that the girl whom he is alleged to have seduced was not a virgin at the time when carnal intercourse took place, the presumption will be that she was a virgin, and the defendant must prove that she had actually had sexual intercourse with another man'.

It has further mentioned that the general rule laid down by the Roman-. Dutch authorities are that in an action for seduction or affiliation (i.e., for maintenance of a child of whom the defendant is the father, or for the lying-in expenses of the plaintiff) the plaintiff's oath that the defendant is her seducer or the father of her illegitimate child must, if the defendant on oath denies the imputation of seduction or paternity, be corroborated by evidence *aliunde*, that is, by extrinsic evidence.

In the case of ***Vedin Singho vs Mency Nona***[25] has focused on the time which corroboration is needed. Corroboration must arise from some conduct or from some circumstance other than that of the bare conduct of the first plaintiff herself, which in this case is certainly at a date very much later than the alleged act of seduction.[26]

22 Emphasis added by me.
23 31 NLR 85, by Fisher J.
24 Vol. III. (1906), section 1638, at -page 1679,
25 51NLR 209
26 Per Nagalingam J.

In the case of ***D.D. Somapala (appellant) and Muriel Sirr***[27], hon. Rose CJ has referred about the nature of required corroborative evidence.

The facts are in germane; the plaintiff and the defendant, who were neighbours, became acquainted with each other, that the acquaintance ripened to affection and that upon the night of 8th May 1949, the plaintiff, who was a virgin at the time, was seduced by the defendant. The plaintiff kept the episode from her parents until she herself was aware of her pregnancy and until her parents discovered her condition. There is evidence, which the learned District Judge apparently accepted, that subsequent to the discovery of the plaintiff's condition, conversations took place between the defendant and the plaintiff's parents, which resulted in the defendant promising to marry the plaintiff in due course. Later, the question of finance was discussed, and the defendant, apparently being dissatisfied with the provision that was proposed to be made by the plaintiff's parents, withdrew from the arrangement.

According to Rose CJ, the principal point taken by the appellant was that there was no substantial corroboration of the plaintiff's story of the seduction. Moreover, it was further contended that the contradictions in the story told by the plaintiff and by her principal witnesses were of such a nature that the learned Judge should have rejected the plaintiff's version of the facts.

Hon. Rose CJ was of the view that the principal item of corroboration relied upon was the discovery of the plaintiff and the defendant in a compromising position by the invalid elder sister of the plaintiff. It appears that the 8th of May was the final day of a two weeks Pirith Pinkama in the village temple. The 8th May was the " Dorakadasna" night, on which the practice evidently is for almost all the people in the village to gather at the temple. In fact, the plaintiff's parents went to the temple at about 7.30 p.m. and did not return to their house until late at night; the suggestion of the plaintiff, of course, being that the defendant was aware that the plaintiff would be alone in the house, apart from her invalid sister. According to the evidence of the sister, she rebuked the defendant for being in the house alone with the plaintiff so late at night, and thereupon the defendant left. Moreover, the subsequent conduct of the defendant, as depicted by the plaintiff's witnesses, would tend to corroborate her (the plaintiff's) story of the seduction.

In an action for seduction, the defendant's false denial of irrelevant matters does not constitute corroboration of the plaintiff's story. This principle

27 55 NLR 247

has been mentioned in the case of ***U. Somasena vs Kusumawathie***.[28] Then it is clear that even in Sri Lanka, where seduction was denied on oath by the defendant cannot succeed unless the plaintiff's evidence is corroborated. Plaintiff has to fulfil that. As mentioned above, not like in the old days, electronic devices play a big role today, since electronic, computer evidence are admissible, if such evidence is available, those can be used to fulfil that task.

Prescription

A question would be whether the Prescription Ordinance apply or not? If yes, what is the prescribed period? It is seen that within two years period, action must be filed. Otherwise, it should be considered as prescribed. Section 9 of the prescription ordinance[29] is applicable to this action. It has been emphasized in the case of *Sopie Nona Abeydeera vs Podisingho* (supra) that a claim for damages arising from seduction is prescribed in two years from t he date of defloration. Prescription begins to run from the date of seduction took place.[30]

Measure of damages

The woman is entitled to be compensated in damages for the wrong that has been done to her defloration without proof *damnum.* In assessing the amount to be awarded court must have regarded all the circumstances of the case.[31]

In a south African reported case ***Aake v Tabane***[32] it has been mentioned about grounds for measuring damages in considering what might be a suitable award for the plaintiff regard must be had to (a) the social standing of the plaintiff, (b) the extent to which the feelings of the plaintiff have been wounded, (c) the awards in comparable cases, only as guidelines;(d) the devaluation in the value of money, and(e) the general behaviour of the defendant. Since there is a persuasive value of that judgement, a court can consider above heads also.

28 60 NLR 355, by hon. H.N.G. Fernando J.

29 No 22 of 1871, sec.9 -no action shall be maintainable for any loss or injury or damage unless the same shall be commenced within two years from the time when the cause of action shall have arisen.

30 The date of defloration

31 THE LAW OF DELICT, p 165

32 (9/97) [2000] ZANWHC 3 (3 February 2000) In the High Court of Bophuthatswana provincial Division, Judgement dated 03.02.2000

Facts of that case are as follows, on or about and during January 1992 and March 1992, the plaintiff, a major spinster, was wrongfully and unlawfully seduced and carnally known by the defendant. By reason of the aforesaid sexual intercourse by the Defendant, sustained an injury to her good name, self-esteem and reputation and impairment of marriage prospects, as a result, suffered damages in the amount of R[33]15 000.00 for which the Defendant is by law liable to compensate. As per Nkabinde J,

> "I now turn to the general damages caused by the seduction. The onus to prove quantum rests on the plaintiff. This is a matter within the discretion of the court. I must mention however that it is difficult to determine quantum with any degree of precision.
>
> The plaintiff has testified that she was a spinster and lady teacher who was respected not only at school but also in the community where she lived. She was persuaded to surrender her virginity by a promise that was not kept but now finds herself not only deflowered but also saddled with a child as a result. The injurious element of this conduct is, in my view, substantially aggravated by the defendant's persistent denial that she was a virgin at the time he seduced her and his scurrilous and unfounded accusation that she was the seducer. The defendant has admitted that her prospects of getting married has diminished. In a comparable case of M, NO v M (1991 (A) SA 587 at 602) the plaintiff, a girl aged 16 years, was awarded a global amount of R[34]6 000.00 for seduction and breach of promise. **The award in money in that year is not an award in money today. Therefore, in making comparison I have taken into account the decline in the value of money**[35] (Southern Insurance Association Ltd v Bailey 1984 (1) SA 98 (AD), and of course, the particular circumstances of each case. It is clear from the defendant's evidence that when he proposed love from the plaintiff, he did so with a wicked heart solely to appease his selfish ends because he testified that he did not love her but was only attracted to her. This heartless and callous attitude should attract censure in the form of damages."

According to the above analysis, Court has focused not only above heads but also inflation, humanitarian findings on defendant's' behaviour as well. If the seduction has resulted pregnancy, the woman, in addition, is entitled to

33 Rand: South African official currency
34 ibid
35 Emphasis added by me.

recover lying- in expenses and, in the event of the child's death, its funeral expenses. She can claim patrimonial damages.[36] There are cases in which it has been stated that she can also recover loss of earnings during pregnancy. Court has the discretion to decide the quantum with circumstances of mitigating or aggravating.

Death of a party

Another question would be, after a death of a party to the action, how it affects to the case? Whether the case is terminated or transmissible?

Under the principle of *action personalis motitur cum persona*, the right of action dies with the death of a person. Then if it is only a claim for seduction (no claim for lying -in expense and maintenance of the child), generally, the action comes to an end with defendants' or plaintiffs' death. But, if the trial stage has arrived, transmissibility has to be decided by the court.

When the seduced woman (plaintiff) dies, Voet and Shore are of the view that the action is not transmissible unless action has begun and the defendant placed *in mora* (delay)[37]. Mckerron says that if pregnancy resulted, the woman's executor would, in any event, be entitled to claim for the lying-in expenses.[38] Then it seems that transmissibility of the action upon the death of a party depends on the principle of *litis contestio* [39] but where a pregnancy resulted, the case is transmissible upon the death of a party for the claim of child maintenance and affiliated expenses. Then the RDL principles are very much concerned with the child's rights despite the fact that the original parties died.

Conclusion

It is seen in the present context, in many western countries such as the USA, Canada, tend to abolish their actions of seduction.

In Canada, over time, seduction suits became infamous for their abuse of the judicial system. By the mid-twentieth century, they were a fertile field for blackmail and extortion. Manufactured seduction claims in which the threat of publicity was used to extract an out-of-court settlement were common. Vindictiveness also reared its head in too many cases before the

36 Jacob vs Lorenzi, 1941 CPD 394
37 Voet 48.5.5
38 THE LAW OF DELICT, p 166
39 Commencement of the issue after filing the pleadings.

courts. Law-reform-commission reports questioned the motives behind many seduction suits. Some women went the argument, used the courts not so much to claim damages as to inflict public and emotionally messy revenge on the man. By the end of the 1980s, every province except Saskatchewan had enacted legislation barring seduction lawsuits. In 1990 Saskatchewan repealed its seduction act and joined the rest of the country in prohibiting seduction suits.[40]

Further in the United States, the tort of seduction has been abolished in "most states". Fears of fraudulent suits, combined with a turn away from the view of property interests in persons, led to the enactment of "heart balm" statutes, abolishing causes of action for seduction, breach of promise etc. in most states in the 20th century[41].

In such a scenario, action for seduction still exists here without any barriers other than prescription. It also supplies adequate protection for the litigants on their claims. The need in the hour is to an expeditious and qualitative conclusion after a fair hearing which are the paramount duties of the Judiciary.

40 Douglas Johnston, Seduction and the Law, https://www.canadashistory.ca/explore/politics-law/seduction-and-the-law, searched on 16.11.2021

41 https://en.wikipedia.org/wiki/Seduction, seduction (Tort), searched on 21.22.2021

NON - CONSUMMATION IS A GROUND FOR DIVORCE OR NULLITY

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District Judge, Kurunegala.

Non – consummationof marriage is an unsettled and uncertain area of divorce and matrimonial law in Sri Lanka. In district courts, parties file the cases praying for non-consummation of the marriage as a ground to obtain an order for nullity; but no statutory provisions are provided for that. In some way, the parties file that ground for divorce. Marriageis not a mere ordinary private contract between the parties. It is a contract creating status and gives rise to important consequences directly affecting society at large that it lies indeed at the root of civilized society"[1] The definition of marriage varies between cultures and religion in the world.

In any society, the consummation of marriage is an important part of fulfilling the marriage obligation. According to Black's law dictionary, "consummation is to bring a marriage complete by sexual intercourse."[2] The judicial dictionary states that "consummation is a completion of a marriage by sexual intercourse between spouses.[3] In view of these definitions, consummation is an integral aspect of fulfilling a marriage contract. Marriage is not a mere contract; it is the responsibility of husband and wife. Entry into marriage by parties putting their signatures in the document does not create their marriage perfection.

According to the marriage registration ordinance, "If both the parties to any marriage shall,knowingly and willfully intermarry under the provisions of this ordinance in any place other than prescribed of this ordinance, or under a false name or names, or except in cases of death bad marriages under section 40 without certificate of notice duly issued, or shall knowingly or willfully consent to acquiesce in solemnization of marriage by person who is not authorized to solemnize marriage, the marriage of such parties shall be null and void.[4]

***** LL.B (Hons), B.A. LL.M.

1 *Weatherly vs weatherly (1879) kotze 71)*
2 Graner A Bryan Black's Law Dictionary. 7th Edition page 320.
3 Aiyer K. J."Judicial Dictionary 13th Edition pa. 237
4 *Section 46 Marriage Registration Ordinance.*

Law relating to divorce in Sri Lanka is under section 19(2) of the Marriage Registration Ordinance; marriage could be dissolved on proof of adulatory subsequent to the marriage, malicious desertion or incurable impotency based on marital misconduct.

Civil ProcedureCode section 608(2b), found the decree of separation could be converted into a decree of divorce after two years and separation a *mensa et*. Therefore, a period of seven years is a sufficient ground for divorce. [5]

In the provisions of section 607 of the Civil Procedure Code, any husband or wife may present a plaint to the district court within their jurisdiction of which he or she resides. Praying that his or her marriage may be declared null and void, such decree may be made on any ground, which renders the marriage contract between parties void by the law. The law relating to making marriage contracts void could be found in section 46 of the Marriage Registration Ordinance. Section 15 of the said Ordinance deals with theprohibited age of marriage. Section 16 deals with the prohibited degrees of relationship, and section 18 deals with the second marriage without legal dissolution of first marriage is invalid. The said Marriage Registration Ordinance, in the view of the above sections, could be stated; that it deals only in the circumstance where the marriage is void *ab initio*. The concept of voidable marriage is not included in the said provisions of the Marriage Registration Ordinance and otherstatuary provisions of Sri Lanka. The law relating to marriage and nullity has not directly dealt with the willful refusal to consummate the marriage. In the case of *Silva vs. Missinona*[6] "Deliberate and unconscientious, definite and final repudiation of the obligations of the marriage state and it clearly implies something in the nature of a wicked mind" We can find the view of "desertion" in Sri Lankancourts; on the decided cases.

Refusal to consummate can be considered as malicious desertion in such a circumstance; it is noteworthy to examine the view of the courts of Sri Lanka in this regard.

Simple desertion may be of three types.

01. Where the deserting spouse leaves the matrimonial home, with the fixed intention of, terminating the marriage.
02. Where the parties have separated either by volition or compulsion and one spouse is responsible for the onset the other in the common household or

5 *Section 608 (2b)of Civil Procedure Code*
6 *(1924)26 N.L.R 113*

03. Where one spouse manifests an intention to desert either by the use of expulsive words or deeds coupled with the cessationof cohabitation, but neither of the spouses leaves the matrimonial home due to exigencies beyond their control.[7] It was held in*Mohitiappu vs. kiribanda*.[8]

"The refusal of a husband to consummate a marriage does not amount to a cessation of the marriage' but amounts in law to desertion and entitles the wife to obtain a dissolution of the marriage."

Both under the Roman-Dutch law and the English law, husbands and wives are entitled to bring an action for damages against persons' who maliciously or without just cause' has enticed away from their wives and procured them or have induced them to absent themselves from their husbands. In the case of *Pathmanayaki vs. Mahenthiran*[9] held that the petitioner invoked the jurisdiction of the family court on the ground that his marriage to the respondent was not consummated; the parties never cohabited, they lived separately from the date of registration up to date of filing the action. It was held that the non-consummation of the marriage was owing to the willful refusal of the husband to hold the ceremony immediately after the registration and continues to live away from the defendant-appellant.Plaintiff respondent who willfully refused to copulate is guilty of the matrimonial offence of malicious desertion.

It is clear that the judicial approach of Sri Lanka in this regard is that the willful refusal to consummate the marriage can be consideredas a ground for malicious desertion. Malicious desertion is a ground for divorce.

In the case of *Tennkon vs. Somawathi Perera*[10] the respondent prayed fora decree for dissolution of marriage under section 608 (2) (b) of the Civil Procedure Code on proof of the *de facto* separation and held that it was unnecessary to decide upon the guilt or innocence of the parties. In the supreme court, the view was taken that an innocent spouse can apply for dissolution of the marriage. Chief Justice Sharvananda held that the words "either spouse" in section 608 (2) refer only to the innocent spouse merely on the reasoning that only the innocent spouse has the right to apply for a decree of judicial separation.There are many criticsof the abovementioned approach in Sri Lanka.

7 *Dr. Shirani Ponnambalam, Marriage relationship in Sri Lanka*
8 *(25 N.L.R 221)*
9 *[(2003) 3 S.L.R 241]*
10 *(1986) .S.L.R 90.*

We can identify the approach of courts in the above cases. In most cases, the position of the innocent party has not been duly considered. In society, men and women register their marriage and live separately due to many social factors—some of them going abroad for employment. Then the marriage is limited only to registration. After a few years, if they want to file a divorce case, the party needs to find the matrimonial offence of either party. The non-breaching innocent party has to face the post matrimonial consequences even without consummating it, not due to her or his fault, but due to thefault of the other spouse. In a cultural society like Sri Lanka, the marriage state of the person is importantly considered. When entering into the next marriage contract, the marriage certificate speaks the prior states of the parties. These unsatisfactory consequences confronted by taken into consideration seriously; otherwise, the rest of her or his entire life they have to suffer without any fault of his or her hand.

Consummation of the marriage in the Indian Hindu Marriage act provides for a decree of nullity of marriage, which is voidable on the ground of non-consummation. A party is impotent if his or her mental or physical condition makes consummation of marriage a practical impossibility. A marriage is a legal status under different personal laws, followed in India, like Hindu Marriage Act, Muslim Personal law, Indian ChristianMarriage Act. Parsi Marriage and Divorce Act, 1936 and Special Marriage Act 1954.

The Indian High court of Karnataka decided in the case of *B.J. Indushekar vs uma c. Swadimath*[11], the husband sought dissolution to the marriage on the ground of cruelty as well as the non-consummation of marriage.

A Pramod vs. Deepika[12] in Kerala High courtdecided on the ground of non – consummation of marriage cruelty and mental disorder for nullity of marriage.

In most cases in India, non – consummation of marriage provides ground for nullity.We have to consider the English common law principles dealing with willful refusal to consummate the marriage. The above definition, incapacity or existence of illegal elements needs to be established in order to obtain a judgment for a voidable marriage. The English law has a liberal approach of willful refusal to consummate is a valid ground for null and void of the marriage. Matrimonial cause Act of 1973 in the united kingdom clearly indicated that " In addition to any other grounds on which a marriage is by law

11 Indian judgment/case law/ casemin. com
12 *Indian judgment/case law/ casemin. com*

void or voidable, a marriage shall be voidable on the ground that the marriage has not been consummated owing to the willful refusal of the respondent to consummate the marriage.[13]

The Matrimonial Causes Act 1973 is the law within England and Wales that governs divorce. Section 12(1b) of the MatrimonialCauses Act 1973 gives grounds on which a marriage is voidable.

> "That the marriage has not been consummated owing to the incapacity of either party to consummate it. Three main element needs to be satisfied to establish the willful refusal to consummate. The first is that the consummation must be proposed to the refusing party. *Horton vs Horton*[14] *(1947) 2A11 E.R.871 .* The court of appeal decision was in favour of the wife and refused to annul the marriage. The court also stated that the word "willful refusal to consummate" in section 7 (1) (a) of the Matrimonial Causes Act 1973 signify a "settled and definite decision come to without just an excuse."

The English law considers, by the statute itself, that the willful refusal to consummate is ground to obtain a nullity of marriage.

In the case of*A.V.J. (Nullity)*[15] *1 FLR 110*, Anthony Lincola, W and H were of Indian ancestry and took part in an arranged civil marriage, which was to be followed by a religious ceremony some four months later, between the two ceremonies, they spent only a few days together because of H's work in the USA. Shortly before the religiousceremony, Wrefused to go ahead with it, giving as her reason H's uncaring and unloving attitude towards her. H apologized and said he had supposed a formal relationship would be appropriate until they were "properly married ", but W refused to accept this apology and maintained her refusal to go through with the religious ceremony. H was granted a decree of nullity for W's willful refusal to consummate the marriage.

In the case of *Kaur vs. sing*[16] *(1972) 1 ALL ER 292,* the parties who were Sikhs were married at a registrar office. According to the Sikh religion and practice, it was necessary to have not only a civil ceremony in a registrar's office; but also a Sikh ceremony in a Sikh temple. The husband had never tried to persuade the wife to have sexual intercourse with him. The court held that the wife was entitled to a decree of nullity. The husband had entirely refused

13 *(section 7(1a) of Matrimonial Cause Act of 1973 of UK)*
14 (1974) 2 A11.E.R 871
15 (1909) 12 N.L.R. 95
16 (1972) ALL E.R.292

and failed to implement the marriage, and to fail to implement the marriage; it had willfully failed to consummate.

The English law recognized willful refusal to consummate the marriage as a valid ground to obtain a decree of nullity in favour of the innocent party

Applicability of the English legal concept of divorce in Sri Lanka is reflected, in the case of *Abeyagoonesekere vs Abayagoonesekare*,[17] held thatthe rule of English practice that in a divorce case, the husband is, as a general rule, liable to pay into court, or give security for, an amount sufficient to cover the wife's costs in connection with the case should be followed in Ceylon.

The English law of divorce and matrimonial concept could be applied in Sri Lanka. It is further emphasized in the case*Silva vs. Silva*.[18]

Layord CJ, empathize that "I think the English rule should be followed, and I shall lay it down as briefly as possible. The rule is that the husband, besides being generally liable to pay his own costs, is also as a general rule, whether the wife be successful or not." In the case of *Naverathne vs. Naverathne*[19] held that the Ceylon court had jurisdiction in action as the marriage, which was voidable, not void in nature, should be regarded as good until the decree of nullity was entered. In this judgment, the principle of voidable marriage was brought into our law of divorce.

In my conclusion, the view of applicability inEnglish Lawof divorce and nullity in Sri Lanka was recognized. Our courts in early days had gone forward from the statutory uncertainly imposed in Civil Procedure Code and the Marriage Registration Ordinance; in this aspect. When considering the jurisdiction in India and the laws of the United Kingdom, we can observe that the traditional approach of divorce law concepts is moderated for social needs. The Roman-Dutch law concepts of divorce in Sri Lanka needs a creative approach of the courts. Willful refusal to consummate as a ground for obtaining a decree for nullity of marriage recently held in our courts the case of *H.M.Priyadarshana Samantha Bandara vs Sharmaine Chulanie Warnakulasuriya*.[20] This modern development applied in that case.

Now it is time for legal experts and legislature to think broader on that liberal approach rather than the traditional approach in the marriage relationship and non-consummation of either spouse.

17 *(1909) 12.N.L.R.95*
18 8 N.E.R.280
19 46 N.E.R 361
20 CA No 767/2000 (f) D.C. Colombo.

A JURIST IN THE GARB OF A NOVELIST

Chanima Wijebandara[1]

Abstract

Chinua Achebe, known as the 'Father of African Literature', is a Nigerian writer whose work consists mainly of fiction, poetry and essays. Though he was a professor in English, his writing reflects that he had been well versed in the science of law. This article discusses, briefly, the law and literature perspectives of Achebe's writing. It highlights that reading his fiction would provide judges insight on jurisprudential philosophy. It also demonstrates how studying the literary devices in his work would help develop judicial writing skills. It suggests that despite being set in an African post-colonial context, Achebe's writing would hold high relevance and value to be included in a law and literature module of a non-conventional judicial education curriculum of any jurisdiction transcending geographical, cultural and jurisdictional boundaries.

Key Words: Chinua Achebe, Law and Literature, Jurisprudence, Criminology, Judicial writing, Judicial Education

Introduction

In the pursuit of judicial excellence, one needs continuing education within and beyond law. One should endeavor to become a person of art, culture and literature. This idea is expressed in the book *Judicial Writing, A benchmark for the Bench* by Chinua Asuzu[2]. He recommends that "to become a good judicial writer, you must read broadly. Read drama, fiction, nonfiction and poetry"[3]. While listing appropriate writers for each of these four categories, he includes the post-colonial African writer Chinua Achebe under fiction. Asuzu employs a novel by Achebe, to illustrate how the theme of a story would guide the writer in choosing whose perspective the story should reflect.

1 Attorney-at-Law (Sri Lanka Law College, 2003), LLB (The Open University of Sri Lanka, 2005), LLM in Criminal Justice Administration (The Open University of Sri Lanka, 2016), Diploma in Forensic Medicine (University of Colombo, 2014), State Counsel, Attorney General's Department (2005 to 2007), Judicial Officer, (From November 2007 to date). The author is also the winner of the Gold Medal for "Justice Nimal Gamini Amarathunga Memorial Award for the Best Article" in the JSA Law Journal consecutively in the years 2016, 2017 and 2018.

2 Chinua Asuzu**,** *Judicial Writing, A benchmark for the Bench*, Partridge Publishing, Africa, 2016 at page 2

3 Ibid at page 1

> Chinua Achebe's adroit thematic development in *No longer at Ease* allows us to forgive the corruption of Obi Okonkwo, the main character in that great novel. Why do we forgive him? Because the story is told from his perspective.[4]

In the same manner, he elaborates how having a theme would guide the judge in choosing from whose perspective the narrative of facts and procedural history of the case should be presented in a judgment. Telling the facts section from the winning party's perspective enhances the persuasive potential of the judgment[5]. This example reflects that the importance of reading fiction is not only for the philosophical and moral insight they provide but also for the literary devices that can be learnt from the styles of different writers.

Thus, it is evident that an interdisciplinary study of law and literature would be an important inclusion in the judicial education discourse.The following is a reproduction[6] of a short essay on law and literature perspectives in Achebe's writing by the author[7], published in the fifth CHINUA ACHEBE POETRY / ESSAY ANTHOLOGY, "ACHEBE: A MAN OF THE PEOPLE" a publication of the Society Of Young Nigerian Writers (Anambra State Chapter) Edited by Izunna Okafor in the year 2020[8]. It demonstrates that Achebe's writing hold high relevance and value to be included in a law and literature module of a non-conventional judicial education curriculum of any jurisdiction transcending geographical and cultural boundaries.

Chinua Achebe the Eminent Jurist in the Garb of a Novelist

The work of Chinua Achebe, the 20th Century Nigerian novelist, the *'Father of African Literature',* has been studied extensively in the light of a broad range of disciplines. His novels, short stories, poems and academic writing are often discussed in terms of social, political, economic, colonial and post-colonial perspectives. However, scholars of the 'Law and Literature' field have been slow in discovering and deciphering the elements of jurisprudence in Achebe's literary creations, perhaps due to the reason that his writing does not overtly deal with law but engages with it effortlessly. The science of law is subtly interwoven into his writing. His first novel '*Things fall apart*' depicts the traditional judicial system of the Igbo community and speaks of different

4 Ibid at page 88
5 Ibid at page 111
6 With prior permission obtained from the Editor in Chief.
7 This essay was selected as one of the top ten best/outstanding entries published in the anthology in the essay category and was awarded a certificate by the Society of Young Nigerian Writers. Therefore, the author wishes to state that this essay is not submitted for consideration for the Award for the Best Article of JSA Law Journal this year.
8 Printed by Charles Dyke Books , Nigeria

degrees of crime and punishment. *'A Man of the People'* is an exploration of White-collar crimes of political corruption. *Arrow of God'* is a compendium on customary law of the Igbo community. Among these, *'No longer at ease'* can be noted as the most significant. It is an elaborate thesis on criminology.

Pronouncing the judgment at the trial of Obi Okonkwo for the offence of bribery, Justice William Galloway, judge of the High Court of Lagos, makes a statement: "*I cannot comprehend how a young man of your education and brilliant promise could have done this*". Achebe assumes the role of a criminologist and goes on to explore the underlying causes that lead to deviant behavior not only in the protagonist but also in other characters involved in a series of crimes of varied gravity, such as the doctors who engage in abortions and civil servants who bribe doctors for issuance of certificates of illness. The depiction of the human psychology and social impact in the genesis of crime in this novel runs parallel to Edwin Sutherland's explanation of White-collar crime, Emilie Durkheim's concept of anomie, Robert Merton's Strain Theory and the Chicago school of criminology.

Though Chinua Achebe has studied literature, history and religion and was a professor in English, he has been well versed in the science of law, making him highly quotable even in judicial pronouncements. A search through judgments of various jurisdictions shows that 'Achebian' quotes have already made their way into the international legal arena. For example, in the fundamental rights application of **Indibily Creative Pvt. Ltd. vs. Govt. of West Bengal** on 11 April, 2019, the Supreme Court of India quotes Achebe from *Conversations with James Baldwin* edited by Fred Stanley and Louis H Pratt:

> Art has a social purpose [and] art belongs to the people. It's not something that is hanging out there that has no connection with the needs of man. And art is unashamedly, unembarrassingly, if there is such a word, social. It is political; it is economic. The total life of man is reflected in his art.

Thus, adorned in the richly embellished garb of a novelist, is an eminent jurist that the legal academia is yet to explore. The versatility of his writing is such that they are not limited to an African –Nigerian context but is of universal applicability. In time to come, Achebe's writing will prove to be a rich reservoir of jurisprudence for judges, lawyers and legal scholars the world over. His lesser known lessons of criminology and penal theory would provide much needed wisdom for the betterment of criminal justice systems beyond jurisdictional, geographical and disciplinary boundaries.

THE CASE FOR THE ABOLITION OF THE DEATH PENALTY IN SRI LANKA

A.A.Anandarajah.[1]

1. Introduction

Capital punishment has been a hot topic in Sri Lanka (SL) in the past few years. The death penalty is available as a punishment on paper and is often the sentence delivered by Courts,[2] but the last execution was held in 1976.[3] This period of no executions could soon be ending as the executive considered re-implementing the death penalty since 2015.[4]

The suggestion that Sri Lanka would recommence executing prisoners created serious concern among the Human Rights activists and the international community.[5] It is unclear what the government will do. On an official mission to the United Nations Human Rights Council in September 2015, the former Foreign Minister promised that 'Sri Lanka would maintain the moratorium on the death penalty leading to its eventual abolition."[6] However, the ruling[7] and the opposition[8] have not made favourable remarks on a moratorium on the death penalty since then. Nevertheless, the Human Rights Commission of Sri Lanka consistently recommends abolishing the death penalty.

1 Master of Law and Development (Melbourne), LL.M (Colombo), MA in Public Administration (Jaffna). Judicial Officer (since December 2008).

2 http://prisons.gov.lk/web/wp-content/uploads/2021/05/prison-statistics-2021.pdf at page 53-54

3 Human Rights Commission of Sri Lanka, *'Review on the Death Penalty by the Human Rights Commission of Sri Lanka'*, (HRC, Sri Lanka, 2014), 13.

4 Saliya Pieris, 'To Hang Or Not To Hang?' *Colombo Telegraph* (online), 27 September 2015 <https://www.colombotelegraph.com/index.php/to-hang-or-not-to-hang/>.

5 Saliya Pieris, above n 2.

6 Shamindra Ferdinando, 'SL reaffirms in Geneva its commitment to abolishing capital punishment.
President under pressure to have killers of children hanged', The Island (online) 15 September 2015 <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=131820>.

7 D.G.Sugathapala, 'Death penalty from next year: President', Daily Mirror (online), 17 September 2015 <http://www.dailymirror.lk/87939/death-penalty-from-next-year-president>.

8 Imesh Ranasinghe Sri Lanka opp. leader wants death penalty for terrorists, drug traffickers (Wednesday July 28, 2021 3:53) pmhttps://economynext.com/sri-lanka-opp-leader-wants-death-penalty-for-terrorists-drug-traffickers-84353/ and https://www.hrw.org/news/2019/04/01/sri-lanka-dont-end-death-penalty-moratorium

Sri Lanka is a party to international human rights instruments which promote the right to life. This article argues that immediate steps must be taken to abolish the death penalty in Sri Lanka, as the death penalty is a deprivation of the 'right to life', and the Government of SL is duty-bound to uphold its international commitment to protect this right. The article supports this argument by examining the international standard and practices regarding protecting and promoting the right to life.

The article begins with a brief historical evaluation of the death penalty and explains why the abolition of the death penalty is necessary. It then examines the relevant provisions of the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights and examines how the right to life is enshrined in both instruments.

This article argues that imposing the death penalty is unconstitutional as it amounts to cruel and inhuman punishment by referring to constitutional provisions and judicial interpretation. It sets out the reasoning behind the decisions of the Supreme Court of SL that recognised the right to life was protected in the Sri Lankan Constitution. Then the article also explains why SL is obliged to protect the right to life.

This article then examines whether there are necessary minimum safeguards in the death penalty process in SL, as required by human rights instruments. It shows that even if a particular execution is consistent with Sri Lankan law, the local legal system lacks adequate protections to prevent a breach of the right to life. The paper shows how the world views the criminal justice system in Sri Lanka and questions the lack of fair trial guarantees. As a result, it argues that it is not appropriate to keep the death penalty as a possible sentence.

The paper concludes that the death penalty should be abolished in the absence of satisfactory statutory provisions and constitutional safeguards to protect the right to life. It is the preferable option for the Government of Sri Lanka, and abolition will enhance the country's democratic values based on human rights and the rule of law by promoting the protection of the right to life.

II. Human Rights, Death Penalty and Sri Lanka's International Obligations.

The death penalty has ancient roots: images found in caves indicate that it existed even in the prehistoric period.[9] The Code of Hammurabi and

9 Willian A. Schabas, '*The Abolition of the Death Penalty in International Law*', (Cambridge, 3rd ed 2002), 3.

the Mosaic Law from the Old Testament set out categories of offences for capital punishment and the modes of execution.[10] Calls for the abolition of the death penalty or limitations to certain offences are also ancient. The New Testament records how Jesus saved a woman from a public stoning when caught in adultery.[11] Likewise, Sri Lankan history also records the existence of the death penalty in the pre-colonial period.[12] Interestingly, Sri Lankan historical chronicles identified the periods where certain kings abolished the death penalty.[13]

This part of the essay analyses modern calls for the abolition of the death penalty and how they are associated with the concept of human rights in the Post-World War II era. Then it sets out the human rights treaties and argues that these treaties impose strict limits on the application of the death penalty.

II. a. Demand for the abolition of the death penalty.

English jurist Jeremy Bentham criticised the concept of the death penalty in the late 18th century on his famous concept of Utilitarianism.[14]According to him, 'a punishment, like any other legal practice, must be morally justified in terms of its conduciveness to the appropriate end.'[15] He argued that the purpose of criminal punishment is 'general prevention' of crimes, and the objective of all laws is the 'total happiness of the community.'[16] He said a punishment by the law should be 'justified only by being the necessary condition of some greater good, benefit, or happiness that exceeds the evil of punishment.'[17]

Bentham thought that the punishment 'always entails a little more pain than the pleasure the offender might hope to gain from the criminal act' and he describes it as 'negative utility' and believes this has a 'valuable deterrent

10 Ibid.
11 Holy Bible, New Testament, Gospel of St. John, Chapter 8, Verses 1-11.
12 L.J.M. Cooray, '*An Introduction to the Legal System of Sri Lanka*', (A Stamford Lake Publication 1987), 108-9.
13 Wilhelm Geiger, *'Mahavamsa The Great Chronicle of Ceylon*', (Oxford University Press, 1912), 258; Laksiri Fernando, 'Bali Nine, Capital Punishment and Sri Lanka's Policy Ambiguities', Colombo Telegraph (online) 10 February 2015 https://www.colombotelegraph.com/index.php/bali-nine-capital-punishment-and-sri-lankas-policy-ambiguities/.
14 Hugo Adam Bedau, 'Bentham's Utilitarian Critique of the Death Penalty', (1983) 74 (3), *Journal of Criminal Law and Criminology*, 1033, 1033-5.
15 Ibid, 1038.
16 Ibid.
17 Ibid.

effect.'[18] He argued that the death penalty could not be justified as it would not give society greater happiness or benefit.[19] He proposes a concept called 'prison discipline' as an alternative for capital punishment and which includes 'perpetual imprisonment, accompanied with hard labour and occasional solitary confinement.'[20]

Though the context of the 21st century is much different from the period where Jeremy Bentham lived, his arguments help to understand whether the concept of punishment could justify the death penalty. One substantial problem with relying on Bentham is that he thought that the deterrence of punishment would reduce crime in society, like other classical criminologists. Recent criminological studies do not support the power of deterrence to reduce crime.[21] If the outcome of the death penalty does not meet with the rationale of punishment, such as prevention of crime or maintenance of social harmony, it is difficult to justify an execution as it ends the life of an individual.

Bentham's theory had a significant influence in the 19th century. In the United States, Michigan was the first jurisdiction to abolish the death penalty in 1846, and Venezuela and Portugal followed it in 1867.[22] However, the momentum was stopped by biological criminologists such as Garofalo, Lombroso and Ferri in the early 20th century, who argued that 'the death penalty was scientifically necessary as a social measure.'[23] Subsequently, World War I and II paused the abolition of the death penalty until the mid-20th century. [24]

II. b. Universal Declaration of Human Rights.

After the loss of millions of human lives in World War II, the international community recognised the importance of human dignity to civilised nations.[25] Therefore, the United Nations ('UN') was established to uphold these principles as a guardian of international peace and security.[26] The UN Charter affirmed the necessity of applying human rights and respecting

18 Martin O'Brien, Majid Yar, *'Criminology: The Key Concepts'* (Routledge, 2008), 21-2.
19 Hugo Adam Bedau, above n 14, 1038-9, 1048.
20 Ibid, 1040.
21 Ibid, 1038-9.
22 Willian A. Schabas, above n 9, 5
23 Ibid, 6.
24 Ibid.
25 Ibid, 1.
26 The Charter of the United Nations, signed on 26 June 1945, came into force on 24 October 1945, Article 1.

human dignity.[27] The member states of the UN recognised the necessity of a human rights document that should accommodate all 'legal and cultural backgrounds from all regions of the world.'[28] This movement resulted in the Universal Declaration of Human Rights ('UDHR'), adopted by the UN in Paris by General Assembly resolution on 10 December 1948.[29]

Article 3 of the UDHR protects the 'right to life, liberty and security of person.'[30]The preamble of the UDHR acknowledged that 'disregard and contempt for human rights have resulted in barbarous acts'[31], and therefore, it emphasised that human rights must be respected to allow all individuals to live with dignity and for 'better standards of life in larger freedom.'[32] One of the purposes of the UDHR is to recover the lost human dignity during the World Wars and protect all individuals from the arbitrariness of states.

In the 1950s, the abolition of the death penalty re-emerged, and international lawyers initially focused on the limitations to a 'list of serious crimes' to reduce its operation as many states were not prepared to abolish the death penalty in the 1950s.[33]

The UDHR is not a binding treaty, and 'no enforcement machinery' was established to back it up.[34] Nevertheless, the UDHR has become an influential human rights source in the UN system, and it is a forerunner of other human rights treaties. [35] It is important to note that no specific provision of the UDHR stated that capital punishment was forbidden, even though this was much debated during its drafting.[36] However, by enshrining the 'right to life', the UDHR limited the application of the death penalty by the states. Therefore, the UDHR is 'significant for its abolitionist outlook.'[37]

27 Ibid, preamble.
28 United Nations, *Universal Declaration of Human Rights ('UDHR')*, UN Official website (online) <http://www.un.org/en/universal-declaration-human-rights/index.html>.
29 Ibid.
30 General Assembly Resolution 217 A (III), '*Universal Declaration of Human Rights* ', 217 A (III), UN Doc A/810 (10 December 1948), Article 3.
31 Ibid, preamble.
32 Ibid.
33 Willian A. Schabas, above n 9, 1.
34 Thomas Buergenthal, 'International Human Rights Law and Institutions: Accomplishments and Prospects', (1988) 63 (1) *William & Mary Law Review,* 1, 6.
35 Willian A. Schabas, above n 9, 23.
36 Andrew Drilling, 'Capital Punishment: The Global Trend toward Abolition and Its Implications for the United States', (2014) 40 (3), *Ohio Northern University Law Review*, 847, 863.
37 Ibid.

That is why many countries, including SL, abolished the death penalty aftermath of the UDHR. Sri Lanka became a signatory to the UDHR on 10 December 1948.[38] In respect of the ratification, former Prime Minister S.W.R.D. Bandaranayake abolished the death penalty in 1956, but when Bandaranayake was assassinated in 1959, it was brought into effect retrospectively, by his immediate successor, in order to punish the assailant.[39]

The UDHR is considered a centrepiece for the 'international human rights revolution.'[40] This revolutionary idea of recognising the right to life as a human right has pushed states towards abolishing the death penalty. Article 30 of the UDHR states, '[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.'[41]

The UDHR is now part of customary international law.[42] The International Court of Justice acknowledged the normative value of General Assembly resolutions in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.[43] No government today would argue that it could deny the rights prescribed in the UDHR due to its non-binding nature because the UDHR acceded a 'special politico-legal status' among the member states of the UN.[44] State practices and the acknowledgement of the International Court of Justice have recognised that member states of the UN have an obligation to protect the human rights found in the UDHR.[45]

Customary international law seems to be moving towards abolishing the death penalty.[46] As a result of this state practice, the right to life, as found in Article 3 UDHR, requires states to abolish the death penalty. There is a substantially different understanding of the scope of Article 3 from when the

38 'The Universal Declaration of Human Rights And Sri Lanka', *www.sangam.org* (online), 10 December 2001 <http://www.sangam.org/ANALYSIS/UDHR_SL.htm>.

39 Laksiri Fernando, 'Bali Nine, Capital Punishment and Sri Lanka's Policy Ambiguities', *Colombo Telegraph* (online) 10 February 2015 <https://www.colombotelegraph.com/index.php/bali-nine-capital-punishment-and-sri-lankas-policy-ambiguities/>.

40 Thomas Buergenthal, above n 34, 6.

41 General Assembly Resolution 217 A (III), UDHR, above n 30, Article 30.

42 Willian A. Schabas, above n 9, 23

43 *The legality of the Threat or Use of Nuclear Weapons (Advisory Opinion),* [1996] ICJ Reports 226, 254-5 [70].

44 Thomas Buergenthal, above n 34, 6.

45 Ibid,9.

46 International Bar Association, 'The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty',(United Kingdom, May 2008), 3.

provision was drafted. Since then, it was commonly agreed that the death penalty is 'an exception to the right to life.'[47] An early report on the death penalty from the Secretariat of the UN points out that Article 3 of the UDHR is a neutral provision as far as capital punishment is concerned.[48] However, a subsequent report in 1973 on capital punishment argued the Article 3 of the UDHR 'implies limitation and abolition of the death penalty.'[49] Therefore, it seems clear that Article 3 of the UDHR was 'aimed at eventual abolition of the death penalty,' and the subsequent human rights conventions fulfilled its ambition.[50]

II. c. International Covenant on Civil and Political Rights and Death Penalty.

International Covenant on Civil and Political Rights ('ICCPR') was the first binding instrument or treaty,[51] which enshrined the right to life. [52] The ICCPR was adopted as a General Assembly resolution on 16 December 1966 but came into force on 23 March 1976.[53]

Article 6 of the ICCPR guarantees the 'right to life' and has six subsections. Article 6 (1), 'every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'[54] General Comment No 6 of the Human Rights Committee acknowledged that the right to life is 'the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.'[55]

Article 6(1) describes the right to life as an 'inherent right'; therefore, General Comments No 6 reaffirms that the right to life should not be narrowly interpreted or 'understood in a restrictive manner.'[56] Therefore, the state parties must adopt constructive actions to protect the right to life.[57]

47 Ibid.
48 Willian A. Schabas, above n 9, 43.
49 Ibid.
50 Ibid.
51 International Bar Association, above n 46, 3.
52 International Covenant on Civil and Political Rights ('ICCPR'), signed on 16 December 1966, came into force 23 March 1976, Article 6.
53 United Nations Human Rights, International Covenant on Civil and Political Rights, *UN Human Rights Office of the High Commissioner* (online) <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.
54 ICCPR, above n 52, Article 6(1).
55 Human Rights Committee, General Comment No. 6 Article 6 (The right to life), 16th sess, HRI/GEN/1/Rev.9 (Vol. I),(adopted on 30 April 1982), 1, para 1.
56 Ibid, para 5.
57 Ibid.

Professor Yoram Dinstein's explanation about the word 'inherent' in Article 6 (1) is noteworthy. He argues that 'the right to life is entrenched as part of customary international law and that it applies even to States that have not ratified or acceded to the Covenant.'[58] Though the question of application as customary international law is still contentious, the explanation of Dinstein indicates that the right to life has a widespread application, at least to the state parties who ratified ICCPR.

Article 6 of the ICCPR does not expressly require the abolition of the death penalty, but it prohibits the arbitrary deprivation of the right to life. Amnesty International noted that 'the death penalty is often used disproportionately against the poor, minorities, and members of racial, ethnic, and religious communities.' Therefore, Article 6 of the ICCPR prohibits the states' indiscriminate operation of the death penalty.[59] Therefore the Article 6 significantly limits the operation of the death penalty.

The ICCPR also prohibits the execution of 'persons below eighteen years of age' and 'pregnant women.'[60] There are restrictions found in Article 6(2), even for other offenders. It provides that the death penalty may be applied 'only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.'[61] Therefore, the scope of the application is limited to 'most serious crimes', and most importantly death penalty could not be implemented for offences that have retrospective operation.

Willian Schabas argues that if a state party to the convention abolished the death penalty, Article 6 (2) prohibited bringing it back to the legal system[62]; because the only exception to the right to life, as per Article 6(2), is the death penalty, but that exception can only be used by 'countries which have not abolished the death penalty.'[63] Schabas argued that this is seen when Article 6 (2) is read with Article 6 (6).[64]

Article 6 (6) invites states to abolish the death penalty. It states that 'nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.'.[65] The abolition

58 Willian A. Schabas, above n 9, 97.
59 Salil Shetty, 'The Value of International Standards in the Campaign for Abolition of the Death Penalty', (2014) 21 (1), *The Brown Journal of World Affairs*, 41, 42.
60 ICCPR, above n 52, Article 6(5).
61 Ibid, Article 6(2).
62 Willian A. Schabas, above n 9, 102.
63 ICCPR, above n 52, Article 6(2).
64 Willian A. Schabas, above n 9, 104.
65 ICCPR, above n 52, Article 6(6).

of the death penalty is the goal of the ICCPR.[66] That is why it made the right to life a general rule and made the death penalty an exception in Article 6(2). However, it cannot be interpreted that the ICCPR recognises the application of the death penalty. It should only be viewed that ICCPR expresses 'an implicit recognition of its existence.'[67] As per Article 31(1) of the Vienna Convention on the Law of Treaties, provisions of treaties must be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms in their context.'[68] Therefore, if Article 6(2) is read in good faith, as it has no ambiguity, there is no way for a state which abolished the death penalty to reintroduce it.

The states parties have highly respected this invitation. When ICCPR was adopted in 1966, ten member states of the UN had abolished the death penalty.[69] In 1977, soon after it came to operation, only 17 states abolished it. According to Amnesty International, this number has rapidly grown: total abolition increased to 108 in 2020[70], and 142 countries have abolished the death penalty in law or practice.[71] It means more than two-thirds of the member states of the UN no longer carry out the death penalty.[72] These figures indicate that the state practice regarding capital punishment is moving towards abolition.

The main reason for the widespread abolition of the death penalty was these human rights instruments, namely UDHR and ICCPR.[73] Article 6 of the ICCPR gives a binding effect of the right to life introduced in Article 3 of the UDHR.[74] Another event that helped promote the abolition of capital punishment was the rapid democratisation of Eastern Europe after the end of the Cold War in the early 1990s and Africa after authoritarianism.[75]

66 Willian A. Schabas, above n 9, 104.

67 Ibid, 103; see judgement of Christine Chanet in *Cox v. Canada*, at Human Rights Committee, decided on 31st October 1994, (Communication No. (539/1993) 421, U.N. Doc. CCPR/C/52/D/539/19930. (1994). 2 IHRR 307, IHRL 2251 (UNHRC 1994)).

68 *Vienna Convention on the Law of Treaties,* (Concluded at Vienna on 23 May 1969), Article 31 (2); Willian A. Schabas, above n 10, 103.

69 International Bar Association, above n 50, 3.

70 https://www.amnesty.org/en/what-we-do/death-penalty/

71 Amnesty International, '*Death sentences and executions 2019',* (London: 2020) 54.

72 Salil Shetty, above n 63, 44.

73 Joel O. Anwo, Grace A. Arowolo, '*Critical Analysis of Abolition of Death Penalty in International Law: An Analysis of Death Penalty Under the United States and Nigerian Laws*', 247, 251 <www.ajol.info/index.php/naujilj/article/download/82408/72563>.

74 Willian A. Schabas, above n 9, 95.

75 Roger Hood, 'Towards Global Abolition of the Death Penalty: Progress and Prospects', (Speech delivered at the invitation of The Death Penalty Project, In the Hall of The Inner Temple, 21 January 2010), 11, <http://www.deathpenaltyproject.org/assets/12/original/Towards_Global_Abolition_of_the_Death_Penalty_by_Prof_Roger_Hood.pdf?1273573377>.

The adoption of ICCPR and other regional Human rights treaties and the new introduction of 'democratically inspired constitutions' reaffirms the significance of the right to life.[76]

It is helpful to look at some specific examples of countries where the death penalty has been abolished. When abolishing the death penalty in 1995, Spain justified its decision as 'the death penalty has no place in the general penal system of advanced, civilised societies' and further mentioned that no 'degrading or afflictive punishment can be imagined than to deprive a person of his life.'[77] Switzerland explained that capital punishment is a blatant violation of the right to life and human dignity.[78] The South African Constitutional Court banned the death penalty in the case of *Makwanyane Vs The State*,[79] and it was held that the 'rights to life and dignity are the most important of all human rights.'[80]

The predominant view among human rights scholars and practitioners is that there is no justification for the death penalty.[81] Human rights approaches reject the Utilitarian justification of deterrence as well, as social science findings have proved that capital punishment only has 'a marginal deterrent effect.'[82]

Therefore the current trend in the world is to evaluate the mode of punishment from human rights perspectives. That is why the South African Constitutional Court warned the state that even though punishing criminals, the state's human rights obligations should guarantee that the scope of the punishment should not infringe the right to life and the right to dignity.[83]

III. Death Penalty in Sri Lanka: an overview of changing situations.

It is now necessary to examine whether the right to life is recognised in Sri Lanka and how the Supreme Court views the importance of the right to life. After all, the right has not been expressly acknowledged in Sri Lankan law regarding the ICCPR.

76 Ibid, 12.
77 Joel O. Anwo, Grace A. Arowolo, above n 73, 251
78 Ibid.
79 *Makwanyane & Another v. The State*, 1995 2 South African Criminal Law Reports para 144 (Constitutional Court of South Africa 1995).
80 Ibid; M. Reyneke, The Right to Dignity and Restorative Justice in Schools', (2011) 14 (6), *Potchefstroom Electronic Law Journal*,129, 130-1.
81 Roger Hood, above n 75, 12.
82 Ibid.
83 *Makwanyane & Another v. The State*, above n 79, para 144.

III. a. Sri Lanka's obligation towards the right to life

Sri Lanka ratified the ICCPR on 11 June 1980.[84] The 1978 Constitution of Sri Lanka has a chapter, which recognises many Articles stipulated in the ICCPR as fundamental rights.[85] When the constitution sets out the fundamental rights as one way of exercising the people's sovereignty, it states that recognition and respect for fundamental rights are crucial.[86] Sri Lankan parliament passed legislation in 2007[87] which incorporated certain articles of ICCPR. Both the constitution and the legislation provided judicial remedies for the infringement of these rights.

Unfortunately, the constitution does not expressly recognise the right to life as a fundamental right. Likewise, the right to life has not been expressly incorporated into any local legislation. Sri Lanka's legal system is dualist and requires domestic ratification to apply international law.[88] Therefore mere ratification of a treaty or a provision of a treaty is not sufficient - incorporation into domestic law is necessary.[89]

However, the Supreme Court of SL has accepted that if a treaty is acceded by the president and the particular treaty is not inconsistent with a written law of Sri Lanka; further incorporation is not necessary.[90] Sri Lankan Constitution came into operation on 7 September 1978, and Sri Lanka acceded to ICCPR on the 11th June 1980. Even though the Constitution came into operation prior to Sri Lanka acceding to the ICCPR, the Supreme Court, in the case of *Nallaratnam Singarasa v Attorney General*., found that

> *'where the President enters into a treaty or accedes to a Covenant the content of which is "inconsistent which the provisions of the Constitution or written law" it would be a transgression of the limitation in Article 33(f) cited above and ultra vires. Such act of the President would not bind the Republic qua state. This conclusion is drawn not merely in reference to the dualist theory referred to above but in reference to the exercise of governmental power*

84 *United Nations,* Treaty Collection-Database, International Covenant on Civil and Political Rights, <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en>.

85 *The Constitution of the Democratic Socialist Republic of Sri Lanka*, (came into force 7 September 1978), Chapter III.

86 Ibid, Article 3 & 4.

87 *International Covenant on Civil and Political Rights (ICCPR) Act* (No. 56 of 2007 Certified on 16th November, 2007)

88 *Nallaratnam Singarasa v Attorney General,* 2013 1 Sri LR 245 at 260.

89 Ibid.

90 Ibid.

> *and the limitations thereto in the context of Sovereignty as laid down in Article 3,4 and 33(f) of the Constitution.* ***Chapter III of the Constitution, which refers to fundamental rights, is not inconsistent with the ICCPR and that, therefore, further incorporation is not necessary'.*** [91]

It is important to note how the Sri Lankan Supreme Court judgements recognised the right to life as implied in Chapter III of the constitution.

Article 11 of the constitution (which is the first Article in Chapter III) states that '[n]o person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[92] In the case of *Sriyani Silva*,[93] Justice Mark Fernando held that '[a]lthough right to life is not expressly recognised as a fundamental right, that right is impliedly recognised in some of the provisions of chapter III of the constitution'[94]. The Court further examined Article 13 (4) of the Constitution (which states that '[n]o person shall be punished with death or imprisonment except by order of a competent court, made in accordance with the procedure established by law.[95]) and Article 11 and said that;

> *'Article 11 guarantees freedom from torture and from cruel and inhuman treatment or punishment. Unlawfully to deprive a person of life, without his consent or against his will, would certainly be inhuman treatment, for life is an essential pre-condition for being human'.* [96]

In another instance, the Supreme Court recognised the Article 11 includes human dignity and violation of human dignity amounts to a 'degrading treatment.'[97]

These decisions of the Sri Lankan Supreme Court are binding on lower courts. Therefore, according to the interpretations of the Supreme Court, the right to life is not only a part of the legal system, but it is recognised as a constitutional right. Likewise, human dignity is also a part of the constitution's fundamental rights. Therefore, Article 6 of the ICCPR directly applies to SL as it is not inconsistent with Sri Lankan constitutional provisions.

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91 Nallaratnam Singarasa v Attorney General, 2013 1 Sri LR 245 at 2619 (emphasis added).
92 *The Constitution of the Democratic Socialist Republic of Sri Lanka, Article 11.*
93 *Sriyani Silva Vs Iddamalgoda, OIC, Police Station Paiyagala and others*, 2003 (2) Sri Lanka Law Report 63.
94 Ibid, 75.
95 *The Constitution of the Democratic Socialist Republic of Sri Lanka,* Article 13(4).
96 *Sriyani Silva Vs Iddamalgoda, OIC, Police Station Paiyagala and others*, above n 95, 75.
97 *Subasinghe Vs Police Constable Sanudn and Others*, 1999 (2) Sri Lanka Law Report 23, 27.

Sri Lanka has not abolished capital punishment for certain offences, and it is not a party to the Optional Protocol II of the ICCPR. Article 13(4) states that *'[n]o person shall be punished with death or imprisonment except by order of a competent court..'* Therefore, it has no international obligation to abolish the death penalty.

However, the Supreme Court's interpretation about the right to life and human dignity and the close reading of the constitutional Articles of 11 and 13 (4) raises the question of whether sentencing or implementing the death penalty is acceptable according to the constitutional provisions. Article 11 prohibits a cruel, inhuman or degrading punishment. As explained above, countries that abolished the death penalty justified their position by stating that the death penalty, as a mode of punishment, is contrary to the right to life and human dignity due to its unacceptable or degrading nature.

Therefore, the state practices established that capital punishment is cruel, inhuman, and degrading, and Article 11 of the Sri Lankan constitution also prohibits these punishments. However, Article 13 (4) permits a death sentence. It is very uncertain when there is a contradiction between these two constitutional provisions and both provisions are non-derogable in any circumstances (as per constitution), which one would prevail. If this uncertainty is interpreted in good faith and the state practices, it would be more favourable to Article 11, which leads to the abolition of the death penalty. One could argue that Sri Lankan constitutional provisions impliedly abolish the death penalty as it protects the right to life from cruel, inhuman and degrading punishments.

However, Sri Lanka has not expressly abolished the death penalty. Therefore, it is crucial to examine whether Sri Lanka respects its international commitment to respect the ICCPR by restricting the death penalty according to the provisions/guidelines of Article 6 of the ICCPR.

III.b. Limitation to the application to the Death penalty in Sri Lanka

Sri Lanka is not only a signatory to the ICCPR; it has incorporated most of the aspects of the ICCPR in its constitution as fundamental rights. As explained above, the Supreme Court acknowledged the existence of the right to life in the constitution and extended its application to providing remedies to the legal heir of a deceased, whose right to life was arbitrarily deprived by

a state agency.[98] Therefore, this part of the paper will examine SL's penal and procedural laws related to the death penalty to understand how the current practice of SL is consistent with international standards, in particular with the ICCPR.

As examined above, Sri Lanka, as a signatory to ICCPR, is duty-bound to provide minimum guarantees as described in Article 6 if it wants to retain the death penalty as a mode of punishment in its criminal justice system. The UN Secretary-General submitted a report ('The Secretary General's report') at the UN Economic and Social Council on 21-22 July 2015, and the report also highlighted nine safeguards for countries that 'continue to impose capital punishment.'[99] Therefore, it is essential to examine Sri Lankan law and compare its features with the ICCPR and the international requirements.

III.b.i. Children and pregnant women.

Sri Lanka abolished the death penalty for pregnant women,[100] and children who are below the age of eighteen.[101] It is in line with the requirement of Article 6 (5) of the ICCPR. Sri Lankan penal code gives a general exception to all types of offences committed by persons who have 'unsoundness of mind and persons who are incapable of knowing the 'nature of the offences.'[102] The death penalty is not imposed on a mother who caused death to her child below the age of twelve months, and the death caused due to imbalance of mind due to childbirth, but this category of offences is considered a culpable homicide, not amounting to murder.[103]

The Secretary General's report also emphasises the prohibition of capital punishment for older persons, but the report did not identify a particular age.[104] This requirement is not necessitated in Article 6 of the ICCPR or General Comment 6. Sri Lanka has no such prohibition for execution. However, many countries have state practices to exclude the death penalty for elders, but the ages differ from country to country.

98 *Sriyani Silva Vs Iddamalgoda, OIC, Police Station Paiyagala and others*, 2003 (2) Sri Lanka Law Report 63, 75-9.

99 Economic and Social Council E/2015/49, *'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General'*, E/2015/49 (21-22 July 2015), 26.

100 Penal Code, Section 54.

101 *Penal Code*, Section 53.

102 *Penal Code*, Section 77.

103 *Penal Code*, Section 294, exception 5.

104 Economic and Social Council E/2015/49, above n 101,31.

III.b.ii. Non-retroactivity.

Article 6(2) of the ICCPR prohibits the death penalty for offences of retrospective nature. The Sri Lankan constitution prohibits retrospective effect to the local penal offences, but it allows it for offences related to international crimes.[105] The constitution is unclear whether the death penalty will be imposed on these international crimes. The Secretary-General report acknowledges that there is no state practice in this regard.[106]

III.b.iii. Mandatory Appeal procedure.

Article 6 (2) of the ICCPR states that the death penalty 'can only be carried out pursuant to a final judgement rendered by a competent court.'[107] General Comment 6 also insists on a higher tribunal's review as a matter of right.[108] The Secretary General's report also requires that the law facilitate a mandatory appeal process against the conviction of death.[109] The appeal procedure is not automatic in the case of Sri Lanka, but the prison department is legally bound to assist the convict to initiate an appeal process.[110] Therefore, though there is no mandatory provision in the criminal procedure code, in practice, all the cases sentenced to death will be appealed by the assistance of the prison department. Failure to provide a mandatory appeal provision in the statutory law violates Article 6 of the ICCPR, and it is a breach of Sri Lanka's international obligation to protect human rights.

III.b.iv. Pardon or Commutation.

Article 6 (4) of the ICCPR emphasises that persons who are 'sentenced to death shall have the right to seek pardon or commutation of the sentence.'[111] General Comment 6 also recognises that seeking pardon or commutation is a right of the convict.[112] The UN also insists on many occasions for establishing a clemency procedure for all types of cases of capital offices.[113] The Economic

105 *The Constitution of the Democratic Socialist Republic of Sri Lanka,* Article 13(6).
106 Economic and Social Council E/2015/49, above n 99, 29.
107 ICCPR, above n 56, Article 6(2).
108 Human Rights Committee, General Comment No. 6 Article 6, above n 55, 2, para 7.
109 Economic and Social Council E/2015/49, above n 99, 36.
110 Roger Hood, Carolyn Hoyle, '*The Death Penalty: A Worldwide Perspective*', (Oxford, 4th revised ed, 2008), 251.
111 ICCPR, above n 56, Article 6(4).
112 Human Rights Committee, General Comment No. 6 Article 6, above n 59, 2, para 7.
113 Economic and Social Council E/2015/49, above n 101,37.

and Social Council requested in 1989 that all the member states who retinae the death penalty provide legislation for automatic review of clemency.[114]

The Human Rights Committee commended in a review application that 'the discretionary power of commutation, which is specifically contemplated in relation to death sentences by article 6, paragraph 4, of the Covenant, may be vested in a Head of State or other executive body without infringing article 14.'[115] It means the accused has to be a part of the process and the presumption of innocence and fair trial guarantees have to be strictly observed. The Secretary General's report also acknowledges this standard.[116]

Unfortunately, the clemency procedure in the Sri Lankan system is not compliant with international standards. In Sri Lanka, before the pronouncement of a death sentence, the Judge of the High Court must ask the accused, if he wants to say anything, why a death sentence 'should not be pronounced against him.'[117] The statement of the accused is called *Allocutus*. After pronouncing the death sentence, the Judge must inform the president 'whether there are any and what reasons why the sentence of death should or should not be carried out.'[118] It does not make it mandatory for the Judge, who recorded the Accused's response or the *Allocutus,* to forward it to the president with his separate report.[119]

No statutory provision authorises the accused to make a clemency application as a right to the president. No statutes provide any right to a person to make a lawful statement or make a clemency application after he/she has been sentenced to death. The *Allocutus* is the only lawful statement an accused can make before being sentenced to death; after that, he is not even informed about what happens.

The period to make such a statement (*Allocutus*) is very short, and the accused is not in a position to consult with his/her lawyer before making the statement. Unfortunately, accused persons find it very difficult to properly use their opportunity to express the reasons they should be granted clemency. Saliya Pieris, PC, a leading human rights activist/lawyer in Sri Lanka, observed

114 Roger Hood, Carolyn Hoyle, above n 110, 258.
115 *Zeydulla Vagab Only Alekperov v. Russian Federation*, Human Rights Committee application No. 1764/2008, CCPR/C/109/D/1764/2008,(decided on 21 October 2013), para. 9.5.
116 Economic and Social Council E/2015/49, above n 99, 38.
117 Code of Criminal Procedure Act of Sri Lanka, Section 280.
118 Ibid, Section 286(b)
119 Ibid, read Sections 280 with 286(b).

that many accused are emotionally disturbed or furious over the jury when they hear the pronouncement of death sentences.[120]

Sri Lanka has not set out any special statutory provisions for clemency applications. There is no time bar for the president to decide upon the report sent by the High Court Judge. The lack of a specified clemency application is contrary to the international standard and practice, and the Human Rights Council has repeatedly stated that the 'lack of possibility to seek pardon or commutation' is a breach of Article 6 of the ICCPR.[121]

The clemency application is a pure act of executive, and therefore the process should include transparency and accountability. No one knows whether the statutory duty for reviewing the clemency application by the head of the state is exercised correctly. Unfortunately, not only in Sri Lanka but in many countries, the clemency application process lacks due process and review against the decision on clemency application is absent in many countries.[122] Clemency application is not only a right as per Article 6 (4) of the ICCPR, but it is a part of the inherent right to life. Many international human rights lawyers and organisations pressurise the states to ensure the 'need for due process and detailed guidelines to govern the exercise of discretion in such proceedings.'[123] Lack of statutory clemency process and not providing an opportunity to the accused persons to participate in the clemency application is another violation of the ICCPR.

III.b.v. Most serious crimes

Article 6(2) of the ICCPR emphasises that the death penalty can only be imposed on 'most serious crimes.'[124] Unfortunately, either ICCPR or General Comment 6 did not mention the categories of most serious crimes. As per General Comment 6, 'most serious crimes' must be read restrictively to mean that the death penalty should be a pretty exceptional measure.[125] The Secretary General's report describes the most serious crimes means, 'intentional crimes with lethal or other extremely grave consequences',[126] and the UN also

120 Saliya Pieris, above n 3.
121 Roger Hood, Carolyn Hoyle, above n 110, 258.
122 Ibid, 262-3.
123 Ibid, 263-4.
124 ICCPR, above n 56, Article 6(2).
125 Human Rights Committee, General Comment No. 6 Article 6, above n 55, 2, para 7.
126 Economic and Social Council E/2015/49, above n 99, 26.

continuously insisted that the scope of the 'most serious crimes' should not go beyond this point.[127] Since the interpretation is left wide open, the definition of a crime punishable by death also 'vary in different social, cultural, religious and political contexts.'[128]

Murder[129], waging war against the State[130], fabricating false evidence leading to the execution of an innocent party[131], abetment to suicide[132], abetment of mutiny (if mutiny is committed in consequence thereof)[133] and Prohibition against the manufacture, trafficking, import or export and possession of dangerous drugs (over 2 grams) and abetting the commission of those offences[134] is punishable by death in Sri Lanka. The UN Human Rights Council has stated that other than murder, all these offences should not be punished by execution.[135] Even in the case of murder, the international community is not convinced that all types of murders are the most serious crimes, and even the justifications for capital punishment for murder are based on deterrent theory.[136] Roger Hood argues that capital punishment should be imposed only for the most serious offences of culpable homicide (murder), but it may not be mandatory for such crimes.'[137] UN Special Rapporteur, Philip Alston, agreed with a similar definition in his report to Human Rights Council.[138]

The penal code of Sri Lanka includes two categories of homicide. One is 'culpable homicide not amounting to murder', which is not punishable by death, and the second mode of homicide is murder, which is punishable only by death. The exceptions to murder include homicides 1) with a grave and sudden provocation, 2) while exceeding private defence, 3) exceeding the power of the public servant when administering public justice, 4) in a non-premeditated sudden fight, and 5) 'if the offender, being the mother of a child

127 Willian A. Schabas, above n 9, 105.
128 Roger Hood, Carolyn Hoyle, above n 110, 129-30.
129 *Penal Code*, Section 296.
130 *Penal Code*, Section 115.
131 Penal Code, Section 191.
132 *Penal Code*, Section 299.
133 *Penal Code*, Section 129.
134 *Poisons, Opium, and Dangerous Drugs Ordinance,* Section 54A and 54B
135 Roger Hood, Carolyn Hoyle, above n 110, 129-30.
136 Ibid, 132.
137 R. Hood, *The Death Penalty: A Worldwide Perspective*, (Oxford, 2002), 77.
138 Human Rights Council, A/HRC/4/20, *'Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions',* A/HRC/4/20, (29 January 2007), para 65.

under the age of twelve months, causes its death.'[139] Causing death by rash or negligent act is not also punished by death.[140]

Even in the case of murder, other than the abovementioned exceptions, all other categories of homicides are considered murder, and the only punishment for murder is the death penalty.[141] The Secretary-General's report rejected the idea of a mandatory death sentence. It proposed that 'defendant's personal circumstances' and 'degrees of seriousness of the particular crime for which the penalty is imposed' should be considered when imposing the death penalty. Unfortunately, the penal code of Sri Lanka has no such provisions. Sections 115 (waging war against the State) and 129 (abetment of mutiny) of the Penal Code prescribe the death penalty as one of the punishments; the other abovementioned sections only provide the death penalty as the only punishment. Therefore, once a person is found guilty for those offences, the courts have no discretion but to impose death sentences. It even applies to young and youthful offenders. Other countries have recognised that a mandatory death sentence violates Article 6 of the ICCPR.[142]

This part of the paper explained how SL failed to protect the right to life. It does not provide the minimum safeguards to ensure the full implementation of Article 6 of the ICCPR. The lack of a mandatory appeal process and no procedure for the accused to request clemency violate human rights. In most countries, many crimes that do not attract capital punishment are still punishable by death in Sri Lanka.

IV. Fair Trial Guarantees in Sri Lanka's Criminal Justice system.

Article 6 (2) of the ICCPR provides that capital punishment can only be imposed after a final judgement by a competent court.[143] The Secretary-General's report identifies the presumption of innocence and fair trial as two necessary safeguards that must be in place if the death penalty is used.[144] Further, it says that the fair trial process should be based on Article 14 of the ICCPR.[145] Article 14 of the ICCPR includes the presumption of innocence as one of the cardinal rules for a fair trial. Therefore, states have to enact statutory

139 *Penal Code,* Section 294, exception 1-5.
140 *Penal Code,* Section 298.
141 Ibid, Section 296.
142 Economic and Social Council E/2015/49, above n 99, 26
143 Economic and Social Council E/2015/49, above n 99, 32.
144 Ibid.
145 Ibid.

provisions that ensure the independent and impartial function of the criminal justice system.

IV.a. Lack of protection of accused in Sri Lanka

As per General Comment 32, 'equality before the courts and tribunals and to a fair trial is a key element of human rights protection', and it serves as 'a procedural means to safeguard the rule of law.'[146] One of the cardinal rules in criminal law is the presumption of innocence of the accused. The UN Economic and Social Council requires state parties to put a strict legal framework to protect the presumption of innocence in all criminal trials for offences punishable by death.[147] States must also ensure the equality of arms of the accused during the trial, making sure the accused person can afford legal expenses 'for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases.'[148]

Unfortunately, the presumption of innocence of the accused is under threat in SL. There are widespread allegations of torture during the police investigations that result in the confession of the accused persons.[149] Confession of the accused given to the police is not admissible under SL law,[150] However, if a 'fact is deposed to as discovered' from the accused's statement, 'so much of information, whether it amounts to a confession or not' is admissible under the Evidence Ordinance.[151] The police widely misuse this provision. Torture or intimidation has been used to secure the confession of the accused.[152]

Scientific tools such as DNA evidence is rarely used in criminal investigations to confirm the perpetration of a crime, as it is costly. In a recent murder case, an accused was charged with participation in the murder of a child after a sexual assault based on a confession, but the court later dismissed the

146 Human Rights Committee, General Comment No 32, Article 14 (Right to equality before courts and tribunals and to a fair trial), 19 sess, CCPR/C/GC/32, (adopted 23 August 2007), 1, para 2.

147 Economic and Social Council E/2015/49, above n 99, 32.

148 Ibid, 32-3.

149 Basil Fernando, 'A Study about the Processes and Strategies of Prevention of Torture in Sri Lanka', Jasmine Joseph (eds), *Sri Lanka's Dysfunctional Criminal Justice System*,(Asian Human Rights Commission, Hong Kong, 2007), 28.

150 *Evidence Ordinance of Sri Lanka*, Section 25.

151 Ibid, Section 27.

152 Basil Fernando, above n 149, 28.

case after a negative DNA matching test.[153] The same happened to the second person, who was also said to confess to the police.[154] Finally, both accused came before the media and complained that their confession was produced through torture. Since that case received substantial media attention, DNA technology was used, and both innocents were discharged, but it would not be the same for all cases.[155] People who demand capital punishment for grave sexual offences do not realise the perspective of these victims of torture.[156]

The Attorney General's department is responsible for criminal prosecution in SL. However, they do not involve in criminal investigations unless the police sort advice from the Attorney General.

There is widespread concern about the competency of defence counsel in criminal cases. Many accused who face murder charges are not financially fit to retain senior criminal counsel. Legal aid is available to people charged with murder, and while the high court has to assign counsel if the accused has nobody to appear on his behalf, these assigned counsels are often inadequate.[157] They are poorly paid, so experienced senior defence counsel rarely appears to defend the case against the well-trained, well-resourced prosecutor.[158]

The Human Rights Commission of SL also realised the "[t]he risk of miscarriage of justice and the irreversibility of capital punishment' in the Sri Lankan criminal justice system and made its objection to re-implementing capital punishment[159]. When requested to the head of state in January 2016, for an abolition of the death penalty, the Commission explained 'the risk of innocent persons being executed for crimes which they did not commit', as follows;

> '*It is the view of the Commission that in view of the serious flaws which exist in the criminal justice system coupled with Sri Lanka, unlike other countries, not having a process permitting the reopening of a criminal*

153 Saliya Pieris, 'Imprisoning The Innocent' *Colombo Telegraph* (online), 4 October 2015 <https://www.colombotelegraph.com/index.php/imprisoning-the-innocent/>.

154 Ibid.

155 ibid

156 Vimukthi Caldera, 'Seyas Case Is Perfect Example Against Death Penalty', *Colombo Telegraph* (online), 2 October 2015< https://www.colombotelegraph.com/index.php/seyas-case-is-perfect-example-against-death-penalty/>.

157 Saliya Pieris, above n 3.

158 Ibid.

159 "Dear Mr President, Do Not Re-Implement Death Penalty"- Human Rights Commission,Colombo Telegraph (online), 26 July 2018 < https://www.colombotelegraph.com/index.php/dear-mr-president-do-not-re-implement-death-penalty-human-rights-commission/>.

case after exhaustion of the appeals procedures, there is a serious risk of a miscarriage of justice. ***Although due process in criminal proceedings are guaranteed by the Constitution and statutory law, there is always the possibility of human error distorting the final outcome.***'[160]

As a signatory to the ICCPR, Sri Lanka must provide a legal framework to ensure the independent function of the criminal justice system. An efficient police force capable of carrying out criminal investigations, along with the use of new technology to assist in investigations, and the provisions of a high standard of legal support to all participants in the criminal justice system, including judges and prosecutors, are essential for the protection of human rights. If Sri Lanka fails to provide these fundamental protections in its criminal justice system, there is a high risk of a fair trial. Not providing an independent and impartial criminal justice system is not only a violation of Article 14 of the ICCPR, but it is a threat to the protection of human dignity and the right to life. Fixing these fundamental and systemic issues may take a considerable period. Therefore, the most immediate option before SL for promoting the right to life and saving innocent people from being executed by this system, which needs more safeguards, is to abolish capital punishment.

V. Conclusion.

It is not the first time the country has been under pressure to re-impose capital punishment. There were many calls in the past but, SL tried to maintain its moratorium on the death penalty.[161] If the death penalty is not implemented, why it should be retained as a sentencing option for the courts?

It is the duty of signatories to the ICCPR to provide constitutional and statutory safeguards to protect the right to life of all individuals. In addition, the essay argued that the right to life is an underlying feature of the Sri Lankan constitution, and it has been reaffirmed on many occasions by the Supreme Court. Therefore, it is an international and domestic obligation for SL to ensure safeguards as recognised by Article 6 of the ICCPR and other UN documents, even if it retains capital punishment in the legal system. The essay identified many deficiencies in the statutes and the criminal investigations and providing fair trials to the accused, which are a direct threat to a fair trial and the protection of the right to life.

160 Ibid. [emphasis added].
161 Roger Hood, Carolyn Hoyle, above n 110, 88.

The criminal justice system is the guardian for protecting all human rights, including the right to life. The incapacity of the criminal justice system and its lack of efficiency is a direct threat to the protection of the right to life. These defects cannot be resolved immediately, and they will need a lot of institutional and individual transformation. This task is not immediately possible.

In these circumstances, retaining capital punishment is contrary to Sri Lanka's obligation to protect and promote the right to life. The ICCPR permits the death penalty as an exception to the right to life, but not if the death penalty is imposed arbitrarily. If Sri Lanka is incapable of providing the safeguards necessary to ensure the right to life in the ICCPR, it violates its international obligation to protect human rights, and it is a challenge to Sri Lanka's democratic rule and its international image. Therefore, the abolition of the death penalty is a preferable option before SL. It would be a positive step for Sri Lanka in its journey of post-conflict state-building towards democracy while protecting the basis of the rule of law and values of human rights.

POISONS, OPIUM AND DANGEROUS DRUGS ORDINANCE (CHAPTER 218) VS. THE ATTORNEY-GENERAL'S CIRCULARS

Daminda R. Weligodapitiya,
District Judge, Moratuwa.

Abbreviations:

AG-	Attorney-General	GA-	Government Analyst
GQ-	Gross quantities	HC-	High Court
MC-	Magistrate's Court	PQ-	Pure quantities
S-	Section	SS-	Subsection

Introduction:

In response to the second AG's circular[1] issued(hereinafter referred as "the circular") in the wake of SARS-CoV-2 pandemic, somewhat contradictory views regarding the directions therein in connection with enlarging on bail of persons suspected of offences under Chapter 218(hereinafter referred as "the enactment") as amended by Poisons, Opium and Dangerous Drugs(Amendment) Act No.13 of 1984(hereinafter referred as "the amendment") were informally communicated in digital platforms of interested stake holders. The purpose of the circular is curbing the transmittance of SARS-CoV-2 among prisoners, as well as into the prisons, by granting bail. The latest circular[2] has increased the weights of Heroin, bailable by the MC. (This article focuses on Heroin)

In the circulars, laboratory detected Heroin quantities reported in GA certificates is termed "Pure Quantities", while, quantities seized by the Police is termed "Gross Quantities". According to the circulars, the Mean Proportion of PQs mentioned therein is 0.15 in GQs analyzed.

In keeping with the directions, the Inspector General of Police has issued circulars[3] to effect following two approaches.

1 *AG's Circular No. CR3/MISC/08/2019 dated 2021.05.20*
2 *AG's Circular No. AG/42/2012 dated 2021.08.13*
3 *Circular No. RTM-890/2021 dated 2021.05.20, Circular No. ආර්ටීඑම්:(412) dated 2021.08.13*

1. S54A of the amendment is not mentioned in fresh information reports(B-Reports) by the Police.
2. S54A is replaced with SS78(5)(a) in already filed B-reports.

   SS78(5)(b) is not included in the circulars(why?).

This article discusses the AG's approach and criteria for the bail policy with its validity and suitability in contrast with the provisions in the act and the amendment.

AG's approach, law and criteria in bail policy:

The AG shall give advice on his own initiative in any criminal matter of importance. Such advices may be pertaining to offences to be mentioned in B-reports depending on circumstances (e.g. concerns, resources, facilities, lawful interests and etc.). Accordingly, issuance of the circulars in response to COVID-19 pandemic is *intra vires* S393 of Code of Criminal Procedure Act No. 15 of 1979.

Replacing S54A with SS78(5)(a) is just a change in stance. Stance mentioned in a B-report is changeable. Such a change is an inherent/ inalienable right in adversarial adjudication system. Court may rightly or wrongly reject prosecutor's initial or revised stance (e.g. in bail matters), but has no authority to question such rights. Stance in B-report is independent of judicial power until proceedings are instituted(e.g., Filing plaint). However, after filing plaint, if court permits, stance can be changed before judgment is given. So, prosecutor may replace S54A with SS78(5)(a). Similarly, SS78(5)(a) can be mentioned instead of S54A. Bail/remand orders are revisable as a function of changing facts/circumstances which decide the stance over time under the amendment.

Before inception of COVID-19 pandemic, the AG had decided to apply SS78(5)(a) for PQ≤500mgs[4] under his discretion. So, facts had been reported under S54A for GQ>500mgs (in B-reports, GQ is deemed Heroin). Depending on circumstances, S54A had been mentioned along with SS78(5)(a) even for GQ≤500mgs. Later on, in the wake of COVID-19 pandemic, he had opted to SS78(5)(a) for <2grammes[5]. After that, SS78(5)(a) has been opted in fresh B-reports for <4grammes[6] and, SS78(5)(a) ought to be applied for

4 *AG's Circular No. සිඑජ්3/විවිධ/05/12*
5 *AG's Circular No. CR3/MISC/08/2019 dated 2020.11.09*
6 *AG's Circular No. CR3/MISC/08/2019 dated 2021.05.20*

both GQs and PQs in different weights, with corresponding retention periods [7]of remandees.

Let's analyze the legality of application of SS78(5)(a) in place of S54A.

Mentionable offences (substantive law) in B- reports: -

1. SS78(5) :78(5)(a),78(5)(b) along with offence defining sections.
2. S54A :54A(a),54A(b),54A(c),54A(d).

Section 54B defines abetting/attempting in commission of an offence under S54A.

SS78(5) is a penal section. S54A contains both definitions of offences and penalties. S54A with part III of the Third Schedule (hereinafter referred as "the schedule") has been brought by the amendment to provide for some more severe [8] penalties on conviction if prosecuted, other than under amended SS78(5). Despite availability of indictable SS78(5)(b), penalties under S54A are invokable from the same High Court. When S54A is mentioned, in view of SS83(1), the MC cannot grant bail. So, mentioning S54A has caused significant increase in number of remandees. [However, when SS54A(d) is mentioned for quantity<1gramme (if it is Cannabis, <5Kgs), subject to provisions of S3 read with S2 of Release of Remand Prisoners Act No. 8 of 1991, the MC can grant bail].

Before introduction of S54A, the common penal section was SS78(5). After the amendment, penal sections are opted by exercising discretion of the prosecutor (the AG/Police).

There are opinions to say that the AG's directions in connection with granting bail are contrary to the substantive law relating to the quantities/ penalties (e.g. 2 grammes of Heroin and above) set out in column II of Part III of the schedule. Such opinionists suppose that when quantity exceeds 1 gramme, S54A becomes the exclusively applicable substantive law (definition of offences, penalties). So, the legality of replacing S54A with SS78(5)(a) is questioned, stressing that COVID-19 is not supposed to bend substantive law.

Accordingly, they suppose that for PQ≥1 gramme, indictments must be filed under S54A. Further, according to them, for PQ≥2 grammes, the only penalty is the death. The reason for these clinging and adhering views is the long-term practice. As of a practice, for any GQ>500 mgs, the Police was

7 *AG's Circular No. AG/42/2012 dated 2021.08.13*
8 *Attorney-General V. Siripala, [1990] 2 Sri L.R. 141.*

accustomed to mention S54A complying with then directions[9]. [You know that the arrested mixture (GQ) is produced as Heroin. MC also takes it as it is]. As a result, practically, GQ>500 mgs (rather, GQ>1 gramme) and S54A seemed like needle and its thread. And also, drug crimes are deemed serious. Armed with such views, for quantities like GQ>1 gramme (or for >500 mgs, the then critical quantity set by the AG), the said opinionists keep clung to S54A. They feel no sense of other available substantive sections. However, if we just suppose that possession of PQ>500 mgs (may be 750 mgs, 10 grammes, 20 Kgs and so on) is exclusively punishable under S54A(d), then S52 becomes uninterpretable. S52 defines offence of possession punishable under SS78(5) with no reference to quantity. The amendment has not repealed several sections including S52. So, can S52 be interpretable exclusively for quantities<1gramme (or for <500mgs, the then critical quantity set by the AG) in honour of S54A? I think "no". S54A doesn't supercede S52 and SS78(5).

Any quantity set out in column II falls within the interpretation of section 52. If S52 cannot be interpreted to the best, instituting proceedings under subsections 78(5)(a) and/or 78(5)(b) is impossible. When interpreted precisely, possession of any higher quantity set out in part II (e.g. 2 grammes of Heroin and above) becomes an offence punishable under SS78(5)(a). The same is an indictable offence under SS78(5)(b). So, S52 defines offence of possession for any quantity while SS54A(b), SS54A(c) and SS54A(d) define offences, having references to categorized quantities as set out in column II [why 54A(a)?]. Applicability of S52(and other offence-defining sections) for higher quantities hasn't been suspended by the legislature on ground of introduction of S54A. Accordingly, SS78(5)(a) and SS78(5)(b) read with S52 are capable of imposing penalties for possession of any quantity (may be 150 mgs, 750 mgs, 2 grammes, 10 grammes, 2Kgs, …etc.). Similarly, this applies in respect of other offences in the ordinance (e.g. import, export, manufacture…, of Heroin, Cocaine, Morphine…,).

Vice-versa, S54A is applicable not only for large quantities but also for small quantities. Setting out of "not exceeding 1 gramme of Heroin" in column II is a proof for the applicability. Therefore, merely on setting out of higher quantities among specified quantities in column II, no one can say that the substantive law in respect of certain higher quantities is available exclusively in S54A. There are many substantive sections (such as 27, 28... 51, 52…,) which

9 *AG's Circular No.සිඅා/3/විවිධ/05/12*

have been existing since prior to the amendment. Evidently, all the criminal acts/ingredients which constitute offences defined in S54A can be found in such sections. Substantive laws relating to SS78(5) cover almost all the componentized versions of S54A. For an example, componentized versions of "trafficking"[the offence under S54A(b)] are sale, giving, transport…and etc. These components can be separately punishable under SS78(5) irrespective of quantity. Such sections(components) should be familiarized to learn the legality of instituting proceedings under SS78(5)(a). Even "manufacture", an offence punishable with death under S54A(a), can be punished by the MC under SS78(5)(a) read with S53 (quantity has no relevance to "manufacture" even under S54A). So, interested professionals should be mindful on applicability of SS78(5) despite provisions in S54A.

Not like in other laws, the prosecutor's absolute discretion to opt for offences is special to the amendment. Under the discretion, stance of non-prosecution for "trafficking" may be compromised with stance of prosecution for several offences(with several charges/counts for componentized versions of trafficking: selling, supplying, procuring, advertising/distributing, administering, delivering, packing/storing…etc.) under SS78(5)(a). When we consider the offence under S296 of Penal Code("murder"), it is not similar kind offence to "trafficking". Murder cannot be componentized into several parts(offences). When the MC has materials for suspicion under murder, surely applicable substantive law is S296(read with S294) and, the penalty is the death. So, stance of non-prosecution for "murder" may not be compromised with stance of prosecution under sections like 297,298 or 300 of Penal Code. In such basis, the Police cannot sustain non-suspicion of murder at B-report stage. (Plea-bargaining for indictable offences is possible in the HC. But, it's not dealing with componentized versions). If, the Police stand on non-suspicion of "murder" despite a possibility of suspicion, such a stance is immaterial to the MC. The MC may study B-reports/facts[10] in order to make orders under bail law without being a rubber stamp[11]. But, under the amendment, the AG has absolute discretion to opt for the substantive law(sections) out of contemporary options. So, under the amendment, the MC shall take the AG's option(section) as the applicable substantive law. If the AG's option in the B-report is SS78(5)(a) for 4 grammes, the MC can grant bail. (remember, in B-reports, GQ is the weight of Heroin). Once plaint is filed on

10 *S3 read with S2 of Release of Remand Prisoners Ordinance No. 8 of 1991*
11 [1983] 2 Sri L. R. 84

receipt of GA certificate, say, for a 3.5 grammes of PQ, charges shall be framed if there is sufficient ground(S182, Act No.15 of 1979). On the other hand, if the AG's option is S54A for a 100mgs, the MC cannot grant bail. And, charges cannot be framed(no plaint). Under the amendment, suspected offence comes exclusively on the part of the AG/prosecutor.

Let's go further.

Section 9 of the amendment: -

9. Section 78 of the principle enactment is hereby amended by the repeal of subsection (5) of that section and the substitution therefore of the following subsection: -

"(5) Every <u>person guilty of an offence</u> against this ordinance, <u>other than a person guilty of an offence</u> under S54A, shall for each offence, be liable-

(a) on summary conviction by a Magistrate, to a fine not less than one thousand rupees and not exceeding ten thousand rupees or to imprisonment of either description for a period not exceeding five years or to both such fine and imprisonment;

(b) on conviction by the High Court, to a fine not less than ten thousand rupees and not exceeding twenty-five thousand rupees or to imprisonment of either description for a period not less than six months and not exceeding seven years, or to both such fine and imprisonment.".

Underlined parts of the above section denote that deciding the penal section for instituting proceedings is exclusively in the hand of the AG/ prosecutor. The wording implies that if not prosecuted under S54A, a person can be prosecuted, made guilty and sentenced under SS78(5). Phrase "other than a person guilty of" provides for discretion to prosecute under SS78(5) or/and S54A. No provisions have been legislated for mandatory prosecution under S54A, where the quantity is (said to be higher quantities as set out in the column II),

2 grammes of Heroin and above; or *(fourth line of column II)*

1 to 2 grammes of Heroin *(nineth line in column II).*

Opinionists are seemingly not troubled by prosecution under SS78(5) where the quantity is(said to be lower quantity),

Not exceeding 1 gramme of Heroin *(eighth line of column II).*

Despite the feeling of morality in favour of reducing crime rate when indited under S 54(A), getting troubled by charging under 78(5) for the quantities in the fourth and nineth lines in column II whilst feeling settled with the eighth line is totally illogical and irrational in terms of law.

A passage of ***Attorney-General V. Siripala, [1990] 2 Sri L.R. 141***, is quoted to below:

"The effect of the new S54A and Section 54B is to provide a more severe penalty on conviction by the High Court but these sections can under no circumstances be construed to mean that they have vested in the High Court exclusive jurisdiction to try the various offences created by the Ordinance. The fact that the report filed by the Officer-in-Charge of the Police Narcotics Bureau in the Magistrate's Court alleged the commission of offences under S. 54A and S. 54B cannot wipe out the jurisdiction of the Magistrate who is empowered by the Statute to try summarily the offences created by the Ordinance."

No further emphasis is needed to realize that SS54A(b), SS54A(c) and SS54A(d) in keeping with corresponding quantities set out in column II, impose penalties in statutorily categorized-quantity-wise manner, while SS78(5)(a) and SS78(5)(b) impose penalties for offences defined ingraining the same criminal acts ingrained in S54A without statutory categorization of quantity. Accordingly, proceedings can be instituted in MC under SS78(5)(a) covering all categories of quantity set out in column II. Similarly, indictments can be filed under SS78(5)(b) in the HC. Further, proceedings can be instituted under SS78(5)(a) and SS78(5)(b) for offence(manufacture) punishable under SS54A(a), where quantity has no relevance. The mere importance of S54A is its usability to severely deal with the same kind criminal acts dealable under SS78(5)(a) and/or SS78(5)(b). (Subject to judicial discretion, at times, penalties under SS78(5) can be made more severe than that of under S54A, for some quantities/offences).

Summary of contemporary options for institution of proceedings: -

1. Probably, on absence of aggravating circumstances, plaints under SS78(5)(a) in Magistrate's Court. Quantity doesn't matter; and/or
2. Indictments under SS78(5)(b) invoking penalties more severe than SS78(5)(a). Quantity doesn't matter; and/or
3. Indictments under SS54A/54B invoking penalties more severe than under the 1 and 2.

Under the 3rd, identifiable sub-options: -

(i) Quantity-dependent indictments under subsections 54A(b), 54A(c), 54A(d). Penalties are statutorily quantity-dependent and court's discretion applies for some quantities. (vide Part III of the Schedule).

(ii) Quantity-independent indictments under SS54A(a). Penalties are quantity-independent. (e.g. "manufacture")

The AG has discretion (depending on circumstances) to opt for one, or any combination of the above options. Corresponding to such options, the Police send or amend B-reports.

Accordingly, on account of the discretion to opt for, the AG's approach *intra vires* substantive law. No one should get troubled, once, S54A is replaced with SS78(5)(a) by further reports and SS78(5)(a) is mentioned in fresh B-reports, for any quantity. Magistrates may act under Bail Act. Sentencing is the point where the MC's discretion deals with quantities.

Even though, the AG should himself adopt a fair mechanism for granting bail, he is not supposed to satisfy the court as to how he exercises his veto power under the amendment. However, by issuing circulars time to time, he has extensively shown his willingness to justify the way he uses his discretion. However, as per my understanding, some material facts in the latest circular No. AG/42/2012 dated 2021.08.13 and related previous circulars seem to be irrational and cannot be justified.

Despite the previous practice of filing plaints under SS78(5)(a) for PQ<500 mgs and the higher probability of PQ<500 mgs in GQs, miserably, the MC had been refusing bail for every GQ>500 mgs, assuming GQ=PQ. According to the advices of circular No. CR3/MISC/08/2019, in view of 0.15(the AG's proposed mean proportion), for up to 600mgs of PQ. SS 78(5)(a) can be opted for (4grammes * 0.15=600mgs). However, the AG's objective is to use SS78(5)(a) for PQ<1gramme in respect of drug addicts. Then, in proportion of 0.15, the applicability of SS78(5)(a) should extend to GQ<6.666grammes (1g/0.15=6.666grammes). if so, GQ<6.666grammes should become bail grantable weight by the MC. To set GQ<4 grammes as the bail grantable point, mean proportion of PQ should be set to <0.25. (1g/4grammes=0.25), under that circular.

In the latest circular(No. AG/42/2012), weights, time periods and availability of GA reports are irrationally included. The paragraphs in this circular are designed to grant bail for suspects already in remand. Paragraph 1.5 does not tally with the policy of granting bail for 2-4 grammes of GQ, because paragraph 1.5 contains a month lapse. Why is a time condition in paragraph 1.5? 2-4 grammes category of GQ corresponds to <1g of PQ. Under the AG's opinion(analysis), the PQ is <1g in 2-4 grammes range of GQ (since, 0.15*4 grammes = 600mgs). So then, no objection should be raised and bail should be granted at the first instance. But, under paragraph 1.5, a remandee of PQ<1g category should wait in prison until completion of a month irrespective of its GQ category.

According to paragraph 1.1, a suspect must complete 3 months in prisons like in paragraph 1.4. The GQ range in paragraph 1.1 is 10-20 grammes. Corresponding to 3 months time, PQ range in paragraph 1.4 is 1-2 grammes. In proportion to 0.15, the maximum PQ correspondent to GQ=10-20 grammes in paragraph 1.1 is 20*0.15=3 grammes. This 3 grammes does not come under paragraph 1.4 or 1.5. So, the policy in paragraph 1.1 contradicts paragraphs 1.4 (and 1.5). The policy of granting bail under paragraph 1.4 with the GA report (PQ=1-2 grammes) is not consistent with the policy of granting bail under paragraph 1.1 without the GA report(Possible maximum PQ should be 20*0.15=3grammes), in respect of time(3 months for both circumstance). The 0.15 value has not been taken into account.

And also, both paragraph 1.2 and paragraph 1.5 refer one month. But, PQ in paragraph 1.5 is not proportional to GQ in paragraph 1.2. In proportion to 0.15, maximum PQ of 5-10 grammes of GQ category should be 10*0.15=1.5 grammes. Then, even though one month lapse is there, in view of paragraph 1.2, granting bail is irrational for 5-10 grammes of GQ. The 0.15 value has not been taken into account.

There is a possibility of releasing a remandee with 19.99 grammes of PQ in 10-20 grammes of GQ category on bail after a three months time under paragraph 1.1 while a remandee with 2.01 grammes of PQ will still be in custody even after the lapse of the three months period (since 2.01 grammes value does not lie within the categories of paragraphs 1.4 and 1.5) under this irrational policy. Maybe this 2.01 grammes may have come from GQ<5 grammes.

The other things behind which no rationales are lengths of remand periods (three months and one-month times). Seeking availability of GA report is also an irrationality. Likewise, there are many irrational points which cause grave unfairness can be seen. Suspects who should be released on bail will not be so released, but others will be so released, as the policy is not consistent.

Accordingly, analysis and policies in AG's circulars are deemed irrational/ illogical. So, suspects and remandees are not treated fairly. The prosecution is basically dependent on the weight of Heroin(PQs) in GA reports. [e.g. In view of paragraphs 1.4 and 1.5, the AG will rely on SS78(5)]. If such a policy for granting bail is adopted it should be a kind of policy that can be fairly applied both for suspects of the first instance and remandees. The time period lagged in remand and availability of GA report should be immaterial if the AG can believe 0.15 proportion. Such time periods or availability of GA reports does not change the proportion of PQ if the AG can depend on the mean proportion of PQ. Taking the possible long-standing prevalence of the pandemic into account, having a reliable estimator[12][12] is worth for long standing use. Such an estimator will eliminate the need of GA reports and regards to retention periods. The estimator will give a fair value for the proportion of PQ for bail purposes. Unfortunately, 0.15 proportion seems to be problematic.

With a large sample size(n)=252, the later described analysis found that the mean proportion of PQ is 0.1072 or 10.72%. Even this value is not a fit value in view of the statistical distribution pattern of PQ proportion values of Heroin (as described later in the analysis).

No matter how serious the irrationalities of selecting 0.15 and <4 grammes limit in respect of addicts as well as other weight/time categories for remandees, the penal section is a matter of discretion of the AG/ prosecutor under the amendment. If he desires SS78(5)(a), that's conclusive. But, unfortunately, putting his absolute discretion undermined, he himself has been bothering with PQ and GQ, by mentioning very rough unreliable estimators [average(mean), ranges and limits] in circulars making further complications to those who cling only to S54A on severe effect of "and above" phrases mentioned in Column II. As far as the AG is realistic in his discretional power, his mean proportion (0.15) of PQ, or 0.25 or 0.1072 has no role with his power to opt for the penal section. Even for proportions of PQ>0.15, he can

12 *https://www.statisticshowto.com/estimator/*

stand on or switch to SS78(5). And, the AG is not duty-bound to satisfy the court showing statistics in respect of quantities, in order to use his discretion.

Theoretically, magistrates seem rubber stamps of the Police/the AG in spirit of the AG's discretion under the amendment. Why then, the AG is relying on estimators (0.15), weight ranges and time periods in remand in opting to SS78(5)(a)? May be, he deems that it is moral to reason out the way of exercising discretion. However, his stance to report facts not under S 54(A) for the only purpose of enlarging on bail is irrational in law. This stance also has made those who are clingy to said "and above" phrases, confused. The AG can report facts under any section(offence) on his choice, subject to subsequent changes. So, he doesn't need to inform the purpose of not mentioning S 54(A) in respect of higher quantity ranges specified in the circulars, because, a plaint is not filed for further proceedings before the magistrate.

From here onwards, I am trying to deal with 0.15, the mean proportion of PQ, because it seems that the AG's discretion is governed by it.

Following questions arise.

Is it good to generally assume that GQ>4grammes do not contain PQ<1g?

Is it good to generally assume that GQ≤4grammes only contain PQ≤1g?

Is it good to generally assume that GQ>20 grammes do not contain PQ<2 grammes to grant bail after 3 months for already remandees?

Is it good to generally assume that GQ≤20 grammes only contain PQ≤2 grammes to grant bail after 3 months for already remandees?

Is it good to generally assume that GQ>10 grammes do not contain PQ<1 grammes to grant bail after 1 months for already remandees?

Is it good to generally assume that GQ≤10 grammes only contain PQ≤1 grammes to grant bail after 1 months for already remandees?

Is it good to generally assume that GQ>5 grammes do not contain PQ<1 grammes to grant bail for already remandees when GA report not present?

Is it good to generally assume that GQ≤5 grammes only contain PQ≤1 grammes to grant bail for already remandees when GA report not present?

I don't think, "yes".

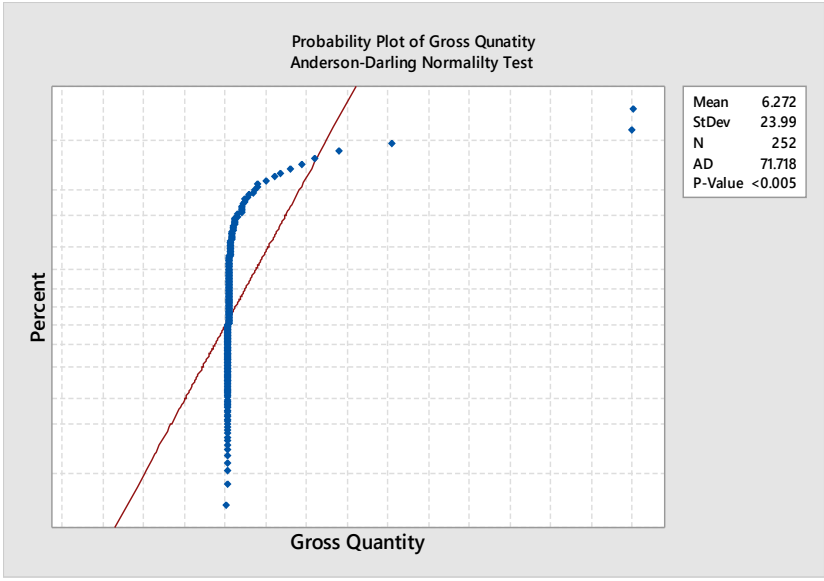
As mentioned above, 0.15 is a rough and unreliable estimator of mean.

Informal study and analysis:

I found, before performing an informal statistical analysis with a random sample[13] to test any possible association between GQ and proportions of PQ (just by informally observing GA certificates), that both the distribution[14] of GQ (the independent variable[15]) and the distribution of proportion of PQ (the dependent variable[16]) are statistically not normal[17].

Figure 01 shows Anderson- Darling Normality Test [18] results for GQ.

Figure 01.



13 *"3. Populations and Samples: The BMJ." The BMJ | The BMJ: Leading General Medical Journal. Research. Education. Comment, 9 Feb. 2021, www.bmj.com/about-bmj/resources-readers/publications/statistics-square-one/3-populations-and-samples.*

14 *Libretexts. "5.8: Understanding the Value Distribution of a Variable." Chemistry LibreTexts, Libretexts, 12 Oct. 2020, chem.libretexts.org/Courses/City_College_of_San_Francisco/Chemistry_101A/Topic_C%3A_Gas_Laws_and_Kinetic_Molecular_Theory/05%3A_Gases/5.08%3A_Understanding_the_Value_Distribution_of_a_Variable.*

15 *"Organizing Your Social Sciences Research Paper: Independent and Dependent Variables." Research Guides, libguides.usc.edu/writingguide/variables.*

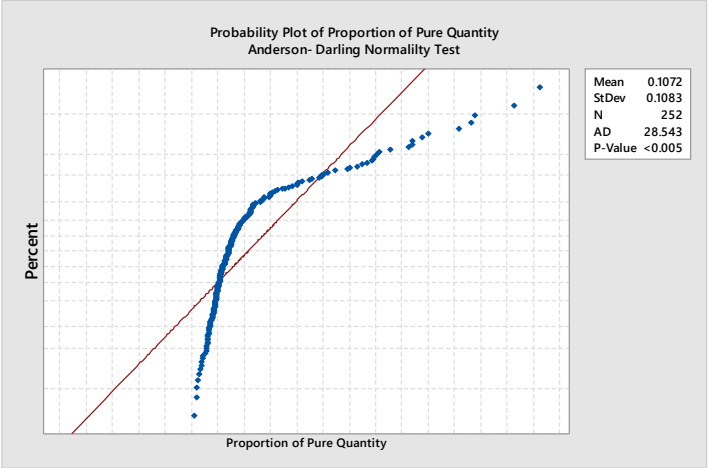
16 *ibid*

17 *"Normal Distribution." Math Is Fun, www.mathsisfun.com/data/standard-normal-distribution.html.*

18 *"The Anderson-Darling Statistic." Minitab, support.minitab.com/en-us/minitab/18/help-and-how-to/statistics/basic-statistics/supporting-topics/normality/the-anderson-darling-statistic/.*

Figure 02 shows Anderson-Darling Normality Test results for proportion of PQ.

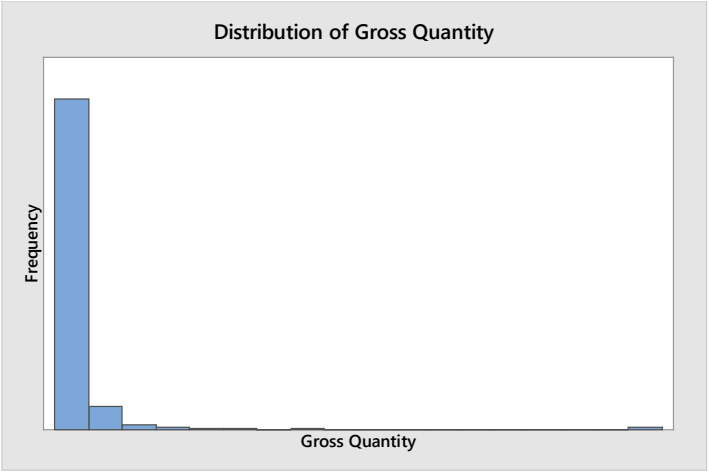
Figure 02.



P-values[19]<0.005 of both variables indicate that sample data do not represent a population[20] having the normal distribution.

Figures 03 and 04 respectively show the Histogram of GQ and the Histogram proportion of PQ.

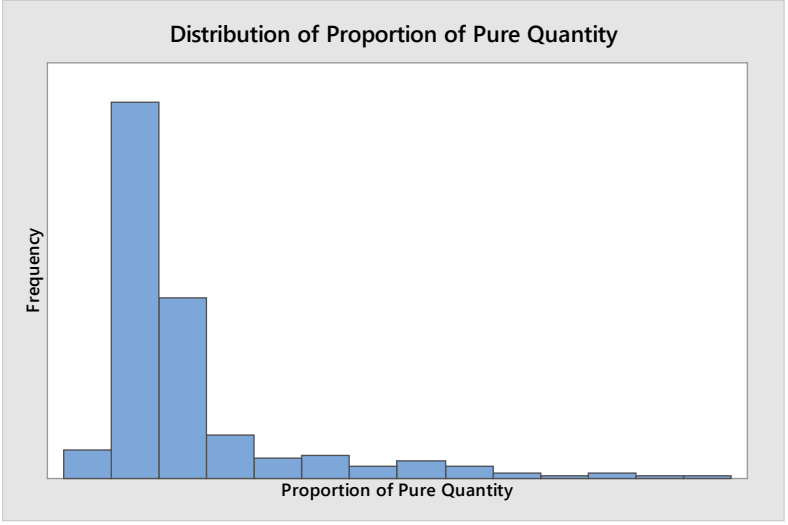
Figure 03.



19 ibid

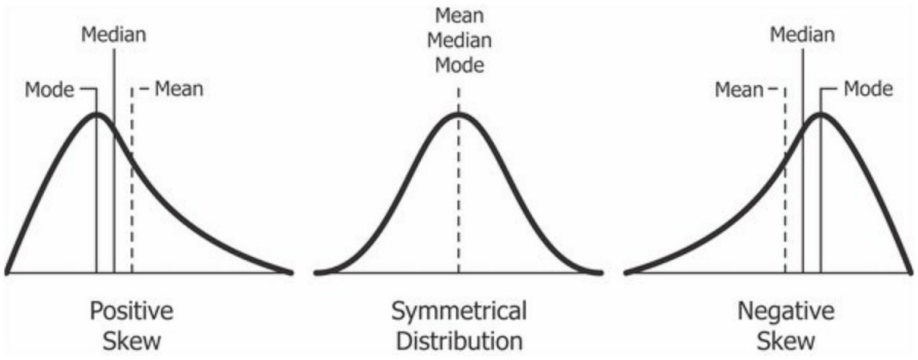
20 *"3. Populations and Samples: The BMJ." The BMJ | The BMJ: Leading General Medical Journal. Research. Education. Comment, 9 Feb. 2021, www.bmj.com/about-bmj/resources-readers/publications/statistics-square-one/3-populations-and-samples.*

Figure 04.



You may see that the distributions of both variables cannot be shaped by a symmetrical[21] curve (bell shaped curve[22]). Instead, the distributions are right skewed (positive skewed[23]). See, Picture No. 01.

Picture 01



21 *Holmes, Alexander, et al. "Skewness and the Mean, Median, and Mode." Introductory Business Statistics, OpenStax, 31 Mar. 2015, opentextbc.ca/introbusinessstatopenstax/chapter/skewness-and-the-mean-median-and-mode/.*

22 *"Normal Distribution." Math Is Fun, www.mathsisfun.com/data/standard-normal-distribution.html.*

23 *Holmes, Alexander, et al. "Skewness and the Mean, Median, and Mode." Introductory Business Statistics, OpenStax, 31 Mar. 2015, opentextbc.ca/introbusinessstatopenstax/chapter/skewness-and-the-mean-median-and-mode/.*

It seems, the situation is not conducive for Central Limit Theorem[24] which generally permits the mean to act as an unbiased and reliable estimator. So, it is difficult to describe the behavior(distribution) of both variables using their means[25] .

AG's estimator 0.15, as the mean, may tend to describe smaller proportions of PQ more than larger proportions because it is highly weighted by smaller proportions (see the four left side taller bars of Figure No. 04). Here, 0.15 is not the central representer(measure). Accordingly, just relying on 0.15 is not sensible. Therefore, the decision to set 0.15 as the general mean proportion (measure of the center or central tendency) of PQ is not justifiable. The estimator 0.15 is not fair as the measure of center[26] of the population. It is not an unbiased estimator[27] of the population mean[28](Here, the population should be the total number of proportions of PQ in mixtures arrested in the Island). And, the two variables are not linearly related[29], but, seemingly monotonic[30]. Both have outliers[31]. So, a better measure of center[32] for these distributions would be the *median*[33].

Accordingly, The Spearman rank-order correlation coefficient(r_s)[34] (a nonparametric[35] measure of the strength and direction of association) has been tested using "Minitab" statistical software.

24 *Frost, Jim, et al. "Central Limit Theorem Explained." Statistics By Jim, 12 Aug. 2020, statisticsbyjim.com/basics/central-limit-theorem/.*

25 *Holmes, Alexander, et al. "Skewness and the Mean, Median, and Mode." Introductory Business Statistics, OpenStax, 31 Mar. 2015, opentextbc.ca/introbusinessstatopenstax/chapter/skewness-and-the-mean-median-and-mode/.*

26 *Summary Statistics for Skewed Distributions, web.ma.utexas.edu/users/mks/statmistakes/skeweddistributions.html.*

27 *SHAZAM Unbiased Estimation, www.econometrics.com/intro/sampdist.htm.*

28 *Stephanie. "Population Mean Definition." Statistics How To, 16 Sept. 2020, www.statisticshowto.com/population-mean/#:~:text=The%20population%20mean%20is%20an,all%20dog%20owners%20in%20Georgia%E2%80%9D.*

29 *Spearman's Correlation, www.statstutor.ac.uk/resources/uploaded/spearmans.pdf.*

30 *ibid*

31 *Ibid*

32 *Stephanie. "Population Mean Definition." Statistics How To, 16 Sept. 2020, www.statisticshowto.com/population-mean/#:~:text=The%20population%20mean%20is%20an,all%20dog%20owners%20in%20Georgia%E2%80%9D.*

33 *Holmes, Alexander, et al. "Skewness and the Mean, Median, and Mode." Introductory Business Statistics, OpenStax, 31 Mar. 2015, opentextbc.ca/introbusinessstatopenstax/chapter/skewness-and-the-mean-median-and-mode/.*

34 *"Spearman's Rank-Order Correlation Using SPSS Statistics." Spearman's Rank Order Correlation Using SPSS Statistics - A How-To Statistical Guide by Laerd Statistics, statistics.laerd.com/spss-tutorials/spearmans-rank-order-correlation-using-spss-statistics.php.*

35 *Spearman's Correlation, www.statstutor.ac.uk/resources/uploaded/spearmans.pdf.*

Hypotheses:

Null hypothesis, H_o:r_s=0.00

No association between GQ and proportion of PQ, in the population.

Alternative hypothesis, H_A:$r_s \neq 0.00$

There is an association.

Test results are,

Spearman Rho: Gross Weight, Proportion of Pure Quantity

Spearman rho for Gross Quantity and Proportion of Pure Quantity = 0.178

P-Value = 0.005

Standardized r_s:

Z-score[36]= $r_s \sqrt{n-1} = 0.178\sqrt{251}$

$= 2.8201$

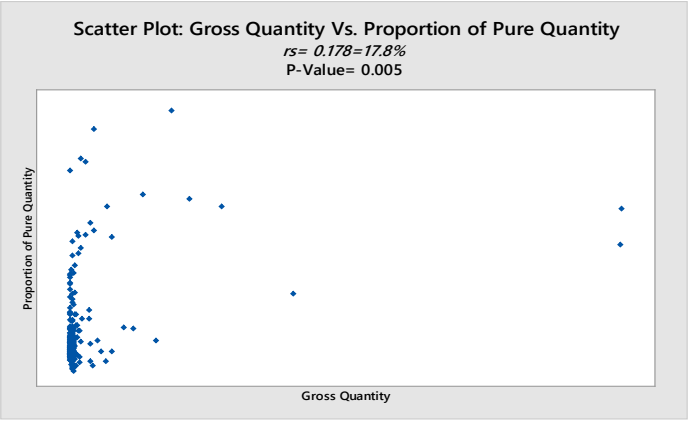
Critical Value of Z at p=0.005 is 2.81 from Z-Table.

Null hypothesis is rejected at p<0.01.

Interpretation of results: -

Results of the Spearman correlation indicated that there is a significant positive association between gross quantity and percentages or proportions of pure quantity, r_S[37] [n=252] = .178, p < .01

Figure 05.



36 *"Z-Score: Definition, Formula and Calculation." Statistics How To, 29 May 2021, www.statisticshowto.com/probability-and-statistics/z-score/.*

37 *"Spearman's Rank Correlation Coefficient Rs and Probability (p) Value Calculator." Barcelona Field Studies Centre, geographyfieldwork.com/SpearmansRankCalculator.html.*

By studying the r_s value and observing Figure 05, you may understand that though the association is significant at *P-Value=0.005*, the strength of the correlation is very weak. Accordingly, PQ seems to be weekly dependent on the GQ. So, the move of the AG to predict PQ as a function of GQ is not secure. I invite you to just have a look into B-reports/GA certificates and Table 01 to get this finding confirmed.

Table 01.

Descriptive Statistics: Proportion of Pure Quantity

Variable	Total Count	Mean	StDev	Minimum	Q1	Median	Q3
Proportion of Pure Quant	252	0.10717	0.10833	0.00653	0.04959	0.06963	0.11196

Variable	Maximum	Range	IQR	Mode	N for Mode	Skewness
Proportion of Pure Quant	0.66187	0.65534	0.06238	0.0326667, 0.0590909	3	2.59

Setting up of 0.15 as the mean proportion of PQ without confidence levels[38] and confidence intervals[39] is not statistically confident, efficient, sufficient and consistent. The AG should have sought to a sound statistical analysis for a scientifically valid mean of proportion of PQ in order to follow an efficient/effective and fair bail policy, if he is really interested in quantity-wise exercising of discretion. Otherwise, justice cannot be meted out for suspects with a larger GQ containing PQ<1g. They will remain in remand. Vice-versa, suspects with small GQ containing PQ≥2 grammes may be granted bail thanks to weaknesses of GQ-dependent bail-policy.

With a good statistical model designed by a statistician, prediction of PQ is possible with variations (confidence intervals). Then, owing to the higher degree of accuracy in opting to the penal section, GQ-dependent bail-policy can be made fair. Seemingly, as the COVID-19 issue will be standing for a long, having a sound Statistic as a criterion for the proportion of the PQ is worth in the name of fairness for long time use.

38 *Stephanie. "Confidence Level: What Is It?" Statistics How To, 5 Jan. 2021, www.statisticshowto.com/confidence-level/.*

39 *Confidence Interval: How to Find It: The Easy Way!"Statistics How To, 12 June 2021, www.statisticshowto.com/probability-and-statistics/confidence-interval/.*

If such a model is not possible, in the name of fairness/uniformity, the best thing without waiting is dropping the quantity-dependent bail-policy in order to exercise the discretion vested with the AG in the fullest humane manner under COVID-19 circumstances. Even with GA certificates, irrespective of PQ reported therein, the AG can opt for SS78(5), on pandemic grounds, setting S54A aside. The AG can direct the Police to mention SS78(5) for any quantity category set out in Column II. Later on, he can change his stance before or at prosecution, if circumstances warrant. Or else, he can proceed without change. All acts are technically permitted by his discretion under circumstances.

Though, the circular is effective to some extent, it is lack of technical professionality. Seemingly, very high ranked professionals have contributed to the content of the circular. Have they done at least a simple calculation to test the mean said to be 0.15? Seemingly, not sure. To set PQ<1 gramme bail-grantable for GQ<4 grammes, proportion of PQ should be 0.25. However, in proportion to the AG's 0.15, the due bail-grantable limit for PQ<1g should be GQ<6.666 grammes (refer the calculations shown earlier). How many suspects/ remandees might be accounted for the difference of GQ= 6.666–4 = 2.666 grammes? They are being remanded or still in remand. But, in proportion to 0.15, they belong to the AG's PQ<1g category. The AG should reach GQ=6.666 if he believes in 0.15, the value in his own choice. But the limit has been set to <4 grammes for arrestees. For remandees, it is 5 grammes (see paragraph 1.3 of the latest circular). Difference for remandees is 6.66-5=1.66 grammes. How many remandees might be accounted for 1.66 grammes? They are in custody until they complete 3 months in custody. But, their proportion of PQ is 5*0.15=750mgs in maximum. The ranges of GQs mentioned in the circulars should be corrected like wise. Ex-facie, figures in the circular seem unprofessionally-derived.

Some may say "dying litigants is improbable owing to legal-unprofessionalism unlike patients who die owing to medical-unprofessionalism". But, vulnerable prisoners are victimized by COVID-19. They may become "litigant-patients". Keeping with standards of technical professionalism is critical in matters of life and death. Bureaucratic-diplomatic professionality should accompany due regards to technical professionality to maintain minimum standards of fairness.

Summary and Conclusion:

SS78(5)(a) can be used as the penal section of any offence in respect of any weight of Heroin(drug) under the amendment. Generally, S54A can be used to invoke more severe penalties than SS78(5). Deciding penal section is a matter of the discretion vested with the AG. For any weight of Heroin, he can use SS78(5) or S54A or both.

It seems that the AG prefers to rely on predicted pure weight-dependent bail policy with justifications. So, circulars have been issued with a copy even to the Judicial Service Commission. As I see, there are many irrationalities and inconsistencies in AG's circulars. Even though the 0.15 value [the mean(average) proportion of PQ mentioned in circulars] is a choice of the AG, the due consideration has not been given to it in setting out GQs and PQs proportionate to the retention periods included in circulars. Seemingly, that might cause a gross unfairness for suspects and remandees. Due to the irrationalities and inconsistencies, those who deserve release on bail may remain in further custody and those who do not deserve may be granted bail.

The mean(average) proportion value of PQ (0.15) is not a reliable statistic(estimator). But, such an estimator is essential to keep standards. Therefore, it should be statistically developed further or replaced with a suitable statistic as the pandemic seems to continue. Such a development or a suitable estimator will eliminate the need to count time periods lagged in remand. Since a reliable statistic(estimator) can be used to make fair and standard predictions of PQ values, the GA report will not be a must in bail stage(B-report stage). A reliable mean proportion value of PQ may resolve all difficulties, irrationalities and inconsistencies in a policy of granting bail in a longstanding manner ensuring the fairness.

Any policy decision in respect of granting bail is a critical thing in the pandemic situation. However, the technical professionality of the circulars seems to be substandard. If the AG does not prefer to keep a reliable statistic(estimator) for the proportion of PQ, he shall immediately substitute the current criteria for his veto power(discretion) and use bailable SS78(5) for any weight of drug(Heroin) as he thinks fit in the midst of the pandemic circumstances.

SALIENT FEATURES IN SECTION 66 APPLICATIONS

D.M. Ruwan Dhammike Dissanayake,
L.L.B, L.L.M (COLOMBO), DISTRICT JUDGE/ MAGISTRATE, MAHO.

1. INTRODUCTION

When it refers to a land dispute, it is well settled law that it should be adjudicated by the District Court. However, cases under part VII of the Primary Courts Procedure Act (PCPA)[1] commonly known as, " SECTION 66 APPLICATIONS", play an important role in safeguarding the peace in land disputes in a speedy way without a long term litigation. In achieving this object, various aspects of the 66 applications have to be taken into consideration carefully. It has not been appropriately used in many instances. As a result, the expectation of the legislature in introducing this chapter is not properly materialized and the whole society is badly affected. Therefore, a sacred duty is cast on a Primary Court Judge to apply the relevant provisions in the correct way.

2. HISTORY

Before the introduction of Present Primary Courts' Procedure Act (PCPA), similar provisions were enacted to our legal system by the Administrative of Justice Law of no 44 of 1973[2]. This had been introduced to our legal system as a result of the suggestion made by the Criminal Courts' Commission in 1953. By that time, magistrates had no power to hear disputes relating to lands and the same had badly affected the people as those disputes sometimes ended by giving disastrous results like murder. This situation warranted the necessity of new law to overcome this. Having considered all the facts, the commission had suggested in the report that changes to be brought in to the Law. In view of these suggestion section 62 to 65 of the AJL was introduced to our legal system. Later these provisions were replaced by Part VII of the present Primary Courts' Procedure Act. The influence of provisions in secitions 145-148 of the Indian Code of Criminal Procedure could be recognized in the Part VII of PCPA. The draftsmen of PCPA wanted to give effect to the principle that parties should not take the law in to their hands.

1 Primary Courts' Procedure Act, No 44 of 1979 (here in after referred as 'PCPA')
2 AJL – Administration Of Justice Law, No 04 of 1973

3. HOW AN ACTION COULD BE INSTITUTED?

(I) Information filed by police [section 66 (1) (*a*)]

(II) Private application (information filed by a party to dispute) [section 66(1) (b)]

4. "BREACH OF PEACE" AND "THE JURISDICTION"

The Primary Court is vested with sole and exclusive jurisdiction to adjudicate a dispute of this nature. Whether breach of peace is threatened or likely plays an important role in the assumption of jurisdiction.

4:1 WHEN AN INFORMATION IS FILED BY A POLICE OFFICER [*SECTION 66(1) (a)]*

Who forms the opinion as to whether breach of peace is threatened or likely was discussed by His Lordship Ismail J as follows, in **Velupillai Vs Sivanathan**[3]

> **" under section 66 (1) (a) of the Primary Court's Procedure Act, the formation of the opinion as to whether a breach of peace is threatened or likely is left to the police officer inquiring in to the dispute _ _ _ The magistrate is not put on inquiry as to whether a breach of the peace is threatened or likely _ _"**

This position has been followed in many judicial decisions. In **Punchinona Vs Padumasena**[4] it was held in the following manner,

> **" where the information is filed under section 66 (1) (a) of the primary court's procedure Act; by a police officer, a primary court is vested with jurisdiction to inquire into the dispute. The police officer is empowered to file the information only if there is a dispute affecting land a breach of peace is threatened or likely "**

This clearly indicates that when a police officer files an information under sec.66 (1) (a) of PCPA, the magistrate is vested with jurisdiction to inquire into the dispute. However, in **Priyanthi Perera Samarasingha Vs D.Colin Abeywardhane**[5] His Lordship Sisira De Abrew. J has stated that;

> **"This is only with regard to the assumption of jurisdiction. But above judicial decisions do not take away the power of the Magistrate to**

3 1993 (1) Sri.L.R 12
4 1994 (2) Sri.L.R 117
5 CA (PHC) APN 64/2010, 5.5, 2011

reach a conclusion at the end of the inquiry whether or not there was a breach of peace. - - - - - - - Therefore in my view the Magistrate holding an inquiry under section 66 of the Act is entitled to make a judicial pronouncement whether or not there was a breach of peace. If the pronouncement confirms that there was no breach of peace or breach peace is not threatened, the Magistrate/ Primary Court Judge should dismiss the case."

So this gives a clear indication that after the inquiry, if the findings do not satisfy a breach of peace or breach of peace is not threatened, the case should be dismissed.

4:2 WHEN AN INFORMATION IS FILED BY A PARTY TO DISPUTE [SECTION. 66 (1) (b)]

In this nature of applications, the Primary Court Judge should initially satisfy himself as to whether there is a threat or likelyhood of a breach of peace. Otherwise the court has no jurisdiction to inquire into the matter. In ***Punchi Nona Vs. Paduma Sena*** [6] this has been emphasized in this way;

" _ _ _ in an information by a private party under sec. 66 (1) (b) it is incumbent upon the primary court judge to initially satisfy himself as to whether there was a threat or likelihood of a breach of the peace and whether he was justified in assuming such special jurisdiction under the circumstances. Failure to so satisfy himself; deprives the judges of the jurisdiction."

Therefore, after filing the information under see 66(1)(b), notices to respondent second party should not be merely issued like in other ordinary criminal cases. The presiding judge has a paramount duty to consider the information with the available materials to see whether breach of peace is threatened or likely.

4:3 "Breach of peace is threatened or likely "

With regard to the fact that **'breach of peace is threatened or likely',** whether there should be an imminent breach of peace is an important question to be discussed. Many judicial decisions show that breach of peace is likely dose not mean that it should be imminent or likely to happen immediately. But if there is a probability or likelyhood of a breach of peace, that would be sufficient in continuing with this kind of application before the court.

6 ibid 4

His Lordship **Gunawardane J.** has beautifully explained how this could be considered as follows in ***Iqbal Vs. Majedudeen***[7]

> **" Breach of the peace does not mean that the breach of the peace would ensue for a certainty; well happen or occur or is sometimes that is, so to speak, on the cards ___"**

These views clearly show the correct way in deciding whether breach of peace is threatened or likely in a given case.

5. PROCEDURE IN A NUTSHELL

I. Information is filed [sec. 66 (1) (a) or sec 66(1) (6)]

II. Notices to respondents to be issued under sec. 66 (1) (b) only

III. Notice to be affixed on the corpus [Sec. 66(3)]

IV. Filing of affidavits by both parties and intervenient parties [sec.66(3),(4)]

V. In a private application, the first party may make application to consider the first information already filed be considered as the affidavit.

VI. Filing of Counter affidavits [Sec. 66 (5)]

VII. - To induce parties to arrive at a settlement

- If settled, settlement to be made accordingly

VIII. If there is no settlement, inquiry to be held.

IX. Order [Sec. 68, 69 & 70, 72, 74]

X. Execution of order [Sec. 76]

6. APPEARANCE [SECTION 66 (8)]

A party to dispute can enter his appearance by an attorney – at – Law or the party himself.

7. DEFAULT PARTY [SECTION 66 (8) (b)]

Where a party fails to appear or having appeared fails to file affidavit and available documents (if any) he shall be deemed to be in default. Then he is not entitled to participate at the inquiry. However, if a default party subsequently make an application with reasons for default, he can be allowed to participate

7 1999(3) Sri.L.R. 213

in the case. In ***Jayaseeli Gunaweera Vs. Puwanes Gunaweera***[8] this has been discussed.

8. SUBSTITUTION OF A PARTY

When it comes to "substitution" of a party in 66 applications, there are no specific provisions in PCPA. But in ***Ganitha Gedara Piyasena and others*** Vs. ***Officer – in – Charge police Station. Katugastota and another*** [9] His Lordship S.V.B. Karalliyadde J held that widow of a deceased party being a person concerned could be substituted.

> **"The widow of the 3rd Respondent is a " person concerned" in the subject matter of the dispute for effectively prevent the breach of the peace in relation to the dispute that has arisen between the 2nd and 3rd Respondents. …… I hold that the petitioner is the fit person to be substituted in the place of deceased 3rd Respondent and direct to substitute the petitioner for the 3rd Respondents ……"**

In this case, the decision of ***Mary Perera Vs. Alexander Perera and others*** [10]which was decided under the provisions of AJL[11] has been followed. Therefore, it is well settled law that substitution of a party in 66 application is permitted.

9. " DISPUTE AFFECTING LAND "

Sec. 75 of the PCPA says the above expression includes any dispute,

I. As to the right to the possession of any land
II. Or part of a land and the building thereon Or the boundaries thereof or
III. As to the right to cultivate any land or part of a land
IV. As to the right to the crops or produce of any land or part of a land.
V. As to any right in the nature of a servitude affecting the land

As per the section, " Land" includes a reference to any building thereon. In ***Kanagasabei Vs. Mylvaganam***[12] it was extensively dealt with this matter.

8 CA(PHC) 147/2014, 12.02.2019
9 CA (PHC) 09/2014, 20.07.2021
10 1983 BALJ vol. (1) part(1) as mentioned in ibid 09.
11 Administration of Justice Law, no 14 of 1973
12 78 NLR 287

This has been further analysed with comparison to the Indian Law in the book of **" New Trends in Sec 66 Applications under the Primary Court's Procedure Act" by D.A.P Weeratna.**[13]

10. DUTY OF THE JUDGE TO INDUCE PARTIES TO ARRIVE AT A SETTLEMENT OF DISPUTE. [SECTION 66 (6)]

Section 66 (6) of the PCPA casts duty on the PCJ[14] to induce parties to arrive at settlement of the dispute. As it was decided in ***Ali Vs Abdeen***[15] this is mandatory and a prerequisite to assume jurisdiction to hold an injury into the matter of possession. Non compliance with this section leads to lack of jurisdiction. But in the case of ***A.W. Mohomad Nizam Vs. S.N. Justin Dias***[16] this view was not followed. There, the court held that if there is a failure to settle the matter or to record it properly the issue of Jurisdiction has to be taken up in the same court and if that is not done, one cannot challenge the jurisdiction over that issue later in the higher Courts. This view has been further accepted in ***Jayantha Gunasekara Vs. Jayatissa Gunasekara*** **and Others.**[17] where the following views held in ***David Appuhamy Vs. Yassassi Thero***[18] have been re-emphasized.

> **" If no objection is taken and the matter is within the plenary Jurisdiction of the court, the court will have the Jurisdiction to proceed with the matter and make a valid order "**

If the parties are willing to settle the dispute, the terms can be entered and signed by the parties. Accordingly the order should be delivered based on the terms of settlement. In such a situation parties cannot canvass it in a revision application.

11. SHOULD ORAL EVIDENCE BE LEAD?

As per section 72 court may permit oral evidence in limited occasions. As mentioned in **Ramalingam Vs. Thangarajah**[19] case. **"adducing evidence by way of affidavits and documents is the rule and oral testimony is an exception to be permitted only in a fit case and not as a matter of course."**

13 D.A.P Weeratna, attorney – at – law has discussed the above in detail in his book titled as above.
14 Primary Court Judge
15 2001 (1) Sri.L.R 413
16 2001 (1) Sri.L.R 413
17 2011(1) Sri.L.R 284
18 1987 (1) Sri . L.R 253
19 1982(2) Sri.L.R.693

12. ORDER AFTER THE INQUIRY

When final order is made after inquiry Sec 72 of the Act has to be followed. As it is mentioned in Sec 75, 68, 69 nature of order is of two ways as;

1. Order regarding possession (Sec 68)
2. Order regarding any other right (Sec 69)

12:1 IDENTITY OF THE CORPUS

In arriving at a decision in a case of this kind, the court should satisfy with the evidence with regard to the identity of the land in dispute. This was observed in the aforesaid **David Appuhamy case**[20]**.** This position has been later followed In the aforesaid **Jayaseeeli Gunaweera case** [21]**.** When the information under 68(1)(*a*) filed, if the sketch of the land is not in a proper way, it is advisable to ask the police to file the correct sketch before proceeding further.

12:2 DECISION UNDER SECTION 68 [POSSESSION]

When the dispute is regarding the possession of any land, sec 68 (1) and sec 68 (3) refer two types of main points. This has been illustrated by His Lordship Sharvananda, J. (as he then was) in **Ramalingam V. Thangarajah**[22] which is considered a landmark judgment in the field, as follows;

> **"In an inquiry into a dispute as to the possession of any land, Where a breach of peace is threatened or is likely under part VII. of the primary Courts procedure Act, the main point for decision is the actual possession of the land on the date of the filing of the information under section 66; but, where forcible dispossession took place within two months before the date on which the said information was filed the main point is actual possession prior to the alleged date of dispossession. Section 68 is only concerned with the determination as to who was in possession of the land or the part on the date of the filing of the information under section 66. It directs the judge to declare that the person who was in such possession was entitled to possession of the land or part there of. Section 68 (3) becomes applicable only if the judge can come to a definite finding that some other party had been forcibly dispossessed within a period**

20 ibid 18
21 ibid 08
22 ibid 19

of two months next proceeding the date on which the information was filed under section 66."

12:2:1 DECISION UNDER SECTION 68 (1)

As it was pointed out in the above mentioned judgment section 68 (1) is only concerned with the determination as to who was in possession of the land on the date of the filing of information under section 66. Here no dispossession but disturbance or interruption could be seen. Then "dispossession within two months time before the date" of filing information has no any application here. This position has been so followed in **Tudor V. Anulawathie and other**[23], **Jayaseeli Gunaweera V. Puwanes Gunaweera**[24] and many other cases.

The nature of the possession was further explained in **Ramalingam Vs. Thangaraja**[25] as follows ;

"Thus, the duty of the judge in proceedings under section 68 is to ascertain which party was or deemed to have been in possession on the relevant date, namely, on the date of the filing of the information under section 66. Under section 68 the judge is bound to maintain the possession of such person even if he be a rank trespasser as against any interference even by the rightful owner. This section entities even a squatter to the protection of the law, unless his possession was acquired within two months of the filing of the information."

First the PCJ has to make a determination as to who is in possession of the land as mentioned above and thereafter make a declaration as to who is entitled to possession of land. This was explained in **David Appuhamy V. Yassassi Thero** [26] Also the views expressed in **Kayas V. Nazeer and Others** [27] on the nature of orders that could be made under section 68 (1) and 68 (3) have to be carefully taken in to consideration.

12:2:2 DECISION UNDER SECTION 68 (3)

Sec. 68 (3) of PCPA refers to a situation where a party who had been in possession of the land had been dispossessed within a period of two months immediately before the date of the information. The aforesaid explanation in **Ramalingam V. Thangarajah**[28] would clearly elaborates how

23 1999 (3) Sri L.R. 235
24 ibid 08
25 ibid 19
26 ibid 18
27 2004 (3) Sri L.R. 202
28 ibid 19

a decision be made in such a situation. **Nimal Karunarathne V. Leelawathi Rathnayake**[29] **and Shanmugasundara Kurukkal Sriskandarajah Kurukkal V. Ramalingham Nadarajah and others**[30] are some of the cases which have followed the above position. When it is mentioned **"forcibly dispossessed"** in section 68 (3), His lordship U.D.Z. Gunawardane J.

In **Iqbal V. Majedudeen and others**[31] held that;

"The words "forcibly dispossessed" in section 68 (3) of the primary courts' procedure Act No 44 of 1979 as amended means that dispossession had taken place against the will of the person entitled to possess and without authority of the law.."

Therefore, in deciding the question of dispossession these views have to be taken in to consideration. Here the order should direct that party dispossessed be restored to possession and prohibit all disturbance of such possession. It should be kept in mind that "dispossession with in two months time" would be considered only under section 68 (3). With regard to the possession it would be in two ways in view of the above judgment namely "actual possession" and "Constructive possession."

12:2:3 ACTUAL POSSESSION

This means when a person has direct physical control over a thing at a given time. Most of the cases actual possession is in dispute.

12:2:4 CONSTRUCTIVE POSSESSION

When a person is not in actual possession he may have both power and intention at a given time to exercise dominion or control over a thing either directly or through another person it is to be understood as "constructive possession". In the aforesaid **Shanmugaraja Kurukal Sriskandarajah Kurukal**[32] case these two situations have been explained with referring the views explained in **Iqbal V. Majedudeen case**[33] Therefore, constructive possession of a person has also been considered under section 68 of PCPA.

12:3 DECISION UNDER SECTION 69 (1) (ANY OTHER RIGHTS)

Section 69 (1) refers a situation where the dispute relates to any right to any land or any part of a land, other than the right to possession of such land

29 CA (PHC) 157/2003, 28.02.2018
30 CA (PHC) H 1/2004, 08.08.2018
31 ibid 7
32 ibid 30
33 ibid 7

or part there of. As mentioned in section 75 disputes as to boundaries, right to cultivate or mostly as to any right in the nature of a servitude affecting the land may be considered under this.

Moreover, there were misunderstandings or misdirection in proving a right in the nature of servitude as to the standard of proof. If the dispute is in relation to use of a right,

(e.g.; use of roadway) whether it should be proved by prescriptive title over 10 years like in a civil case was once an important issue. In **Kandiah Sellappah V. Sinnakkuddy Masilamany**[34] it was held that proof of the use of the footpath for over period of 10 years would be required to get a declaration under sec 69. This is the burden of proof in a civil case. However, His Lordship A.W.A. Salam J in his landmark judgment to the issue, **Ananda Sarath Paranagama V. Dhammadinna Sarath Paranagama and other** [35] has extensively discussed this and held that;

"I am of the view that the decision in kandiah sellappah's case has been entered per incuriam without properly defining or appreciating that all what section 75 mandates is "a dispute in the nature of a servitude" and not a dispute touching upon a servitude per se. There, When the right concerned is in the nature of a servitude relating to a right of a pathway, the period of 10 years plays no important role."

Further His Lordship has elaborated this and held,

"That the right intended to be declared under 69 is definitely not with the servitude per se but a right in the nature of a servitude

Therefore, now it is well settled law that use of a right in the nature of a servitude over a period of time would be sufficient in a 66 application.

As per section 69 (2) the order may declare that the relevant party shall be entitled to any such right and prohibit all disturbance or interference with exercise of such right.

12:3:1 EXISTENCE OF AN ALTERNATIVE ROADWAY

In a dispute that comes under section 66 of PCPA, The court is bound to consider the possession or right which directly affected to the dispute. Therefore granting new relief could not fall within the ambit of the case. In **Abul Hason Mohamed Mubarak V. Officer-in-Charge, Sri Lanka Police,**

34 CA 425/80, 18.3.1981
35 CA (PHC) APN 117/2013, 07.08.2014

Aluthgame[36] the existence of an alternative roadway was not considered and the right over disputed roadway was taken in to consideration.

12:3:2 A MERE USER IS NOT ENTITLED TO EXERCISE THAT RIGHT

As it was pointed in **Ramalingham V. Thangaraja** case, the court has to determine which of the parties has acquired right that comes under section 69 (1) Therefore, a mere user is not entitled for that as it was held in **D.M.Ariyarathne and Another V. D.M.Somaweera and Others**[37]

> **"This Court has to observe that both the Courts have failed to appreciate the fact that the existence of a roadway by itself cannot be any license for others claim an entitlement to use it. Further, even if the Respondents have used it, a mere user by itself would not get an entitlement to use it."**

13. IS " TITLE" TOTALLY IRRELEVANT?

It is a well known fact that question of title is not adjudicated in 66 applications but possession as explained above is considered. But in deciding the question of possession evidence of title could be considered to some extent. In the aforesaid **Shanmuga Sundara Kurrukal SrisKandarajah Kurukul**[38] case this was held as follows ;

> **"In proceedings under this section the Magistrate is not required to investigate the title of the disputed land or the rights of the administrative body. In fact, he can use the evidence of title merely to guide and aid his mind in coming to a decision upon the question of possession, but he is precluded from deciding questions of title alone.."**

In **Ramalingam V. Thangarajah** [39] this position was held in the following manner;

> **"evidence bearing on title can be considered only when the evidence as to possession is clearly balanced and the presumption of possession which flows from title may tilt the balance in favour of the owner and help in deciding the question of possession.."**

36 CA (PHC) 167 / 2013, 2021.07.20
37 CA (PHC) 89 / 2015, 2018.05.25
38 ibid 30
39 ibid 19

Then it is clearly understood that evidence of title could be considered to decide possession in some occasions as pointed out above.

14. INTERIM ORDERS [SECTION. 67(3)]

An interim order can be issued as provided in sec 67(3) and this has been explained in **Hotel Galaxy V. Mercantile Hotel**[40] in the following manner.

> **"A primary court judge has jurisdiction to make an interim order under S. 67 at any time after proceedings are instituted until conclusion of the inquiry and not only at commencement or the inquiry"**

15. TIME LIMITS

As it is commonly known, every inquiry under this should be held in a summary manner and it shall be concluded within three months of commencement. (section 67(1) There are certain time limits given for the steps in PCPA. The question whether these time limits are mandatory or directory is rightly addressed in **Silinona V. Dayalal Silva and Others**[41] as follows:

> **"Statutory time limits within which a party is required to act are mandatory as distinguished from acts required to be done by a court, where the provision of time limits should be considered as being directory. Consequently the petitioner was in default in terms of section 66(8 (b) _ _ _ "**

Accordingly the nature of time limits has to be understood and applied in proceeding with 66 matters.

16. REMOVAL OF OBSTRUCTION CAN BE ORDERED

Although there are no specific provision in PCPA in this regard, jurisdiction to order for removal of obstruction has been recognized in view of the decision in **Tudor V. Anulawathie and others**[42]**.** The same view wasfollowed in **Gandhi V. Mabarak**[43]

40 1987 (1) Sri. L. R (S)
41 1992 (1) Sri. L. R. 195
42 1999 (3) Sri. L. R. 235
43 2003 (3) Sri. L. R. 31

17. ORDER NOT TO AFFECT CIVIL RIGHTS [SECTION 74 (1)]

An order under sec 66 application shall not affect or prejudice any right or interest in civil suit. Also it is a duty of the PCJ to explain the effect of these sections to the relevant parties.

18. DISOBEDIENCE TO AN ORDER [SECTION 73]

Violation or disobedience to an order is an offence punishable under section73. Then separate proceedings should be initiated.

No second case could be filed or entertained for the same matter between the same parties when there is an existing order which is binding on them. This was held in **Rajeswary Sriskantharasa V. Selvam Vijendra Kumar and others**[44].

19. EXCUTION OF ORDERS [SECTION 76]

As per section 76, the fiscal of the court shall execute all orders.

19:1 Execution Of Writ Pending Appeal After Revision Application.

After the order of the revision application in the High Court, mere lodging an appeal against that order does not automatically stay the execution of writ in the Primary Court as per views held in **Jayantha Wickramasingha Gunasekara alias kananke Dhammadinna Vs. Jayatissa Wickramasinghe Gunasekara and Other** [45].

20. IS THE ORDER APPEALABLE ?

Section 74(2) provides that no appeal could be filed against the order made after inquiry. However, revision application would be filed as mentioned in many judicial decisions.

21. INSPECTION

There are no specific provisions in PCPA for a Local Inspection. But the court may visit the scene of the dispute and give an order on the dispute up on the invitation by all the parties. This has been followed in **Tudor Vs Anulawathi**[46] **, Panawala Ralalage Wijethilake Vs Officer in charge, Police Station Kegalle**[47]

44 CA (PHC)/161/2011, 21.02.2018
45 CA (PHC) APN 17/2006, 30.09.2011
46 ibid 42
47 CA (PHC) 249/2003, 08.08.2018

22. PENDENCY OF A CIVIL ACTION

In **Kanagasabai V Mylvaganam**[48] which was decided under early law (AJL) it was observed that mere pendency of a civil case is an irrelevant circumstance. Also In **Priyanthi Perera Samarasinghe V Dharmapala Colin Abeywardana**[49] it was held that

> " **filing of a civil case in the District Court is not a ground to set aside a judgment of a primary court in an application under sec 66 of Primary Court Procedure Act ___"**

23. EXISTENCE OF A SPECIAL REMEDY CREATED BY A STATUTE

When a dispute is to be resolved as specified in a special law, Section 66 has no application in that regard. In ***Mansoor Vs. O.I.C. Avissawella***[50] it was held that eviction of a tenant cultivator from a paddy land could be decided in the manner provided in Agricultural land Law and that dispute does not come under 66 application.

However, the views expressed in ***Kanagalingam Vs. Jegatheswaran and Anotherr***[51] also have to be taken into consideration in this regard. In that case it was considered that there is no provision under Rent Act which gives any special remedy to an evicted tenant other than to recourse to the general law in order to restore the possession. Then the PCJ is vested with limited jurisdiction to decide the issues of possession in order to prevent a breach of peace as held follows in the above case.

> **" If case of rent and ejectment is filed in the Primary Court, the Primary Court has no power to go into the matter, but if the dispute is referred to by way of Section 66 application where the jurisdiction is circumscribed and limited to deciding only the issues of possession in order to prevent a breach of the peace, then such action is within the plenary jurisdiction of the Primary Court. "**

24. APPLICATION OF SECTION 78 [CASUS OMISSUS]

There is no specific provision in part VII of PCPA dealing with clerical mistakes or accidental slip or omission of orders or invoking inherent power in similar matter. Then, as per the sec 78 and sec 189, sec 839 of civil

48 78 NLR 280
49 ibid 5
50 1991(2) Sri.L.R 75
51 2009(1) Sri.L.R 159.

procedure code would be adopted in rectifying the error. This was held in **Batahena Wedaralalage Senarath Tusantha Vs Owitigedara Gamaralalage Senarathne** [52]

However, in view of the decision in **Kayas V. NaZeer and Others**[53] for other matters arising in the inquiry under this part, this section cannot be made use of.

25. CAN COMMISSION TO SURVEYORS BE ISSUED OR REPORT FROM GRAMA NILADHARI BE CALLED?

As set out in part VII of PCPA, the court is not required to issue commissions or call for reports like in a civil case. In **Ramalingham Vs. Thangarajah** the nature of the proceedings was explained in detail and the procedure in part VII of PCPA has to be strictly followed.

26. NO INJUNCTION BE ISSUED BY DISTRICT COURT TO NULLIFY THE ORDER IN 66 APPLICATION

As it was held in the following way in **Lowe V. Dahanayake and another**[54] the District court cannot issue an injunction to invalidate an order in 66 application

> **"The District Court cannot issue an interim injunction which will nullify or invalidate an order made by a primary Court – If the Primary Court had already made an interim/ final order for possession of land."**

27. WHEN THE "DISPUTE" IS AFFECTING A 'STATE LAND'

27:1 WHEN A GOVERNMENT BODY EXERCISES OF STATUARY POWER GIVEN BY A STATUTARY AUTHORITY.

When there is an unlawful possession of a state land or building, various statutes like State Lands (Recovery of possession) Act, Municipal Councils Ordinance, contain provisions to recover the state land without recoursing to the regular procedure. On such an occasion there may be breach of peace caused by the acts of the other party. But that does not come under sec.66 applications held as follows in **The Municipal Council, Batticaloa and another V. M.K.Ratnasingam**[55]

52 CA (PHC) 152/2012, 15.05.2018
53 ibid 27
54 2005 (2) Sri.L.R 413
55 CA (PHC) /287/2005, 08.02.2018

"It is the view of this Court that exercise of statutory power by a statutory authority to evict a person from a state land or a building cannot amount to a dispute affecting land where a breach of peace is threatened or likely, within the meaning of section 66 (1) of the Act"

In view of the above, it is to be understood that a 66 application cannot be maintained against the state in respect of a state land.

27:2 WHEN THE DISPUTE IS BETWEEN PRIVATE PARTIES OTHER THAN THE STATE

When a dispute of this nature arises between private parties, it can be adjudicated under part VII of PCPA. In **Lasanthi Rangana Malalasena and Others V. Mahathelge Sudath Krishan Dias and Others**[56] the dispute was in respect of a State land and both parties were not formally granted any permission to possess the land. However, as per the evidence it was decided that the respondent was in possession of the land in dispute on the relevant date.

28. CONCLUSION

As pointed out in many judicial decisions applying the relevant provisions in part VII of PCPA in a correct way would have a great impact on maintaining law and order in dispute affecting land where breach of peace is threatened or likely. Therefore views expressed by His LordShip Salam J quoting the following great ideas pronounced by His LordShip Boncer CJ more than a century ago is herewith given attention with due respect to both justices.

"In a country like this, any attempt of parties to use force in the maintenance of their rights should be promptly discouraged. Slight brawls readily blossom into riots with grievous hurt and murder as the fruits. It is therefore, all the more necessary that Courts should strict in discountenancing all attempts to use force in the assertion of such civil rights "

BONSER CJ – Perera Vs. Gunathilake (1900 – 4 N. L. R181 at 183)[57]

56 CA (PHC) 49/2012, 2018.02.12
57 ibid 35

FROM JUS IN BELLO TO JUS AD BELLUM: WILL NON-INTERNATIONAL ARMED CONFLICTS EVER END?

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Introduction

International Humanitarian Law which governs the conduct of hostilities, regulates the means and methods of warfare used by parties to an armed conflict with the aim to protect civilians and civilian objects by striking an appropriate balance between legitimate military action and the humanitarian objective of reducing human suffering, particularly among civilians. The principle of distinction requires that the parties to a conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives, and only direct their attacks at combatants and military objectives. Hence, the four Geneva Conventions of 1949 and their two additional protocols of 1977 set out the rules aiming to safeguard the wounded, sick, shipwrecked, prisoners of war and civilians as much as possible from the scourges of war. Though at first instance, it does not seem to matter if the conflict is waged by various States or between various armed groups within a State, it unfortunately, does matter, and the protection offered by international humanitarian law in an international or inter-State armed conflict is much wider than the one offered in a non-international armed conflict, or an armed conflict within a State, although the suffering remains the same or is even more severe in an internal armed conflict. As such, the nature of the conflict does make a difference, and a correct delineation can be of the utmost importance for the people's protection against the barbarism which is still present in armed conflicts. However, "the rules contained in international humanitarian law are equally binding on all parties to conflicts, irrespective of differences in their status, and their share of responsibility for the breakdown of social harmony and for starting the struggle".

In the light of contemporary situation in which majority of armed conflicts are fought out in a single State it is important to identify as to how

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the differentiation between conflicts emerged. A first partial explanation in this regard lies in the horrors of the Second World War, an international armed conflict in which civilians and prisoners of war were frequently mistreated. This led the International Committee of the Red Cross and the States participating at the conference in Geneva in 1949, to seek a general framework which would provide adequate protection for the wounded, sick, shipwrecked, prisoners of war and civilians in an inter-State armed conflict. On the other hand, the four Geneva Conventions contain only one article, Common Article 3, applicable in non-international armed conflicts. Second reason lies in the reluctance of States to adopt a comprehensive framework for non-international armed conflicts since they regard these conflicts as occurring within their domestic jurisdiction and consider rebel factions as mere criminals not deserving the protection of international humanitarian law.

Although international law has strived to mitigate the difference between international and non-international armed conflict by the adoption of human rights law and the recent developments in the international prosecution by the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the adoption and the entry into force of the Rome Statute of the International Criminal Court, until today the difference between an international and a non-international armed conflict remains relevant.[1] In this article, I will first focus on the concept of "armed conflict" and will then shift to classical examples of non-international armed conflicts. This will be followed by an analysis of jus ad bellum and jus in bello in the context of contemporary armed conflicts and a brief analysis of the various complexities in applying International Humanitarian Law rules to non-international armed conflicts.

Armed Conflict

The Geneva Conventions and their Additional Protocols use the terminology of armed conflict instead of war[2] and there are two main reasons for this; firstly, the concept of "armed conflict" more aptly captures the spectrum of violent clashes between organized groups and "war" frequently has the connotation of violence between States or between armed groups

1 The statutes of these tribunals contain provisions criminalizing violations of humanitarian law in a non-international armed conflict, whereas the Geneva Conventions and Additional Protocols do not contain provisions obliging States to penalize certain behavior in non-international armed conflicts. Article 8(2) ICC Statute, Article 3 ICTY Statute, which criminalizes violations of the law & customs of war, includes violations of IHL in non-international armed conflicts.

2 Common Article 2 & 3 Geneva Conventions 1949; article 1 AP I; article 1 AP II

within a State of a very intensive form of hostilities in a collective way on a wide scale. In order to therefore provide protection to victims of armed violence, the restrictive notion of war needs to be abandoned and replaced by a new concept, namely, armed conflict, which includes low-intensity hostilities. Secondly, in the past, the war had to be declared in order to bring into action all the relevant humanitarian rules. This requirement was grossly abused by States which started full-scale hostilities without declaring there existed a state of war between them, leaving the victims of the hostilities without proper protection. For this reason, Common Article 2 of the Geneva Convention 1949 provided for the application of the rules of the conventions in case of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The concept of "armed conflict" thus allows for better protection of victims. Though the notion of armed conflict was adopted in international humanitarian law documents and in resolutions of the United Nations General Assembly of 1949, it is nowhere defined. A good description was offered by the ICTY, which held that: *We find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.*[3]

This description not only covers a wide range of hostilities contained in the notion of "armed conflicts", but also indicates the multi-dimensional aspect of the concept.

Non-international armed conflicts

While international armed conflicts are fought between States (eg, the United States and Iraq) or between a State and an armed group that can be associated with another State (eg, the Taliban in 2001 to Afghanistan or, possibly, Hezbollah in 2006 to Lebanon), non-international armed conflicts

3 *Prosecutor v Dusko Tadic* (1995) IT-94-1-A (ICTY) [69]

are fought between a government and rebels, sometimes with the involvement of foreign governments and rebels (eg, in the Congo), but essentially on the territory of one State (eg, in Sudan, Sri Lanka and Colombia). The conflict in Lebanon between a State and a non-State armed opposition group on the territory of a State that did not take up arms had also raised some challenges in interpreting international law relating to armed conflicts. Non-international armed conflicts today are often characterized by a high mortality among the civilian population and cruel behaviour by the warring factions. However, during non-international armed conflicts, only a small part of the law applies, namely, common Article 3 of the Geneva Conventions of 1949 and Additional Protocol II of 1977.

Common Article 3 is vague since it offers no definition of a non-international armed conflict; it only applies to it. Hence it is not easy to distinguish a non-international armed conflict from an internal disturbance. Common Article 3 applies to "case[s] of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties", but does not refer to any end of the said application, nor does it give any guidance as to when these armed conflicts not of an international character may end. For example, the conflict between the government of Sri Lanka and the LTTE:[4] a peace agreement was signed between the warring parties in 2002, but the fighting did not cease until the full-scale military defeat of the LTTE in May 2009. However, such a non-international version of *debellatio*[5] is rare. In Sierra Leone, two agreements were signed before the Revolutionary United Front was finally defeated and dissolved. It happens that non-international armed conflicts just taper until no warring parties exist anymore. Most often, like the Shining Path in Peru, the armed groups continue to exist on a smaller scale, thereby becoming less of a threat.

Further, States do also often refuse to acknowledge that an armed conflict is waged in their territory since this position is often politically very problematic. As such, States have refused to consider the ongoing conflict in their boundaries as a non-international armed conflict and instead describe the violence as mere internal disturbance, upheavals or riots.

Common Article 3 was a revolution at its inception since, for the first time, international humanitarian law was automatically applicable in a non-international armed conflict, regardless of the recognition of belligerency

4 Liberation Tigers of Tamil Eelam

5 Means defeating, or the act of conquering or subduing

by States, by lowering the intensity which were previously required in case of civil war by international humanitarian law.[6] Common Article 3 has also evolved as one of the key provisions of the Geneva Convention of 1949 and of international humanitarian law in general. The International Court of Justice held that this provision is a minimum yardstick, which applies in international armed conflicts besides the more elaborate rules governing these conflicts and is to be considered as part of the elemental considerations of mankind.[7] Despite its undisputed importance, it only plays a role when an armed conflict is present and because of lack of definition and the lowering of the exigencies previously required, it remains unclear if and when violence in a State can be regarded as a non-international armed conflict.

Practice too has developed criteria to establish the scope of Common Article 3 to differentiate between a non-international armed conflict and internal disturbances and riots. Common Article 3 is not applicable in very low armed hostilities, and the violence has to pass a certain threshold. The intensity of the hostilities has to lead to the deployment of military forces instead of police forces, and the hostilities should have a collective character, putting different armed groups with a minimum of organization, discipline and responsible command in order to be capable of meeting some minimum humanitarian requirements against each other. However, if this is not the case, the application of Common Article 3 will not be completely barred. The scope of application of Common Article 3 needs to be as wide as possible, without however being applicable at *de minimis*[8] situations.[9] Further, Common Article 3 lays down basic requirements, in particular the prescription of humane treatment without discrimination, the protection against torture and other cruel treatment, the prohibition of the taking of hostages and the right to a fair trial. These obligations can also be found in human rights treaties which do apply in peacetime and continue to apply during armed conflicts, although some human rights obligations can be suspended. On the other hand, a criterion to conclude for the application of Common Article 3 can be found

6 Francois Bugnion, 'Jus Ad Bellum, Jus In Bello And Non-international Armed Conflicts' < www.icrc.org/en/doc/assets/files/other/jus_ad_bellum,_jus_in_bello_and_non-international_armed_conflictsang.pdf> accessed on 27 September 2021

7 'Case concerning Military & Paramilitary Activities in & against Nicaragua, 27 June 1986' <https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf> accessed on 27 September 2021

8 Means lacking significance or importance

9 'Abdella case, Inter-American Commission of Human Rights, Case No. 11.137, 18 November 1997' <www.cidh.oas.org/annualrep/97eng/argentina11137.htm> accessed on 27 September 2021

in the suspension of certain human rights; if an internal violent situation has deteriorated as to suspend human rights obligations, one could argue that Common Article 3 should come operative since at least to safeguard some basic humane treatment. Another criterion was offered by ICTY, which stated that "a non-international armed conflict is witnessed by protracted armed violence between different armed forces, a condition which was repeated in the Rome Statute".[10] On the other hand introduction of this criterion cannot be justified because of the following – why would Common Article 3 not apply in short but very intense armed clash between the government and organized armed groups or between such groups? Would then the minimum standards contained in Common Article 3 not apply? Such a finding of course goes against the purpose of the Geneva Conventions of 1949 and the object of Common Article 3 to protect individuals by ensuring a minimum humanitarian law regime in non-international armed conflicts.

The Additional Protocol II is also activated only in the case of a non-international armed conflict waged between the governmental armed forces and an insurgent group or groups. It does not involve the conflicts between insurgent groups or various armed groups within a territory of a single State. According to the Conference of Government Experts, the reason for this was because this situation was too theoretical to occur, though such a conflict was waged in Lebanon. “Armed forces” of the government is generally broadly understood to cover military forces, paramilitary groups, which under national legislation do not fall under armed forces.[11] Secondly, the insurgent has to be under a responsible command, which implies some degree of organization of the insurgent armed group or dissident armed forces. This does not, however, entail that a hierarchical system of military organization similar to that of regular armed forces should be present. It merely means an organization capable on the one hand of planning and carrying out sustained operations, and on the other hand, of imposing discipline in the name of a de facto authority. Thirdly, the insurgents should exercise control over a certain amount of territory of the State to enable them to carry out sustained military operations and to implement this Protocol. These conditions are closely interrelated. If an insurgent group controls a part of the territory of a State, it

10 D. Momtaz, ‘War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court’ <www.cambridge.org/core/journals/yearbook-of-international-humanitarian-law/article/abs/war-crimes-in-noninternational-armed-conflicts-under-the-statute-of-the-international-criminal-court1/F2A3CABC8EB76EE585168108E3089458> accessed on 27 September 2021

11 See Note 6

is likely to be organized and capable of mounting military operations against the government armed forces, which in most cases are superior and better equipped. Non-international armed conflict consisting of guerrilla operations which result only in a temporary occupation of a small village or town without absolute control over another part of the territory do not fall under Additional Protocol II. Therefore, Additional Protocol II requires military operations conceived and planned by organized armed groups.[12] Lastly, the insurgents should be able to implement Additional Protocol II. This is conceived as the fundamental criterion which justifies the other elements of the definition, namely, being under responsible command and in control of a part of the territory concerned.

The second paragraph of Article 1 of Additional Protocol II provides for the exclusion of situations of internal disturbances and tensions from the scope of Additional Protocol II; first, the hostilities regulated by Additional Protocol II are so intense and severe that they never can be regarded as disturbances or tensions; second; internal disturbances and tensions are not considered as armed conflict at all, even in the framework of Common Article 3.

From this, it becomes clear that Additional Protocol II will not necessarily be applicable from the outbreak of hostilities due to the restrictive requirements. As a result, Common Article 3 will regulate the initial stages of the non-international armed conflict. Conversely, the application of Additional Protocol II can cease towards the end of the conflict if one of the requirements cannot be fulfilled anymore. In such case, the final stages of the non-international armed conflict will fall under the scope of Common Article 3.

Analysis of jus ad bellum and jus in bello

Rules of attribution form part of the law of state responsibility and affect both the jus ad bellum[13] and the jus in bello.[14] Jus in bello at least will, in turn, affect the scope of individual criminal responsibility for war crimes under international criminal law. The traditional approach to State responsibility for acts of non-state actors laid out by the International Court of Justice in the judgments[15] delivered in the Nicaragua[16] and Iran Hostage[17] cases are

12 Ibid
13 International rules governing the right to employ force
14 International humanitarian law, international rules governing the way in which armed conflict is waged
15 and delivered in modified form by the Appeal Chamber of ICTY in the Tadic decision
16 See Note 7
17 United States of America v Iran (1980) (ICJ) < www.icj-cij.org/public/files/case-related/64/064-19800524-JUD-01-00-EN.pdf> accessed on 29 September 2021

considered as "secondary rules" because they determine when the acts of non-state actors will be attributed to a State for the purpose of invoking international obligations governing the conduct of that State i.e. once the threshold of responsibility is met, the act of the non-state actor will be considered as an act of the State with all the ensuing legal consequences. There is a substantive difference between legal consequences of one, attributing a non-state actor to a State, two, a failure of that State to meet due diligence obligations. In the second case, the State will have to bear the responsibility for the failure to exercise due diligence rather than for the act itself. In order for an act of a non-state armed group to be attributed to a State, Nicaragua case requires "effective control" wherein even "financing, organizing, training, supplying and equipping" as well as "the selection of its military or paramilitary targets and the planning of the whole of its operations" is not enough to meet the exacting threshold. Tadic case relaxed the standard of attribution specifically for acts by a non-state military organization set in the Nicaragua case, but still required "overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations". Another way in which conduct of non-state actors can be attributed to a State is if it acknowledges and adopts such actions ex-post facto, like the Khomeini government in Iran after Americans were taken hostages by students not affiliated with the State. International Law Commission's Articles on State Responsibility, codifying customary law, recognizes both "control" and "acknowledgment" as bases for state responsibility. Following US acts of self-defense in Afghanistan post-September 11, 2001, the threshold for the secondary rule of attribution to a State for non-state acts has slackened when it comes to the right of self-defense in response to an armed attack by a non-state actor involved in terrorist activities. Some advocate a standard of due diligence to prevent such activities, while others caution that radical changes to the international legal order could result in the very anarchy that terrorists pursue. An alternative means of assessment would therefore be to apply the primary customary rule of "substantial involvement" as enumerated in Article 3(g) of UN General Assembly Resolution 3314 on the definition of aggression. The United Nations Charter limits the use of force to collective security authorized by the Security Council under Chapter VII and self-defense in reaction to an "armed attack" as envisioned by Article 51. While post-September 11th consensus is that the Charter does not require the armed attack to be attributable to a State in order to invoke the right to self-defense,

the problem is that attacking a non-state actor will inevitably require military operations on the sovereign territory of a State. If that State does not give its consent, then any use of force on its territory will be an illegal use of force according to the traditional charter system. The increasing capacity of non-state actors to launch "armed attacks" against a State challenges interpreting Article 51 strictly. If you use the strict interpretation of Article 51, Israel's use of force in Lebanon's territory is problematic if the acts of Hezbollah cannot be attributed to any State or if the acts of Hezbollah are attributable to either Syria or Iran and in both cases, Israel's campaign in Lebanon would only be legal under an expanded interpretation of the right to self-defense.

When one looks at jus in bello, it is divided into two legal regimes; while the first covers international armed conflict between two States, the other covers non-international armed conflict between a State and a non-State actor, or between two or more non-State actors. In this case, a determination of attribution will affect the classification of the conflict e.g. if the acts of Hezbollah are attributable to a State, the conflict is considered as international, and the Geneva Conventions will apply in their entirety. Otherwise, Common Article 3 will be the governing regime. In both cases, the principles of Protocol I to the Geneva Conventions, on the conduct of hostilities, generally apply by nature of their customary law status, even though Israel is not a party to the Protocol. A further complication was the existence of a parallel international armed conflict between Lebanon and Israel. Although Common Article 2 covers the only conflict between High Contracting parties, it also applies when there has been a partial or total occupation of a High Contracting Party. As such, even though Lebanon may not have been engaged in an armed conflict with Israel, the Geneva Conventions apply to any occupation of Southern Lebanon. There is also another argument that the conflict is international in nature, not as a result of any issue of attribution but simply because Common Article 2 applies as soon as Israel attacked Lebanese territory. A significant consequence of attributing Hezbollah acts to a State would be that each party to the conflict would be bound to grant Prisoner of War status to captured enemy combatants who meet the criteria of Article 4(A) (1) or (2) of Geneva Convention III. Israeli soldiers, as members of the regular army, would be automatically entitled to Prisoner of War status under 4(A) (1), while Hezbollah fighters would probably have to meet the conditions of Article 4(A) (2) as members of "other militia" to be granted Prisoner of War status. All Prisoners of War must be released at the end of hostilities

on a non-reciprocal basis. The universal jurisdiction component of the grave breach regime requires that all State parties have an obligation to prosecute or extradite suspected perpetrators, regardless of where the breach took place. Accordingly, the US would have mandatory jurisdiction over an Israeli soldier or Hezbollah fighter visiting New York for alleged grave breaches committed in Lebanon in the case of an international armed conflict. In fact, prior to the 1995 ICTY Tadic Appeal decision on jurisdiction, it was commonly held that war crimes did not exist in non-international armed conflict. This difference is further marked by the fact that the Statute of International Criminal Court lists 26 war crimes for international armed conflict, while only 12 for non-international. It is significant to note that intentionally launching a disproportionate attack attracts individual criminal responsibility only in international armed conflict eg, determination of State attribution for acts committed by Hezbollah would have effects echoing beyond Israel's right to self-defense. It would also influence the extent to which belligerents on both sides of the conflict can be held responsible.

Practical complexities in applying IHL

Some of the principal challenges in applying International Humanitarian Law during contemporary armed conflicts are: In situations where the protection of human dignity depends on the respect of International Humanitarian Law it is necessary for this body of law to provide solutions to the new realities of warfare to ensure that persons affected by armed conflict are provided with protection of their dignity.

The other challenge is the qualification of the "war on terror". During the "Cold War", it was never argued that the "Cold War" was an international armed conflict regulated by International Humanitarian Law even though certain battles during this war of ideologies did amount to actual armed conflicts, eg, international armed conflicts like in Vietnam, Korea and non-international armed conflicts in Latin America. As such, the same approach should be adopted with regard to the qualification of the “war on terror” and each component of this struggle should be analyzed separately to determine whether it amounted to an armed conflict.

Third complexity is when a situation amounts to an armed conflict between two states, it is always regulated by the rules of International Humanitarian Law applicable to international armed conflict. However, if it involves a State and an organized armed group, it is not regulated by these

rules even though it may spread across national borders, and in such case, there is a threshold that must be met for a situation of violence to amount to a non-international armed conflict, and a number of factors need to be taken into account. These include the tactics used such as military operations of a coordinated character would be a factor pointing towards the existence of an armed conflict, the degree of organization and discipline of the parties to the violence, the intensity of the violence in terms of participants and victims and also whether the non-State party has de facto control over certain victims. The duration of the violence is, of course, of less importance.

The next challenge is the protection of persons in situations of armed conflict, which also requires the application of different bodies of international law such as Human Rights Law, even though the application of certain rights may be suspended during an armed conflict. Different issues in different situations are regulated primarily either by International Humanitarian Law or by Human Rights Law. Further, the basis for assessing the lawfulness for the deprivation of liberty in non-international conflicts is regulated exclusively by Human Rights law and national law.

In relation to the application of International Humanitarian Law in non-international armed conflicts, it is now accepted that many of the rules on conduct of hostilities in the treaties regulating international conflicts now form part of customary rules of International Humanitarian Law applicable in non-international conflicts, including the principle of distinction, the definition of military objectives, the prohibition of indiscriminate attacks and the principles of proportionality.

Further, the absence of a mechanism for qualifying a situation as a non-international armed conflict and to trigger the application of International Humanitarian Law in the face of the reluctance of States to accept the existence of a conflict and the minimal training and weak command structures of organized armed groups are another challenge to obtain respect for International Humanitarian Law during times of a non-international armed conflict.

Conclusion

Across many situations, we have seen a shocking lack of respect for the basic principles of international humanitarian law when it comes to the way war is waged and the way weapons are used. We have witnessed military strategies unfolding through which civilians become the primary object of

attack rather than being the primary object of protection. These dynamics and trends continue to have a profound impact on the lives of millions of people, who are exposed daily to death, injury, permanent disability and humiliation resulting from armed violence. The distinction between international and non-international armed conflicts, therefore, is a cardinal principle in International Humanitarian Law since the classification of an armed conflict decides the rules applicable to it. International armed conflicts are better regulated than non-international ones mainly due to the fear of States that a more extensive regulation on non-international armed conflicts could lead to the recognition of insurgents and their cause. Non-international armed conflicts have, however, become the most widespread armed conflicts in the world and are sometimes characterized by the total collapse of State authority. Hence most atrocities and barbarities are committed during non-international armed conflicts, mostly against civilians. Consequently, the summary regulation of non-international armed conflicts is no longer tenable. First, the rise of international human rights instruments, which remain applicable in times of armed conflict, has removed much of the reasoning that insurgents should not receive protection of International Humanitarian Law; if members of such groups enjoy protection by human rights conventions, why not by International Humanitarian Law? Second, most victims of non-international armed conflicts are civilians who do not take part in hostilities. Since International Humanitarian Law is mainly aimed at the protection of persons who do not take part in the hostilities, it can be justified that civilians in non-international armed conflicts are protected less than those in international armed conflicts, certainly when the atrocities suffered are often harsher in the former. Third, the distinction between international and non-international conflicts during the Cold War and after, and the involvement of the United Nations in non-international armed conflicts, the distinction between the two categories has become murky. Therefore, the rules contained in International Humanitarian Law has become equally binding on all parties to conflicts, irrespective of differences in their status and their share of responsibility for the breakdown of social harmony and for starting the struggle.

WHY SPECIAL TREATMENTS FOR JUVENILES IN CONFLICT WITH THE LAW?

with Special Reference to the United Nations Convention on Rights of the Child (CRC)

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Introduction

Juvenile Justice, which is a paramount important part of any legal system, is applicable to three main categories of children.

i. Children in conflict with the law (Juvenile Offenders)
ii. Children who become victims or witnesses of a crime
iii. Children who need care and special protection

This paper mainly focuses on children in conflict with the law, their rights guaranteed under the Convention on the Rights of the Child (CRC) and integration of such rights into the Laws of Sri Lanka, with special reference to the Children and Young Persons Ordinance. A special attention is being given to discuss the rationale behind special laws and procedures for children.

Children in Conflict with the Law; we commonly known as juvenile offenders, have been given special attention with special laws and procedures applicable to them. Article 40 of the United Nations Convention on the Rights of the Child (CRC) requires member countries to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the law.

Convention on the Rights of the Child (CRC)

This convention was adopted by the United Nations in 1989 and came into force in 1990. This significant convention in which, 196 countries are members, guarantees civil, political, economic, social, health and cultural rights of children. The implementation of the convention is monitored by a UN Committee on the Rights of the Child (hereinafter referred as The Committee) who submits reports periodically to the General Assembly of the United Nations. General Comments No. 10 (2007) on Children's Rights on Juvenile Justice, submitted by such committee has been mainly discussed here

as a guideline given to state parties in implementation of the provisions of the CRC.

Sri Lanka has ratified the UN Child Rights Convention in 1991 and as a follow up to the UN Convention; Sri Lanka formulated the Children's Charter in 1992.[1]

Definition of the 'Child'

Article 1 of the CRC defines the 'Child' as every human being below the age of **eighteen (18)** years unless under the law applicable to the child, majority is attained earlier.

In terms of the Children and Yong Persons Ordinance, 'child' is defined as a person under the age of 14 years and a 'young person' is defined as a person who has attained the age of 14 years and is under the age of 16 years. The writer understood that the steps are being taken by the relevant authorities to amend this definition in line with the definition in CRC, which is a much needed amendment.

Best Interest of the Child

The underlying principle of the CRC or any other legislation in respect of juvenile justice is the 'the best interest of the child'. Article 3 (1) of the CRC sets out that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration. This is the golden thread running through the legislations on Juvenile justice in Sri Lanka as well.

Why Special Laws for Children?

International studies show that the children in these adolescent years are undergoing dramatic hormonal changes, making them very impulsive and vulnerable. They tend to take risks and don't possess required capacity to think of consequences of their acts. They are very concerned about their peers and could be easily carried away by peer pressure. Scientific studies have revealed that brain development process is slower than the physical development of adolescents and specially the areas which is responsible for reasoning and logical thinking are not fully develop until they reach the adulthood.

1 http://www.childwomenmin.gov.lk/institutes/dep-probation-and-child-care-services/child-rights/crc

The Committee states in its General Comment No. 10 (2007), that the children differ from adults in their physical and physiological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children.[2] Such special attention based on the best interest of the child should be reflected in every stages of juvenile justice namely, investigation, pre-trial stages, trail and post trail stages. The judicial officers have a very prominent role to play in this regard from the moment a child in conflict with the law is brought before the justice system.

Article 37 and 40 of the CRC outline the general principles and procedures to be followed by justice systems in respect of children in conflict with the law.

Minimum Age of Criminal Responsibility (MACR)

Article 40(3) of the CRC requires state parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law, which is known as Minimum Age of Criminal Responsibility (MACR). Rationale behind this requirement is to give a special consideration to the emotional, mental and intellectual immaturity of younger children.

Section 75 of the Penal Code says nothing is an offence which is done by a child under eight years of age. Section 76 further states that nothing is an offence which is done by a child above eight years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.

The Committee has observed that certain state parties have set two MACR and says this is often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices. The committee strongly recommends that the state parties set a MACR that does not allow, by way of exception, the use of a lower age. Internationally accepted MACR is 12 years but parties are encouraged to increase it to a higher level.[3]

However, there are some criticisms that the raising of MARC would encourage the exploitation of children by adult criminals.

2 General Comment No.10(2007), pg 5, Committee on the Rights of the Child, 44th Session, Geneva, 15 January – 2 February 2007

3 Ibid page 11

Deprivation of Liberty of the Child

Art 37(b) of CRC stipulates that no child shall be deprived of his liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. The Committee explains that the use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his reintegration in society.

The matter of deprivation of liberty of the child arises in two stages of juvenile justice. That is Pre- trial detention and post -trial incarceration.

Separate Place of Safety

Article 37 (c) of the CRC stresses that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, taking into account the needs according to his age. It further says, they shall be separated from adults, unless it is considered in the child's best interest not to do so.

The Committee mentions in its general comment that the placement of children in adult's prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate to the society. The Committee's view is that the exception mentioned in article 37(c) should be interpreted narrowly and child's best interest does not mean for the convenience of the state parties.[4]

The Committee recommends that an opportunity should be given to children who are deprived of their liberty to visit his home/family and the same provides in the article 37(c) of CRC.[5] This is a very progressive approach to be incorporated into the domestic legislations and it will help to reduce the rate of escaping children from place of safety.

Special Settings and Simplicity of Procedures

Article 40(3) of the CRC requires state parties to promote the establishment of not only special laws, but also special procedures for children alleged or recognized as having infringed the penal law. Article 14 of the Beijing Rules[6] provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to

4 Ibid page 21
5 Ibid page 23
6 United Nations Minimum Rules for the Administration of Juvenile Justice

express himself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices.

Privacy of the Child

According to article 40(2)(b)(vii) of the CRC, the right of a child to have his privacy should be fully respected during all stages of the proceedings. The Committee says that all stages of the proceedings includes from the initial contact with the law enforcement up until the final decision by a competent authority. It means to avoid harm caused by undue publicity or by the process of labeling. It further says, no information shall be published that may lead to the identification of the child offender because of its effect of stigmatization and possible impact on his ability to have access to education, work, housing or to be safe. Public hearing in Juvenile justice should only be possible in well-defined cases and at the written decision of the court. The committee recommends that the court and other hearings of a child in conflict with the law to be conducted behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law.[7]

Previous Records

In conformity with the United Nations Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) the Committee recommends that the records of child offenders should not be used in adult proceedings in subsequent cases involving the same offender or to enhance future sentencing with a view to avoid stigmatization and/or prejudgments. The committee also recommends introducing rules which would allow for an automatic removal from the criminal records of the name of the child who committed an offence reaching the age of 18, or for certain limited serious offences where removal is possible at the request of the child, if necessary under certain condition (eg. post good behavior)[8]

Parental support

The committee recommends that parents or legal guardians of juvenile should also be present at the proceedings because they can provide general psychological and emotional assistance to the child. It doesn't mean that they can act on behalf of the child or be involved in decision making.[9]

7 Ibid page 18-19
8 Ibid page 19
9 Ibid page 16

A Fair Trial

Article 40(2) of CRC guarantees a fair trial in respect of children in conflict with the law. Same principle has been recognized by article 14 of the International Convention on Civil and Political Rights (ICCPR) as well.

Presumption of Innocence

Though the presumption of innocence is a basic principle in most justice systems, this has a significant relevance to children in conflict with the law. Article 40(2)(b)(i) of the CRC provides that every child alleged of having infringed the penal law should be guaranteed with the presumption of innocence until proven guilty according to the law. This means a child should not be pre-judged. The Committee says due to the lack of understanding of the process, immaturity, fear or other reasons, the child may behave in a suspicious manner, but the authorities must not assume that the child is guilty without proof of guilt beyond reasonable doubt.[10]

Prompt and Direct Information of the Charge

Children who are brought before the court should be informed of the charge promptly in a simple language. Article 40(2) (b) (ii) of CRC states that they should be informed promptly and directly of the charges against them, if appropriate, through their parents or legal guardians and or have legal or other appropriate assistance in the preparation and presentation of their defense. This means the child should be informed of the charge against him in a simple language which he could understand. The Committee reiterates the fact that though it may require a presentation of the information in a foreign language and also a 'translation' of the formal legal jargon often used in criminal/juvenile charges into a language that the child can understand. Further, providing the child with an official document is not enough and an oral explanation may often be necessary. The committee stress that the authorities should never leave this to the legal guardian or parents or child's legal assistance. Interpreters in juvenile court have to have a special training as children's understanding of the language is different from adults.[11]

Freedom from Compulsory Self-incrimination

In accordance with article 14(3) (g) of the ICCPR, article 40(2)(b)(iv) of CRC stipulates that a child should not be compelled to give testimony

10 Ibid page 14
11 Ibid page 15

or confess or acknowledge guilt. The Committee explains that the term 'compelled' should be interpreted in a broad manner and not be limited to physical force or other clear violation of human rights. The age of the child, the child's development, the length of interrogation, the child's lack of understanding, the fear of unknown consequences or a suggested possibility of imprisonment may lead him to a confession that is not true. That may become even more likely if rewards are promised such as 'you can go home as soon as you have given us the true story' or lighter sanctions or released are promise.[12] Therefore, it is the duty of judicial officers to be extra careful in considering the admission of guilt of children in evidence.

Speedy Disposal

Article 40 (2)(b)(iii) states that every child who is in conflict with the law, has a right to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law.

The Committee reports that internationally there is a consensus that for children in conflict with the law, the time between the commission of the offence and the final response to the act should be as short as possible and otherwise the response will lose its desired positive impact. The Committee recommends that state parties should set a time limit for the period between the commission of the offence and the completion for investigations, bringing the charges and final adjudication, which should be much shorter than for adult offenders.

The committee is conscious of the practice of adjourning court hearings, often more than once and urges the states parties to introduce the legal provisions necessary to ensure that the court makes a final decision on the charges not later than six months after they have been presented. [13]

This is another positive guideline to be incorporated into national legislations.

Punishment Options for Children who are in Conflict with the Law

The Committee recommends that the state parties should adopt a juvenile justice system which promotes the use of alternative measures such as diversion and restorative justice so that children in conflict with the law could be responded in an effective manner, serving not only the best interest of these children, but also the short and long-term interest of the society at large.[14]

12 Ibid page 17
13 Ibid page 22
14 Ibid page 3

Death Penalty and Life Imprisonment

The death penalty and life sentence without parole are explicitly prohibited under Article 37(a) of CRC. It says no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age.

However, the Committee recommends that the state parties should abolish any form of life imprisonment for children.

Other Sentencing Options

Section 40(1) of the CRC recognizes the principles of reintegration of the children who have infringed the penal law, to the society. It says, state parties should recognize the right of every child alleged as accused of, or recognized as having infringed the penal law, to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account that child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in the society.

It is one of the characteristics of a good juvenile justice system to have a wide range of sentencing options for children who found guilty of offences, which ultimately promote a constructive role in the society of such juveniles.

Though the rehabilitation is the primary concern in punishing the children in conflict with the law, imposing suspended imprisonment terms, ordering community services, fine or warning alone will not rehabilitate them. They need to be guided, monitored and counseled. The courts could often combine other punishment options with Probation Orders. Probation Officers have to play a leading role to make the rehabilitation a reality. Majority of children in conflict with the law are coming from under privileged families who live in areas where the crime rate is very high. In despite of whatever the orders issue from courts, such juveniles return to the same environment. Unless there are good monitoring and guidance programs are in place for them, the primary purpose of all these sound legal principles will be futile. Therefore, it is a very good investment by states to provide expert human resources in this particular filed.

The Committee states in the general comment that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and the needs of the child, as well as to the various and particularly long term needs of the society. In cases of severe offences by children , measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his reintegration.[15]

Sentencing options for children in conflict with the law, which promotes social and educational measures, should be given prominence while deprivation of liberty should be utilized as the last resort.

Conclusion

Every human being has inalienable rights and inherent dignity which should be respected and protected by everyone. Children are a very important component of the human family and their rights should be protected in an equal manner. As indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". An effective juvenile justice system is an indication of a society where the human rights of children are respected and protected.

Many important guidelines provided by the CRC have been incorporated into the national legal system in Sri Lanka, in respect of children in conflict with the law. Apart from the integration of certain suggested provisions, judicial activism, within the framework of the law, could be utilized to fill the gap between the internationally accepted system and the existing domestic juvenile justice system.

It is not an easy task to strike a balance between the leniency shown to the children in conflict with the law and rights of victims. With a deep understanding of the rationale behind such special treatment for children, one could realize that they need to be treated differently. Children are the backbone of any society. They are the future stake holders of the society. All the legal provisions and procedures discussed above are focusing on their best interest and reintegrating them into the society as good citizens.

15 Ibid page 20

EVIDENCE OF AN ACCOMPLICE; A BRIEF ANALYSIS OF SRI LANKAN AND INDIAN LEGAL JURISPRUDENCE

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Abstract

The word "Accomplice" has not been defined anywhere in the Evidence Ordinance of Sri Lanka[1] or in the Evidence Act[2] of India. Hence; it is complicated and confused to identify and determine "who really is an accomplice?" Diverse interpretations that have been given to the word "Accomplice" can be identified in numerous legal scripts and judicial interpretations. Various guidelines and different tests have been introduced by jurists to identify, who should be treated as an accomplice. Admissibility and credibility of the evidence of an accomplice in Sri Lanka and India will be critically examined through this article.

Introduction

"Particeps Criminis" is one who takes part in a crime. Although some writers have tried to differentiate; Partner in a crime, helper, approver or an accomplice can be considered as synonyms. Despite diverse meanings[3] for the word "Accomplice", it is in simplicity a participant in a crime. Degree of participation differs and consequently the liability may be different.

1 Evidence Ordinance No. 14 of 1895 as amended by Ordinance and Act Numbers 15 of 1904, 16 of 1925, 23 of 1927, 18 of 1933, 01 of 1946, 03 of 1961, 10 of 1988, 33 of 1998, 32 of 1999, 29 of 2005 and 06 of 2021

2 Act No. 01 of 1872

3 * A person who helps another to commit a crime or to do something wrong – Oxford Dictionary- https://www.oxfordlearnersdictionaries.com/definition/american_english/accomplice,accessed on 15/06/2021

* A person who helps someone else to commit a crime or to do something morally wrong- Cambridge Dictionary -https://dictionary.cambridge.org/dictionary/english/accomplice accessed on 15/06/2021

* A party who agrees to a crime as the main criminal or in accessory- Black's law Dictionary- https://thelawdictionary.org/accomplice/#:~:text=Black's%20Law%20Dictionary)-,What%20is%20ACCOMPLICE%3F,main%20criminal%20or%20in%20accessory accessed on 15/06/2021

Evidentiary value of the testimony of an accomplice should be determined as per the prevailing legal provisions of respective country.

E.R.S.R. Coomarasamy[4], suggests interpretation of "Wharton" as appropriate for Sri Lanka. "Wharton", in his textbook on Evidence defines accomplice as follows;

> *"An accomplice is a person who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime. The term cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or is morally delinquent or who was an admitted participant in a related but distinct offence. To constitute one an accomplice, he must perform some act or take some part in the commission of the crime, or owe some duty to the person in danger that makes it incumbent on him to prevent its commission."*

According to the above explanation, it is understood that an accomplice is a person who had contributed to commit a crime. However; a person who had neglected duty cast upon him/her to protect the victim, has also been included into that definition. This creates a sort of controversy. The definition given for the "accomplice" in the Indian case of *Chetumal Rekumal v. Emperor*[5] had cross fertilized Sri Lankan law and was adopted in approval in the case of *King v. Pieris Appuhamy* [6]

> *"An accomplice is one who is a guilty associate in crime or who sustains such relation to the criminal act that he could be charged jointly with the accused. It is admittedly, not every participation in a crime which makes a party an accomplice in it so as to require his testimony to be confirmed"*

In the case of *Queen v. Liyanage and Others*[7], it was held as follows;

> *"In the case of fellow conspirators or accomplices the established practice, virtually equivalent to a rule of law, requires independent corroboration of their evidence, in material particulars. What is required is some additional evidence, direct or circumstantial, rendering it probable that the accomplice's story is true and reasonably safe to act upon, and connecting or tending to connect the particular defendant with the offence. The degree of suspicion attaching to an accomplice's evidence varies according to the extent and nature of his complicity."*

4 The law of Evidence, A Stamford lake publication reprint, 2012
5 1934 AIR 183
6 1942 (43 NLR 412)
7 (1962) (67 NLR 193)

Every person associated with a crime by doing a precise act, himself could not be treated as an accomplice. There should be a sharing of common intention and/or knowingly contribute to commit the crime in conjunction with the main culprit[8]. Mere presence of a person at the scene of a crime would not suffice. This concept was initially introduced by *King v. Pieris Appuhamy*[9] and it was followed in *The Queen v. Ariyawantha*[10] and its progeny[11].

As indicated above, it is apparent that deciding whether a person is an accomplice predominantly depends on the magnitude of guilty association of such person to the alleged crime. Henceforth; there can be identified various degrees of guilty participation of a person in committing a crime.

- *Aid, Abet or conspire to commit the offence, however no involvement when the crime is committed.*
- *Help/assist the main culprit to commit the crime. (prior to the commission of crime and not while committing the crime)*
- *Participate/ associate/ involve completely (with common intention) in committing the crime.*
- *Participate/ associate/ involve partially or moderately in committing the crime.*
- *Present at or closer to the crime scene along with the offender/s when the crime is taken place, but no involvement in committing the crime or does not share common intention.*
- *Help/assist the main culprit after committing the crime.*

Despite certain criticisms as to the technicality, there observed many types of accused that can be categorized as accomplices. It is in proportion to the contribution, guilty association and participation of such person for committing the alleged crime.

Ex:

- Person who was convicted for the original offence (same offence as is against the main culprit) on his/her own plea of guilt.

8 Wimalaratne Silva and another Vs. A.G. 2008 (1) SLR 103

9 1942 (*43 NLR 412)"A witness who merely assisted in the disposal of the dead body, but who did not take part in the perpetration of the crime is not an accomplice".*

10 1957 (*59 NLR 241*)

11 Sajeewa alias Ukkuwa and others Vs. The A.G. (Hokandara Case) 2004 (2) SLR 263 (The question was whether "Jonty" could be treated as an accomplice. "Jonty" had seen the rape committed by 1st, 2nd and 3rd appellants. But, he was only present at the scene of crime and had no participation in committing the crime. Hence, he was treated as a general witness rather than an accomplice)

- Person who was convicted for a lesser offence on his/her own plea of guilt.
- Totally or partially pardoned as per sec.256 and sec. 257 of the Code of Criminal Procedure Act, Sri Lanka/ Sec. 306 and 307 of the Code of Criminal Procedure Act, India.
- Accused who was discharged under sec. 186 of the Code of Criminal Procedure Act, Sri Lanka.

Though one can argue as all the above categories of persons must be treated as accomplices, such an argument will be a one of highly technical nature. Prosecution should initially decide, whether there is a necessity of the evidence of an accomplice to prove the case. It is to be vigilantly decided at the inception of the case. Once the Co-accused is convicted (for the main crime or ancillary offence) or else discharged under sec. 186 of the code of criminal procedure Act, such person will not have enthusiasm and interest to give evidence on behalf of the prosecution.

Further; there exists a risk of narrating deliberate false in his/her testimony; as per the interest *(against the accused to take revenge or in favor of the accused to get him/her acquitted)* of the witness towards the case. Perjury charges against the accomplice would not render justice because; the main culprit will be acquitted based on the inconsistent evidence of the accomplice. Hence; those who were proffered official pardons as provided in sec. 256 and sec. 257 of the Code of Criminal Procedure Act, Sri Lanka (corresponding Sec. 306 and 307 of the Code of Criminal Procedure Act, India) are recurrently deemed as accomplices.

Admissibility

It is required first, to discuss about the admissibility of the evidence of an accomplice. Sec. 118 of the Evidence Ordinance of Sri Lanka (Ideally same as the Evidence Act of India) provides as to, who may testify as competent witnesses.

> ***"118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."***

Accordingly; sec.118 of the Evidence Ordinance does not explicitly preclude the admissibility of the evidence of an accomplice. Furthermore; there seem precise legal provisions in the evidence ordinance of Sri Lanka concerning the admissibility of the evidence of an accomplice.

Section 133 of the Evidence Ordinance of Sri Lanka (ideally similar legal provision in the Indian evidence Act) provides as follows;

> ***"133. An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."***

Apparently; Judge can base his/her conviction on the uncorroborated testimony of an accomplice. This legal provision, if considered alone provides a liberal interpretation. It imposes no restriction as to the admissibility of the evidence of an accomplice. However; there seems another provision in the Evidence Ordinance of Sri Lanka which could be considered as somewhat contradictory and restraining the liberal interpretation of sec.133.

Section 114 (b) of the Evidence Ordinance of Sri Lanka (similar legal provision is available in the Indian evidence Act) provides as follows;

> ***"114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.***
>
> ***(a)……***
>
> ***(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;***
>
> ***(c) ……."***

As per the above rebuttable legal presumption, it is to be presumed that uncorroborated testimony of an accomplice in material particulars is unworthy of credit. This legal provision on the face of it seems contradictory, not only to section 133 but also to section 134 of the Evidence Ordinance. Section 134 of the Evidence Ordinance provides as follows;

> ***"No particular number of witnesses shall in any case be required for the proof of any fact"***

It is obvious that; sec.134 again focuses our view towards section 133 of the Evidence Ordinance rather than 114(b) of the evidence ordinance.

However; sec.114 (b) can be rebutted and hence it is theoretically not erroneous to rely only on the evidence of an accomplice. When the evidence of accomplice is concerned, there can be identified three schools of thoughts.

- It is wrong and unsafe to rely on the evidence of an accomplice.
- It is correct to rely on the evidence of an accomplice if it is corroborated.
- Correctness of relying on the evidence and corroboration of the evidence of an accomplice should be decided objectively considering each individual case (as per the admissibility and weight that can be placed on the evidence of the accomplice.)

It is no doubt that, deciding whether a witness is an accomplice or not would be an intricate task. However; it is erroneous to follow the first view above; because there are expressed legal provisions as to the admissibility of the evidence of an accomplice. Moreover; the second view too must be cautiously assessed because, the degree of corroboration matters. Some judicial decisions[12] laid down the supposition that, there is no need to corroborate the evidence of an accomplice. However; it is not considered as an absolute rule.

There might be inherent deficiencies in admitting and evaluating the evidence of an accomplice. Few jurists categorize it as totally bias and interested evidence. Accomplice's sanctuary will be guaranteed consequent to the degree of satisfaction he/she provides to the prosecution. Accomplice gives evidence in return of the pledge for lenient treatment. However, this does not necessarily mean that, the evidence given by an accomplice as a whole should be corroborated. If so; there will be no use of accomplice's evidence. Obviously, in such a situation, sufficient evidence would be available to prove the case, even without the evidence of an accomplice. Hence; it is incorrect to state that, everything uttered by an accomplice must be corroborated through independent evidence[13]. Furthermore; the requirement of corroboration is totally unfair in cases of organized crimes where, the testimony of the accomplice is crucial.

Co-Accused

Co- accused is another concept that should be taken into consideration. Section 30 of the Evidence Ordinance of Sri Lanka provides as follows;

12 R. Vs Atwood and Robbins (1787) 1 Leach 464 , 168 ER 334
13 P. Saravanamuttu Vs. R.A. De Mel (1948) 49 N L.R 529. 560

"30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court shall not take into consideration such confession as against such other person.

Explanation – "Offence" as used in this section includes the abetment of or attempt to commit the offence.

It is clear that, the confession of one accused implicating another to the crime cannot be used against such other person. However; it is to be noted that, this provision is applicable only for a ***confession*** of a co-accused.

This legal notion was critically evaluated in *Regina Vs. Hayter*[14] by the House of Lords. "Bristow" was the first accused of that case and she wanted to consign a contract to kill her own husband. "Ryan" was the 3rd accused and he was the killer. "Hayter" (appellant of the case) was the second accused who hired and paid the 3rd accused on behalf of the first accused. Case against the third accused was entirely based on a confession he allegedly made to his girlfriend. Whether such confession is admissible against the 2nd accused was one of the major concerns in that case. Trial judge had directed the jury not to use the confessionary evidence of the third accused against the second accused. Further; the jury was directed first to consider the liability of the first and third accused and thereafter to consider the liability of the second accused only upon the conviction of any one or both the first and third accused. The majority decision of the House of Lords was that, no misdirection of the jury was taken place and hence the appeal should be dismissed.

Failure of the trial judge to direct the jury as to the necessity of corroboration of the evidence of an accomplice was considered as a fatal defect and serious misdirection in *Fernando Vs. The Republic of Sri Lanka*[15]and its progeny. However; a contrary view, to apply "Either-or" standard rather than completely vitiate the conviction (upon failure of the judge to properly direct the jury) was recommended in certain U.S.A. cases[16]. Either ***corroboration*** of the evidence of an accomplice or ***caution of the judge to the jury*** was expected to convict an accused based on the testimony of an accomplice[17].

14 2005UKHL 6

15 1980 (2) SLR 79

16 United States Vs. Lee 506 F.2d 111(D.C.CIR.1974), United States Vs. Williams 463 F.2d 393(10th Cir.1972)

17 Corroboration, caution of the trial judge to the jury and admissibility of the evidence of an accomplice was discussed in detail in the case of Jayasinghege Wimalaratne Alias Wimale Mudalali and others Vs. The A.G. (Shyama Dedigama Case) 1997 (1) SLR 309

When the Sri Lankan law is scrutinized, there can be identified another provision in the Evidence Ordinance pertaining to the evidence of a conspirer.

Section 10 of the Evidence Ordinance is a follows:

> *"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."*[18]

As per the above legal provision, such evidence of a conspirer would be considered as admissible and relevant.

Momentary look at the legal provisions and judicial interpretations would visibly indicate that, there exists *prima facie* confusion over several legal provisions. There seem dissimilar interpretations in different jurisdictions as well. It is accordingly comprehensible the fact that, harmonious interpretation must be offered to the interconnected and ambiguous legal provisions.

Credibility

Credibility of the evidence of an accomplice is often subjected to certain inherent deficiencies. Accomplice has already become unfaithful and disloyal to the own colleagues or partners of the crime. Hence; it is not prudent to believe accomplice's evidence due to the possibility of deceiving during the judicial process as well. Source of evidence (Being an accomplice) itself is culpable due to the guilty participation of the crime and hence, his/her version in evidence might be treated as unreliable.

Furthermore; accomplice is considered as an interested witness. He/she needs to get rid of his/her liability while proving the culpability of the other accused in the dock. Hence; there is a great possibility for an accomplice to misrepresent or exaggerate while giving evidence. Truthfulness of the evidence is doubtful, because the evidence is given by the accomplice to gain his/her own liberty. Immunity will not be proffered if the prosecution is not

18 Peiris Vs. Silva 17 NLR 139, The king Vs. Vavuniyam 48 NLR 183, Queen Vs. Liyanage and others 67 NLR 194 are some of the cases related to section 10 of the evidence ordinance

satisfied with the evidence of the accomplice. Hence, an accomplice has a grave impetus to lie.

Every competent witness is not a reliable witness. Some writers have recommended that; direct/ circumstantial evidence to corroborate the material particulars of the testimony of an accomplice, must be from an independent source. Evaluation of the evidence of an accomplice must be done cautiously, in a sound, comprehensive and reasonable manner with a well trained judicial mind. Accused who has pleaded guilty, acquitted accused or an accused whose case is concluded or discontinued may be technically deemed as accomplices. However, there is an intrinsic risk of such accused giving false or contradictory evidence since he/she has already undergone punishment. Henceforth; prosecution rarely relies on the evidence of a co-accused who had already been punished.

However; the credibility of the testimony of an accomplice can be tested through the cross examination. Whether the witness is a truthful, disinterested, genuine and trustworthy witness could be ascertained via cross examination. Only the accused and the accomplice might know the reality of the crime. Even if the evidence of an accomplice is corroborated, reasonable doubt might be raised when examining the evidence of the perpetrator[19].

Indian Perspective

In cases of ***Rameshwar Vs. State of Rajasthan***[20] and ***Sarwan Singh Rattan Singh Vs. State of Punjab***[21] while accepting the admissibility of the evidence of an accomplice; it was emphasized that such evidence must be corroborated in material particulars through the evidence of an independent witness. In ***K.Hashim Vs. State of T.N.***[22] it was held that, the provisions in illustration (b) of section 114 of the evidence Act- India, provides the rule of prudence cautioning the court not to believe the evidence of an accomplice unless corroborated.

"Corroboration" is not to give mere evidence to prove other evidence or to corroborate every material circumstance through an independent source. Rather; it is to provide some additional evidence rendering it probable and reasonable to admit the version of the accomplice and to act upon such evidence. However; it was further mentioned in the above case that, rejection

19 Karunanayake Vs. Karunasiri Perera 1986 (2) SLR 27
20 AIR 1952 SC 54
21 AIR 1957 SC 637
22 AIR 2005 SC 128

of the uncorroborated evidence of an accomplice should not be considered as an absolute rule. Hence; the conviction of an accused can sometimes be based on credible and cogent testimony of an accomplice itself even though such evidence is uncorroborated.

Some writers had tried to differentiate "accomplice", "approver" and "co-accused". Tosani Lal[23] states that, although an approver is constantly considered as an accomplice; it is not essentially so treated *vice versa*. His contention is that, in order to become an approver; accomplice or co-accused need to reveal the truth or confess in exchange to receive concession from charges against such person. He further emphasizes the necessity to differentiate the confession of a co-accused and the testimony of an accomplice or approver.

The legal notion introduced by the case of ***Laxmipat Choraria Vs. State of Maharashtra***[24] and reiterated in ***Chandran Vs. State of Kerala***[25] is that; evidence of a person who has not been made a suspect in a case (even though he could have been named and dealt with as other accused) can still be considered as reliable. This legal position was followed long ago in Sri Lanka, in the case of ***King*** Vs. ***Walter***[26]where evidence of an accomplice who had not been convicted, acquitted or pardoned was still considered as admissible in law. It was further emphasized that, the uncorroborated testimony of an accomplice itself would not negate its validity unless, court decides on the circumstances of the case that it is unsafe or unsuitable to convict based on the tainted evidence.

In the case of ***Mrinal Das & Others Vs. State Of Tripura***[27], it was deeply analyzed the provisions of Indian Evidence Act and observed as follows;

> *"It is clear that once the evidence of the approver is held to be trustworthy, it must be shown that the story given by him so far as an accused is concerned, must implicate him in such manner as to give rise to a conclusion of guilt beyond reasonable doubt. Insistence upon corroboration is based on the rule of caution and is not merely a rule of law. Corroboration need not be in the form of ocular testimony of witnesses and may even be in the form of circumstantial evidence."*

23 https://lawtimesjournal.in/difference-between-accomplice-approver-and-c--accused/ accessed on 14/09/2021.
24 AIR 1968 SC 938
25 2011 5 SCC 161
26 5 NLR 375
27 Criminal Appeal No.1994 of 2009 (Decided on 5 September, 2011, By P. Sathasivam j.and H.L. Gokhale J.)

Accordingly; it is obvious that, the corroboration of the entire evidence of an accomplice is essentially not a *sine qua non* for the admission of such evidence. "Corroboration" has been treated in some cases as a rule of prudence/ caution while in certain other cases as a rule of law[28].

Brief analysis of the Sri Lankan Case Law

Whether a witness should be treated as an "accomplice" or not is to be appropriately decided. Guilty association and/or culpability of such person to the original crime must be the foremost consideration. In the case of ***Galagamage Indrawansa Kumarasiri and others* Vs. *W.M.M. Kumarihami and Hon. A.G.***[29], the above concept was extensively discussed. Supreme Court in ***Prabath de Seram* Vs. *Republic of Sri Lanka*** held that, the principal witnesses of the case were not accomplices. Thereby it was again reiterated the necessity of carefully deciding whether someone can be considered as an accomplice or otherwise; drawing attention to the extent of involvement of such person to the main crime. Mere suspicion of someone being an accomplice would not suffice. There must be a confession or similar unique evidence, to treat a person as an accomplice.

A.G.* Vs. *D. Senevirathna[30] is one of the important cases on the subject of accomplices where Weeraratne J, Sharvananda J and Soza J were the majority while Wanasundara J and Ratwatte J dissented. Description as how to decide whether a person could be treated as an accomplice was pronounced by Soza J.

"Murder" and "robbery" charges were framed against the accused. He was found guilty for all three charges in the High Court, as per the unanimous verdict of the Jury. The Court of Appeal however, affirmed only the conviction for robbery and acquitted the accused from two murder charges. Special leave to appeal was granted by Supreme Court. This case was primarily based on circumstantial evidence. Whether the evidence of "Arnolis" and "Rasheed" could be treated as evidence of accomplices? was one of the major questions raised in the case. Soza J. stated that, there can be formulated three main definitions of accomplice, when perusing cases.

28 Rule of law mentioned here does not give general meaning of supremacy of the law over other institutions and individuals. Rather, it's meaning here is legal rule or provision of law.

29 S.C. TAB Appeal No.02/2012, Decided on 02/04/2014 *"Therefore, this submission of the defense has no legal basis and is not tenable in law. On the facts of this case, the Court does not find evidence to reasonably conclude that the witnesses were accomplices. Therefore, it is held that their testimonial creditworthiness has not been assailed and that the evidence of the witnesses taken individually and cumulatively corroborates each other on material facts and all the evidence in the case, when considered together, proves the charges beyond a reasonable doubt."*

30 1982(1)SLR 302

(1) *An accomplice witness is one who could have been convicted of the actual offence with which the accused is charged as a principal.*

(2) *An accomplice witness is one who could have been convicted of the actual offence with which the accused is charged whether as principal, aider and abettor, or counsellor.*

(3) *An accomplice witness is one whose liability to prosecution arises from the same facts as that of the principal offender.*

Follow*ing observations were made by Soza J.;*

> *"While a co-perpetrator and an accessory before the fact clearly are accomplices, an accessory after the fact is not necessarily always so. The principal danger in the evidence of an accomplice is that he may be tempted to purchase immunity by currying favour with the prosecution and implicating another while reducing his own role in the offence. But no such danger exists in the case of an accessory after the fact. Indeed, the interest of an accessory after the fact should be to establish the innocence of the principal offender not his guilt.*
>
> *The expression accomplice should be confined to the natural and primary meaning of perpetrators and accessories. The test which Basnayake J. adopted in Peiries v Dole (supra) is that an accomplice is one who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be charged jointly with the accused needs modification. An accomplice no doubt is a guilty associate in crime but the test that he should be chargeable with the same offence is not always suitable for general application.*
>
> *There may be occasions when an accomplice though a particeps criminis cannot be charged with the same offence. His guilty participation may not go far enough for this. Further it does often occur that an accused person though charged with a particular offence is found guilty only of a lesser or kindred offence. More properly therefore an accomplice is a guilty associate whether as perpetrator or inciter or helper in the commission of the criminal acts constituting the offence charged or a lesser or kindred offence of which the accused could be found guilty on the same indictment."*

Accordingly; it is possible to trace several tests that can be applied in deciding whether a witness is an accomplice or not. Primary deliberation

should be paid to the degree of involvement of the accomplice for committing the alleged crime. Though, Justice Soza had offered such an interpretation to the word "accomplice", it was again revisited by Sarath N. Silva C.J.[31] in the case of ***De Seram Vs. Republic of Sri Lanka***[32], where it was recommended to follow the interpretations given in the cases of ***The Queen v. Ariyawantha*** and ***King v. Pieris Appuhamy.***

In *De Seram*'s case, one of the main questions was whether; witnesses "Sanjeewa" and "Sumith Piyalal" could be considered as accomplices? After the completion of murder by the accused, "Sanjeewa" and "Sumith Piyalal" assisted in burying the dead body. Hence; they both had committed an offence under sec.198 of the Penal code[33]. It was decided that, it is an independent charge which could not be fallen under "lesser or kindred offence" when considering the primary charge of murder. It was held as follows;

> *"I have to note at the outset that in Seneviratne's case, relied on by learned President's Counsel, Soza, **J.** had not dealt with the two judgments referred to above, where it was specifically held that a person who has merely assisted in the disposal of the body is not an accomplice. Soza, **J.** referred to a perpetrator, inciter or helper,in the commission of the criminal acts constituting the offence charged or lesser or kindred offence, which the accused could be found guilty on the same indictment. The category of persons referred to by Soza, J. are those involved in the commission of the criminal acts constituting the offence. The reference to "lesser or kindred offence" cannot encompass an offence under section 198 of the Penal Code, which relates to causing the disappearance of evidence of the offence that has been committed. This is an entirely different species of offence, where the mens rea is "the intention of screening the offender from legal punishment". The words used by Soza, **J.** should be restricted to offences of the same kind or which may be lesser in gravity. The mens rea of an offence under section 198 referred to above shows that it is not a lesser of kindred offence in relation to the offence of murder. Servai's case is authority for the proposition that a person indicted with murder, could be convicted for the offence of causing the disappearance of the body under section 198 of the Penal Code by applying section 182 of the Criminal Procedure Code (section 177 of the present Code of Criminal Procedure Act). It would be*

31 with the concurrence of Bandaranayake J., Edussuriya J.,Yapa J. and J. A. N. De Silva, J.
32 2002 (1) SLR 288
33 Causing disappearance of evidence of an offence

*far fetched and an artificiality to import that reasoning to expand the category of persons who should be considered as accomplices.***"**

This case again reiterated that the "lesser or kindred offence" does not mean a distinct offence for which detached *mens rea* is required, other than for the main crime. Only the offences of same kind or offences with less gravity should be considered in deciding whether a person is an accomplice.

Ilangathilaka* Vs. *Republic of Sri Lanka[34] is an important case with regard to the corroboration of the evidence of an accomplice. Colin Thome J. stated as follows;

"The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal who has cast his erstwhile associates and friends to the wolves in order to save his own skin What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.

There is also a rule of common sense that one accomplice cannot corroborate another accomplice. Tainted evidence is not made better by being double in quantity. Corroborative evidence against some of the accused cannot be used to accept the evidence of the accomplice as regards the other accused. It will suffice if the accomplice is corroborated on one or more material particulars as regards each of the accused persons he implicates."

Therefore; it is clear that, the concept of "corroboration" should be dealt with extreme cautious.

Decoy

Can the evidence of a decoy be considered as evidence of an accomplice? Decoy is defined in oxford Dictionary[35] as "*a thing or a person that is used to trick someone into doing what you want them to do; going where you want them to go etc.*" Plainly; it is to occupy an officer or a known person to the officers investigating into the offence to divulge the offence and to identify the offenders. Decoy is not genuinely and/or intentionally implicated in the crime along with the accused. He/she is being used by the prosecution as a bait to reveal the offence and the offenders.

34 1984 (2) SLR 38

35 https://www.oxfordlearnersdictionaries.com/definition/american_english/decoy accessed on 07/05/2021

Roscoe[36] states as follows;

"Agents, provocateurs, spies, informers, detectives, &c., are not accomplices. Such persons employed in entrapping criminals, are entirely distinguished in fact and in principle from accomplices"

Henceforth; it is evident that, the testimony of a decoy does not fall under the "evidence of an accomplice". This notion was further illustrated by Soertsz J. in the case of ***Beddewela Vs. Albert***.[37] Furthermore; our courts have decided that the evidence of a prosecutrix[38] does not fall under the evidence of an accomplice and henceforth corroboration of such evidence is not imperative.

Conclusion

Three tier approach is to be applied when the evidence of an accomplice is produced before the court. Firstly; decide whether the witness is an accomplice. This will be the foremost and significant step. U.S.A. has introduced a process similar to pretrial procedure[39] so as to decide this. Secondly; consider the objections against the admission of the evidence of an accomplice and prerequisites needed for deciding the technical admissibility of such evidence. Finally; it is entailed to consider the aspect of corroboration, sufficiency of the independent evidence, admissibility and weighing of the testimony of an accomplice.

It is crystal clear that, unavailability of proper definition for the word "accomplice" has created some sort of ambiguity in Sri Lanka as well as in India. However; the judicial decisions in both countries have appreciably assisted to overcome such uncertainty. Still; there exists a necessity of promulgating appropriate legal provisions to overcome difficulties. Until the elimination of that ambiguity; it is the utmost responsibility of the presiding judge to determine those questions by giving compatible interpretations (by properly applying his/her judicial mind) and paying due attention to the *stare decisis*.

36 Roscoe on Criminal evidence 15th edition page 156

37 42 NLR 136

38 Prosecutrix cannot be treated as an accomplice – Inoka Gallage Vs. Kamal Addaraarachchi and another 2002 (1) SLR 307

39 Kastigar Vs. United States 406 U.S.441,461 (1972)- the pretrial procedure was named as "Kastigar hearing", Subsequent to this case.

ADEQUACY OF SRI LANKAN LEGISLATION ON PREVENTING MONEY LAUNDERING

Nuwan Tharaka Heenatiagala[1],
Additional District Judge Negombo.

Introduction

Crimes such as murder, robbery, arson, drug trafficking, terrorism, bribery and corruption are committed to achieve specific objectives. One of the main objectives in such instances can be identified as economic or financial benefits. Certain organized crimes such as drug trafficking may be yield enormous financial profits. Since the proceeds of such crimes are tainted with criminality there is a difficulty in using such proceeds. Therefore, there is a need to add a legitimate face to the said proceeds of crime. Criminals make use financial systems to provide legitimate face to proceeds of their criminal activities. This conversion process that criminals use to disguise ill-gotten money which was obtained from illegal or criminal activities such as drug trafficking, prostitution, illegal arms trading, smuggling or corruption in order to appear those proceeds to have originated from a legitimate source can be described as 'Money Laundering'.

Money Laundering has many consequences to the financial system in a country. It reflects organized effects at providing a legitimate face to proceeds of crime and that may threaten security, compromise financial stability, affect the whole economy of a country and tarnish the integrity of financial systems. Therefore, this becomes a global problem which should be addressed by each and every country.

Financial systems should not rely on black or ill-gotten money as a stable deposit base. This may affect and threaten liquidity and solvency in the economy and it might lead to an unfair competition and slowing down economic activities. If a country permits Money Laundering, it will affect the integrity of the financial system of that country and also tarnishes the reputation of the country. Therefore, Money Laundering should not be welcomed and should be recognized as a crime. Since 2005 Sri Lanka has also

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joined with the global effort on prevention of Money laundering by enacting and enforcing necessary anti Money Laundering legislations.

This paper will discuss the process of Money Laundering and its relationship with financial institutions, Sri Lankan legislations on preventing Money Laundering and adequacy of such legislations and recommendations for a strong legal and administrative structure with capable of detecting, preventing and combating money laundering.

The Process of Money Laundering and Its Relationship with Banks/ Financial Institutions

The process of Money Laundering consists of three stages namely; Placement, Layering and Integration. Placement can be described as the initial introduction of proceeds gained from criminal activities into the financial system by the launderer usually through financial institutions. The stage of Placement might cause risks to economy such as false identification and false information may be provided and transactions may be structured to avoid reporting requirements, etc.

After the first transaction being completed in Placement stage the launderer might create a series of transactions to hide the first transaction. The original criminal identity of the money is sought to be separated from the money and legitimacy invoked through generally a series of transactions is referred to as the Layering stage. This will disassociate the illegal proceeds from the original source of crime.

The third stage of Integrity means that the integration of funds into the legitimate financial systems making it appear to have been legally earned money. In this stage a legitimate explanation is provided or attracted by the launderer to the monies at his command and the proceeds openly used as per his wishes.

Money Laundering activities adversely affect the financial sector, as well as the whole economy of a country. Association with criminal elements involved in Money Laundering tends to expose employees of financial sector institutions to corruption which would inevitably undermine public confidence in these institutions. Banks are doing an important role in the process of laundering illegal funds to legitimate funds. As the financial institutions [including banks] offer multiple services such as deposits, loans, foreign exchange, cross border transactions and online banking, money

launderers use these channels to hide the origin and identity of the proceeds, which have been earned through criminal activities.

Until the 1980's the concept of Money Laundering was not considered as an important aspect. However, the whole world experienced a growth of cross border crimes relating to narcotics and terrorist financing. The international community had several discussions regarding the adverse impact of money laundering in financial systems of every individual country and the world as a whole. Therefore, the need of enacting anti money laundering legislation is considered as a very important aspect by many countries.

Anti-Money Laundering Legislation in Sri Lanka

The attention of the Sri Lankan society was focused into the area of terrorist financing and money laundering activities as a result of ethnic conflict prevailed for three decades and growth of narcotic trade with the country. Certain provisions under the exchange control laws[2], laws relating to customs[3] and banking[4] discouraged money launderers from using financial institutions for their illegal activities.[5].However, until 2005 there were no separate acts to prevent money laundering in Sri Lanka.

After 2005 Sri Lankan legislation has enacted some specific acts to combat against money laundering and terrorist financing. They are: -

1. Convention on the Suppression of Terrorist Financing Act No. 25 of 2005
2. Prevention of Money laundering Act No. 05 of 2006
3. Financial Transaction Reporting Act No. 06 of 2006

The Act no.25 of 2006 was enacted to give effect Sri Lanka's obligation under the International Convention for the Suppression of Terrorist Financing.[6] This provides that a collection of funds for use terrorist activity with the knowledge or belief that such funds could be used for financing a terrorist activity is an offence and the law of extradition also applies to such offences.

Prevention of Money Laundering Act No. 05 of 2006 [hereinafter mentioned as PMLA] provides necessary measures to combat and prevent

2 Exchange Control Act No. 24 of 1953
3 Customs Ordinance
4 Banking Act No. 30 of 1988
5 Know Your Customer [KYC] guidelines to all banks issued by the Department of Bank Supervision of the Central Bank
6 This was adopted by United Nations in 2000

laundering of illegal proceeds in Sri Lanka. According to the PMLA the offence of Money Laundering is defined as follows:

> '*Any person, who engages directly or indirectly in any transaction in relation to any property which is derived or realized directly or indirectly, from any unlawful activity or from the proceeds of any unlawful activity; receives, possesses, conceals, disposes of, or brings into Sri Lanka, transfers out of Sri Lanka, or invests in Sri Lanka, any property which is derived or realized, directly or indirectly, from any unlawful activity or from the proceeds of any unlawful activity, knowing or having reason to believe that such property is derived or realized, directly or indirectly from any unlawful activity or from the proceeds of any unlawful activity, shall be guilty of the offence of money laundering*'[7]

If a person convicted of the offence of money laundering punishment will be a fine of not less than the value of property involved in the offence and not more than three times this value or to rigorous imprisonment for a period of not less than five years and not exceeding twenty years, or to both such fine and imprisonment[8].Any person who attempts or conspires to commit the offence of money laundering, or aids or abets, the commission of the offence of money laundering also considered as guilty of an offence under the PMLA and shall be liable to the same punishment as is specified for the offence of money laundering after a trial.[9] A one salient feature of PMLA is that a conviction for the commission by the accused of the unlawful activity[10] shall not be necessary for the proof of the offence of money laundering.[11]

There is a presumption under PMLA that the cash/property is acquired by a person shall be deemed as acquired through an unlawful activity until the contrary is proved by the accused.[12]PMLA provides a duty to certain persons to disclose knowledge or belief of acts constituting the offence of money laundering.[13]

Any person who knows or has reason to believe that an investigation into the commission of the offence of money laundering has been, is being, or is about to be made, and disclose or divulge such information for a purpose

7 Sec 3[1] of PMLA
8 Sec 3[1] of PMLA
9 *Ibid* Sec 3[2]
10 *Ibid* Sec 35-interpretation of 'unlawful activity'
11 *Ibid* Sec 3[3]
12 *Ibid* Sec 4
13 *Ibid* Sec 5

other than carrying out a duty under the Act to any person knowing that such disclosure would prejudice the investigation or knowingly falsifies, conceals or destroys any material relevant to the investigation commits an offence and liable for a punishment of a fine not exceeding Rs 50000 or imprisonment not exceeding 6 months or both to such fine and imprisonment.[14]

Another salient feature in PMLA is that it provides for a police officer not below the rank of Superintendent of Police or in the absence of such an officer an Assistant Superintendent of Police to issue an order prohibiting any transaction in relation to any account, property or investment which may have been used or which may be used in connection with the offence of Money Laundering for a specific period which may be extended by the High Court, if necessary, in order to prevent further acts being committed in relation to the offence.[15]

Transactions in contravention of the Freezing Order shall be considered as null and void[16] but the High Court may on an application made in that behalf, if it is of opinion that such an Order could damage legitimate business or other interests of any person affected thereby, and that essential transactions relating to such account, property or investment as may have been prohibited by such Freezing Order may be legitimately carried out, make order permitting the carrying on of such transactions subject to supervision by and under thedirection of a person appointed in that behalf by Court or of a receiver appointed in that behalf[17].

Where a person is convicted of the offence of money laundering, the Court convicting such person shall, make Order that any movable or immovable property of such person derived or realized, directly or indirectly from any unlawful activity, be forfeited to the State free from all encumbrances.[18] However, in determining whether an order of forfeiture should be made under sec 13[1] of PMLA, the Court shall be entitled to take into consideration the fact whether such an Order is likely to prejudice the rights of a *bona fide* purchaser for value or any other person who has acquired, for value, a *bonafide* interest in such property.[19]The extradition law also applies to the offence of Money Laundering.[20]

14 *Ibid* Sec 6
15 *Ibid* Sec 7 & 8
16 *Ibid* Sec 9
17 *Ibid* Sec 10 [receiver is appointed under Sec 11 of PMLA]
18 *Ibid* Sec 13[1]
19 *Ibid* Sec 13[2]
20 *Ibid* Part IV

Financial Transaction Reporting Act No. 06 of 2006 [hereinafter mentioned as 'FTRA'] was enacted parallel to the PMLA and it provides for certain obligations and prohibitions on banks.

FTRA provides for the setting up of a Financial Intelligence Unit [FIU] as a central agency to receive analyze and disseminate information in relation to Money Laundering and the financing of terrorism and obliges institutions, to report to the FIU cash transactions above a value prescribed by an Order published in the Gazette.[21] The FTRA provides power to enforce Know Your Customer [KYC] rules, Customer Due Diligence [CDD] rules to prevent banking products and services being used for money laundering and monitor suspicious financial transaction.

Even though there are legislations to combat and prevent money laundering activities in Sri Lanka with the technological advancements, modernization of banking activities and growth of international cross border transactions these current legislations may be inadequate to overcome new threats in money laundering activities. Therefore, in next chapter those issues and recommendations to overcome such issues will be discussed.

Challenges and Effectiveness of the Current Anti Money Laundering Legislation in Sri Lanka and Recommendations

At the moment Sri Lanka is not a leading financial hub in the region. However, with the creation of mega projects such as port city Sri Lanka is moving towards to become a global financial center. Thus, our financial system is vulnerable to money laundering and terrorist financing. Even though there are anti-money laundering legislation, Sri Lanka was on the European Commission's blacklist of countries at risk of money laundering in 2018[22].

With the development of technology money laundering methods also become more advance and its detection is difficult in electronic methods such as online banking, online payment services, mobile phone transaction, etc. Persons involved in money laundering activities can do transfer or withdraw money through these online methods without leaving little or no trace of such transactions. Investigators in Sri Lanka such as police officers might not have

21 Sec 6 of FTRA

22 European Parliament (2018). *MEPs Confirm Commission Blacklist of Countries at Risk of Money Laundering.* [Online]. Available at: http://www.europarl.europa.eu/news/en/press-room/20180202IPR97031/meps-confirm-commission-blacklist-of-countries-at-risk-of-money-laundering

educational or professional knowledge on information technology in order to investigate these crimes. Therefore, there is a need to train these investigators regarding these technological issues. Mere creation of a separate unit in police department[23] alone is not sufficient if the investigators do not have any knowledge about financial system and transactions as well as electronic commerce issues.

In Sri Lanka Rules were made by the relevant minister regarding Customer Due Diligence in 2016.[24]By these rules financial institutions should upgrade their customer due diligence measures but the issue is whether there is a proper supervision by the Central Bank or FIU on financial institutions taking these measures. Anti-Money laundering legislation in New-Zealand[25]makes number of changes such as requiring businesses to appoint a compliance officer and enhancing the requirements relating to suspicious transactions and cross border transportation of cash, etc. Further the New Zealand regulations provides for imposing significant civil and criminal penalties for non-compliance on businesses and their directors and senior managers. However, in Sri Lanka even the PMLA, FTRA and Corporate Governance directions to Banks and Financial Institutions provides such provisions no such convictions made against such non-compliance.[26]

In New Zealand and in Singapore relationship with 'shell banks'[27] is prohibited and such provisions should be introduced in to Sri Lankan legal regime too in order to enhance the adequacy of anti-money laundering laws.

An efficient investigation system requires for the bodies responsible for regulating or supervising anti-money laundering activities. They should set standards that reflect the requirements of legislation and public expectations of fairness, impartiality, transparency and accountability. Investigators and Prosecutors should be competent to exercise the powers given to them and should act with integrity, impartiality and independence.

The Financial Crimes Investigation Department lacks the capacity oninvestigation processes involved with technology. They are not exposed

23 Financial Crimes Investigation Department also known as FCID

24 Gazette Extra Ordinary No.1951/13 dated 27.01.2016

25 The Anti-Money Laundering and Countering Financing of Terrorism Act 2009

26 It was revealed in Parliamentary Select Committee on Easter bombings that the Sharia University started in Eastern Province received funds from foreign entities but the Central Bank in Sri Lanka does not have any supervision over those transactions.

27 Banks with no physical presence in the countries where they are licensed and no effective supervision

to any education and training and are not schooled in best practices. Their integrity, impartiality and independence might be in doubt when there is a regime change after an election. There is a need to create a specialized and skilled agency that would be responsible for investigation and combat financial crimes such as money laundering.

There are no specialized financial crimes courts in Sri Lanka. In present context High Court in Colombohas the exclusive jurisdiction to hear and determines matters under the provisions of PMLA, but the absence of a specialized financial crimes court and effective tools to supervise and manage the investigation process makes the whole PMLAineffective.

Presently, cases under PMLA are heard by the High Court in Colombo and at the investigation stage relevant Magistrate Court has the power to hear under the Code of Criminal Procedure. Most of the judges in High Courts and Magistrates Courts do not have sufficient exposure to financial systems and anti-money laundering legislations. Lack of facilities and insufficient competent staff affect the combat process against money laundering. The quality of judges can be enhanced by providing for transparent, predictable and efficient rules of procedure that leave little room for corruption. Therefore, there is a need to enhance the knowledge of investigators, prosecutors as well as judges regarding anti-money laundering legislations and latest technological advancements in order to combat against new methods of money laundering.

Further, the FATF[28]in its revise recommendations, extended the scope of reporting persons and entities to cover up professionals such as accountants and lawyers when acting in entities such as money changing companies, companies involved in cross border transactions, casinos etc. Thus, not only banks and other financial institutions but all traders must be acting in due diligence on money laundering methods and tactics. There should be amendments to present PMLA and FTRA regarding these issues too.

Conclusion

The PMLA and FTRA mark a significant milestone in the development of anti-money laundering law in Sri Lanka.However, criminals might use wide variety of new techniques to clean illegal funds and therefore, prevention of

28 Financial Action Task Force [FATF] is an independent body established in 1989 at the Organization for Economic Co-operation and Development economic summit held in Paris.

money laundering has become an international effort. With the advancements of online banking and crypto currencies[29], preventions are extremely difficult.

The police officers whom are involved in money laundering activities has to be enhanced by education and training to create a specialized anti-money laundering office that would be responsible for investigationprocess. Specializedfinancial crimes courts have to be introduced to the judicial system in Sri Lanka to increase the effectiveness in supervision and management of the anti-money laundering system. There is a need for training, continuous education and greater interaction of judges with financial forensic audit experts to hear and determine cases in these kind of specialfinancial crimes courts.

Therefore, introducing such changes is a must for a strong legal and administrative structure with robust controls capable of detecting, preventing and combating money laundering. Further it is recommended that the public must be made aware of the money laundering and they should be empowered with knowledge so they can act swiftly in such circumstances.

29 A crypto currency is a digital asset designed to work as a medium of exchange

RECOVERY UNDER THE DEBT RECOVERY (SPECIAL PROVISIONS) ACT

Chamila Rathnayake,
*District Judge/Magistrate - Dambulla.**

1.0 Introduction -

Debt Recovery (Special Provisions) Act (DRA)[1] is one of the specialized Acts which sets out the law relating to recovery of debts by lending institutions and it has gained popularity as an expeditious mode of recovering debts in civil courts. This article attempts to discuss some significant legal provisions of the Act especially relating to the institution of debt recovery actions, special procedure provided for recovering debts, defenses available to a defendant to defend the suit against him and the decided case laws on the same in order to find out the applicability of this law in the practical scenario.

2.0 How to institute an action & Prerequisites before filing the action-

An action under this Act shall be instituted by presenting a plaint to the District Court within local limits of whose jurisdiction the defendant resides or cause of action arises or the contract sought to be enforced was made[2]. There must be an affidavit together with the plaint to the effect that the sum claimed is lawfully due to the lending institution from the defendant and the documents sued upon should be annexed to the plaint.Also a draft of the decree *nisi* (as set out in 1st schedule to the Act) and requisite stamps for the decree *nisi* and for service thereof are required to be submitted to the court[3].

However, no action shall be instituted under this Act if the sum alleged to be in default is less than Rs.150,000/- [4] and it is clear that the promise or agreement relating to the "debt" should be in writing. As held in the case of ***Eagle Breweries Ltd.*** *Vs.* ***People's Bank***[5], "Cheque drawn from a Bank and a

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1 No.02 of 1990 as amended by Act No.09 of 1994.
2 Sections 2(1) & 3
3 Section 4(1)
4 Section 2(2)
5 2008 (2) SLR 199

statement of account from a Bank would come within the ambit of a document in terms of section 4(1)"

In the case of ***Ramanayake** Vs. **Sampath Bank Ltd. & Others***[6], it was held that a plaint filed under the provisions of the Act must be accompanied by an affidavit to the effect that the sum claimed is justly due from the defendant as well as the instrument, agreement or document sued upon or relied on. The affirmant of the affidavit should be;

(a) a director or principal officer of the lending institution or an attorney-at-law duly authorized to bring and conduct the action, and

(b) a person having personal knowledge of the facts of the cause of action; and this fact must be averred in the affidavit.

However, in ***Seneviratne** Vs. **Lanka Orix Leasing Company***[7] it was held that it is not essential that the plaintiff should actually use the word "justly" in his affidavit. If the affidavit substantially complies with the requirements of section 705 and if the facts therein set out show that the sum claimed was rightly and properly due, it is in order.

In the case of ***Metal Packing Ltd and Another** Vs. **Sampath Bank Ltd***[8] also a similar view was adopted by the Court of Appeal and held that the failure to aver in the affidavit that the word is "justly due" is not a fatal defect and it is only a technical objection which should not be allowed to prevail.

3.0 Who can institute an action & Instances where actions can be instituted under the DRA-

A special feature of this Act is only lending institutions can institute actions under the Act. In the case of ***National Development Bank** Vs. **Chrys Tea (Pvt) Ltd & Another***[9] it was held that under the Debt Recovery Act, an action could be filed only by a lending institution as defined in section 30 of the Act and only for the recovery of a debt.

In terms of section 30 of the Act "debt" means a sum of money which is ascertained or capable or being ascertained at the time of the institution of the action, and which is in default, whether the same be secured or not, or owed by any person or persons, jointly or severally or as principal "borrower or guarantor or in any other capacity, and alleged by a lending institution to

6 1993 (1) SLR 145
7 2006 (1) SLR 230
8 2008 (1) SLR 356
9 2000 (2) SLR 206

have arisen from a transaction in the course of banking, lending, financial or other allied business activity of that institution, but does not include a sum of money owed under a promise or agreement which is not in writing."

In ***Kiran Atapattu*** *Vs.* ***Pan Asia Bank Limited***[10] the Court of Appeal held that whether one calls the sum borrowed 'an overdraft or a loan' if it is capable of being ascertained it falls within the meaning of 'debt' on his own explanation the sum borrowed by the defendant and the interest component can be ascertained. Term 'debt' in section 30 includes overdrafts if the amount is capable of being ascertained at the time of institution of the action. Similarly, in ***Dharmaratne*** *Vs.* ***People's Bank***[11] where it was contended that the 'overdraft' was not a 'debt' or a 'loan' the Court of Appeal rejected that contention and held that an 'overdraft' falls within the definition of 'debt' as the overdraft arises from a transaction relating to banking.

In ***Eassuwaran and Others*** *Vs.* ***Bank of Ceylon***[12], it was held that a 'guarantee' provided by the appellants falls within the definition of 'debt' and a lending institution could have recourse to the provisions of the Debt Recovery (Special Provisions) Act No.02 of 1990 as amended.

In the very recent Supreme Court case of ***Mahavidanage Simpson Kularatne*** *Vs.* ***People's Bank***[13]**,** referring to the aforesaid judicial decisions, it was held that "it is amply clear that an 'overdraft' falls within the four corners of the Act subject to the other pre-requisites therein been fulfilled." As it was held in this case**,** if the lending institutions could satisfy court that the transaction referred to in the plaint, falls within the definition of "debt", they may resort to the provisions of the Act. Accordingly, the term "debt" as defined in section 30 is very wide and covers many situations.

4.0 Entering the decree *nisi* & due process after serving the decree nisi on a defendant -

Once a plaint is filed, if the court is satisfied that the plaint and the relevant documents are in terms of the section 4(2) of the Act, the court being satisfied of the contents contained in the affidavit shall enter a decree *nisi* against the defendant.

10 2005 (2) SLR 276
11 2003 (3) SLR 307
12 2006 (1) SLR 365
13 S.C. Appeal No. 04/2015; S.C. Minutes dated 15.09.2020

As it was held in the case of ***Mahavidanage Simpson Kularatne*** *Vs.* ***People's Bank***, "…At the point of presenting the plaint what is material is for a court to be satisfied upon the affidavit and the 'instrument, agreement or document' presented before it, that the sum claimed is a 'debt' lawfully due to the plaintiff bank and the 'instrument, agreement or document' 'annexed to the plaint is in conformity with the threshold provisions of section 4(2) of the Act for a court to issue a decree *nisi*, an exparte order against a defendant…"[14]

Once the decree *nisi* is duly served on the defendant in the manner specified in the DRA, he shall not appear or show cause against the decree *nisi* unless he obtains leave from the Court to appear and show cause[15].

In the case of ***People's Bank*** *Vs.* ***Lanka Queen Int'l (Pvt.) Ltd***[16], upon receiving the decree *nisi* the defendant filed two affidavits and moved to file answer and defend unconditionally. Here, it was held that it is mandatory for the defendant to file an application for leave to appear and show cause and such application must be supported by an affidavit. Furthermore, Per De Silva, J. stressed that "In the absence of an application to show cause in writing, it is possible to say that there is no proper application supported by an affidavit before court".

It was held in the case of ***W.K.M.D. Perera*** *Vs.* ***People's Bank***[17] that, "A defendant has no status in terms of section 6 of the Debt Recovery (Special Provisions) Act No.2 of 1990 to participate in proceedings in an action instituted under the Act until such time he obtains leave of court. He has first to make an application for that purpose." In that case further it was held that there is no provision to lead oral evidence on any of the matters at this stage. It is only upon court being satisfied on the material placed before it by the defendant that there is an issue or a question in dispute which ought to be tried that leave to appear and show cause against the decree *nisi* will be granted.

5.0 The scope of an application for leave to appear & show cause -

5.1 Section 6(2) contemplates how an application for leave to appear and show cause is made-

6(2)."The court shall upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit which shall deal specifically with the plaintiffs claim and state clearly and concisely

14 Ibid at p.13
15 Section 6(1)
16 1999 (1) SLR 233
17 1994 (2) SLR 344

what the defence to the claim is and what facts are relied upon to support it, and after giving the defendant an opportunity of being heard, grant leave to appear and show cause against the decree *nisi*, either -

(a) upon the defendant paying into court the sum mentioned in the decree *nisi*; or

(b) upon the defendant furnishing such security as to the court may appear reasonably and sufficient for satisfying the sum mentioned in the decree *nisi* in the event of it being made absolute; or

(c) upon the court being satisfied on the contents of the affidavit filed, that they disclose a defence which is prima facie sustainable and on such terms as to security, framing and recording of issues, or otherwise as the court thinks fit."

5.2 A defendant is obliged to establish a prima facie sustainable defence -

An application for leave to appear and show cause should specifically deal with the Plaintiff's claim and clearly and concisely state what is the defendant's defence to the claim of the Plaintiff and the defendant should set out the facts which is relied upon to substantiate the defence.

In ***Ramanayake*** *Vs.* ***Sampath Bank Ltd***., Wijeyaratne J. discussed the ambit of the section 6 of DRA as;

"(1) The defendant shall not appear or show cause against the order *nisi* unless he obtains leave from the court. Leave to appear and defend has to be granted upon the defendant paying into court the sum mentioned in the decree or furnishing reasonable and sufficient security for satisfying the decree. Leave may be granted unconditionally where the court is satisfied that the defendant's affidavit and other material raise an issue or question which ought to be tried (section 6 (2)(c) of the Act). The purpose of section 6 is to prevent frivolous or untenable defences and dilatory tactics.

(2) An issue or question which ought to be tried means a plausible defence with a triable issue; that is to say, an issue which cannot be summarily disposed of on the affidavits but requires investigation and trial.

(3) The court has to decide which of the alternatives under section 6(2) whether (a), (b) or (c) has to be followed and the court has to

exercise its discretion judicially. The court must briefly examine the facts of the case, set out the substance of the defence and disclose reasons in support of the order.

(4) In this case the 3rd and 4th defendants-petitioners had been given unconditional leave. The 3rd defendant in his affidavit has not dealt specifically with the plaintiff's claim and stated his defence and the facts relied on as required by section 6(2)(c). He had denied the correctness of the loan account, but had not specified in which particulars the loan account was incorrect, neither stating the reasons for so alleging nor the facts he was relying on to support his claim that the loan account was incorrect. He had not dealt with the plaintiffs claim on its merits but merely set out objections of a technical nature. If a defendant is granted leave unconditionally on this type of technicality and evasive denial, then the purpose of this Act will be brought to naught".[18]

It was held in the case of ***Mercantile Credit Ltd.*** *Vs.* ***Jayatilake & Two Others***[19] that where the defendant fails to satisfy court that there is an issue or question in dispute which ought to be tried, the decree *nisi* should be made absolute.

In ***National Development Bank*** *Vs.* ***Chrys Tea (Pvt) Ltd***[20], De Silva J. observed that;

"(i) Under Section 6(2) (a) or 6(2)(b) the court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the decree *nisi*

(ii) Section 6(2)(c) is the only section which permits the court discretion to order security which would be a lesser sum than the sum mentioned in the decree *nisi*."

In this case, the court also noted that the court must first come to the conclusion that the court is satisfied on the contents of the affidavit filed by the Respondents that they disclose a defence which is *prima facie* sustainable.

In the case of ***Kiran Attapattu*** *Vs.* ***Pan Asia Bank Limited***, Justice Wimalachandra held that:

18 Ibid at 6
19 1993 (2) SLR 418
20 Ibid at 9

> "…..The section 6(2) of the Debt Recovery (Special Provisions) Act provides for the affidavit of the defendant to deal specifically with the plaintiff's claim on its merits. In the instant case the defendant has relied on technical objections and not revealed his defence, if he has any, to the claim made by the plaintiff. He has taken refuge mostly on the technical objections set out in his affidavit. The defendant has not set up any plausible defence relating to a triable issue.."[21]

In ***Zubair*** *Vs.* ***Bank of Ceylon***[22] the Court of Appeal held that in debt recovery matters, it would not be correct for the courts to hold against the intention of the Legislature on technicalities.

In the aforesaid recent case of ***Mahavidanage Simpson Kularatne*** *Vs.* ***People's Bank*** also, the Supreme Court has insisted on establishing a *prima facie* sustainable defence. Moreover, the Supreme Court has stressed the fact that the intention of the Legislature has to be fulfilled and the purpose of the Act should not be brought to naught by a court relying on technical objections to defeat the very purpose of the Act.[23]

5.3 Is the defendant entitled to unconditional leave to appear & defend the case?

In most of the actions instituted under the DRA, defendants often plead to grant unconditional leave to appear and defend. However, after the section 6(2) of Debt Recovery (Special Provisions) Act No. 02 of 1990 was amended by Act No. 09 of 1994 it does not permit unconditional leave to appear and show cause under any circumstances. The minimum requirement according to section 6(2)(c) is for the furnishing of security.

In the case of ***People's Bank*** *Vs.* ***Lanka Queen Int'l (Pvt.) Ltd***[24] per Asoka De Silva J. noted the effect of the inclusion of the new section by 1994 amendment as;

> "This new subsection clears any doubt that would have prevailed earlier in respect of the procedure a defendant has to follow in applying for leave to appear and show cause…….This section does not permit unconditional leave to defend the case as the defendant-respondent

21 Ibid at 10 at p. 283
22 2002 (2) SLR 187
23 Ibid at13 at p.19
24 Ibid at 16

has requested from the District Court. The minimum requirement according to sub section (c) is for the furnishing of security……The court will have to decide on one of the three matters specified in the above section".

In this case court has clearly illustrated the variance among the three sub sections of section 6(2) as follows;

" (a) The court may order the defendant to pay into court the sum mentioned in the decree *Nisi* .Thus, even where the requirements as stated above are complied with, the court has the power and the authority to order the defendant to pay the full sum mentioned in the decree Nisi before permitting the defendant to appear and defend.

(b) Alternative to (a) above, the court can order the defendant to furnish security which, in the opinion of court is reasonable and sufficient to satisfy the decree *Nisi* in the event it being made absolute. The difference between this provision and the (a) above is that instead of paying the full sum mentioned in the decree *Nisi*, it will be sufficient for the defendant to furnish security, such as banker's draft, and then defend the action.

(c) The third alternative is where the court is satisfied on the contents of the affidavit filed, that they disclose a defence which is *prima facie* sustainable and on such terms as to security, framing of issues or otherwise permit the defendant to defend the action. Thus, it is imperative that before the court acts on section 6(2)(c) it has to be satisfied;

(i) with the contents of the affidavit filed by the defendant;

(ii) that the contents disclose a defence which is *prima facie* sustainable; and

(iii) determine the amount of security to be furnished by the defendant, and permit framing and recording of issues or otherwise as the court thinks fit."

In the case of ***Kiran Atapattu*** *Vs.* ***Pan Asia Bank Limited***[25] also the court has made a comprehensive analysis of section 6(2) as amended by Act No.09 of 1994 and it was held that the amended section 6(2) does not permit

25 Ibid at 10

unconditional leave to defend the claim, the minimum requirement according to section 6(2) (c) is for furnishing of security.

In the aforesaid Supreme Court case of ***Mahavidanage Simpson Kularatne*** *Vs.* ***People's Bank*** also it was held by Her Ladyship Murdu Fernando, P.C.J. that,

> "The Legislature in no uncertain terms has laid down the procedure to be followed for a defendant to show cause against a decree *nisi* and I see no reason to deviate from the said provisions or to disregard such provisions. The Act does not permit 'unconditional leave' to appear. Leave to appear is always subject to conditions. The least being furnishing security as the court thinks fit."[26]

6.0 Procedure where leave to appear and defend is guaranteed

According to section 07 of the Act once leave to appear and show cause is granted the provisions of sections 384 to 387, 390 and 391 of the Civil Procedure Code (Chapter 101) shall, *mutatis mutandis*, apply to the trial of the action. Those are the provisions set out in the Civil Procedure Code in respect of the "summary procedure" and then the right to begin as well the burden of proof is on the defendant and the plaintiff only has a right to reply.

In the aforementioned case of ***W.K.M.D.Perera*** *Vs.* ***People's Bank***[27], where the District Court made order granting the defendant leave to appear and file answer upon the deposit of Rs.3,500,000/- to the credit of the court, Court of Appeal held that "The order which the Court made in giving leave "to appear and file answer" upon payment of Rs.3,500,000/- was wrong. For these words, the words "to appear and show cause against the decree *nisi*" should be substituted."

However, in the case of ***Union Bank of Colombo Ltd*** *Vs.* ***Wijayawardana and Another*** [28] Court of Appeal has decided that if the defendants deposit the security, the defendants must be allowed to show cause why the decree *nisi* should not be made absolute and they can show cause by filing an answer supported by an affidavit. It is clear that Court of Appeal has adopted a different approach here by allowing the defendant to file an answer supported by an affidavit in an action instituted under the DRA and anyhow it is a deviation from the special procedure provided by the Act.

26 Ibid at 13 at p.19
27 Ibid at 17
28 2008 (2) SLR 306

Moreover, section 19 stipulates that in any matter or question of procedure not provided for in this Act, the procedure laid down in the Civil Procedure Code in a like matter or question shall be followed by the court if such procedure is not inconsistent with the provisions of this Act.

7.0 Making the decree *nisi* absolute & consequences thereof -

> "Where the defendant either fails to appear and show cause or having appeared, his application to show cause is refused, the court shall make the decree *nisi* absolute. For this purpose, the judge shall endorse the words "Decree *nisi* made absolute" (or words to the like effect) upon the decree *nisi* and shall date and sign such endorsement."[29]

In the case of ***Mercantile Credit Ltd. Vs Jayatilake & Two Others***[30] it has been decided that if the defendant fails to appear upon service of decree *nisi* and even if he appears and fails to obtain leave of court to show cause against the decree *nisi* as provided in section 6(2) of the Act, the decree *nisi* should be made absolute.

Accordingly it is clear that after receiving the decree *nisi* it is the obligation of the defendant to seek leave from the court to appear and show cause if he wishes to participate in the proceedings. If the defendant fails to appear upon service of decree *nisi* or having appeared his application to show cause is refused, the court shall enter the decree *nisi*, absolute.

However, under the DRA no appeal by a defendant shall lie against the decree *nisi* but it shall be competent to the court within a reasonable time after the decree absolute was entered to entertain an application by way of summary procedure to have it set aside on the ground that, the applicant was prevented by reason of accident or misfortune or that such decree *nisi* was not served on him.[31]

On the ground established to the satisfaction, court may set aside the decree absolute on such terms and conditions court think just and right. Upon the decree absolute being set aside the court shall proceed with the hearing and determine the matter in accordance with the summary procedure provided by the Civil Procedure Code.

However, when it appears to the court that a decree *nisi* entered was obtained by willful suppression or non-disclosure of any relevant facts or if

29 Section 6(3)
30 1993 (2) SLR 418
31 Section 6A(1)

after the entering of the decree *nisi*, the decree *nisi* is discharged and the action is dismissed, the court may on the application award reasonable compensation for the expenses or injury caused to the defendant.[32]

Section 11(2) provides that notwithstanding the dismissal of any action instituted under this Act where an application is made for compensation under section 11(1), in respect of a *decree nisi* entered in such action, the action so dismissed shall be deemed to continue until the determination of such application.

8.0 Execution of the decree absolute-

Where the decree nisi is made absolute it shall be deemed to be a writ of execution duly issued to the Fiscal in terms of section 225(3) of the Civil Procedure Code. It shall be the duty of the Fiscal to execute the writ in the manner prescribed in the Civil Procedure Code for the execution of writ and the writ of execution shall valid for a period of three years from the date on which the *decree nisi* was made absolute.[33]

In the case of ***Bandara*** *Vs.* ***The People's Bank***[34] court has held that, "There is no obligation on the part of respondent to give notice of execution of decree to the defendant. In terms of section 13, where a decree *nisi* entered is made absolute it shall be deemed to be a writ of execution duly issued to the fiscal in terms of section 225(3) of the Civil Procedure Code and it shall be the duty of the fiscal to execute same." As held in this case this is a special jurisdiction which was created by the DRA.

However, in terms of section 16, proceedings in the original court need not be stayed even though leave to appeal is granted against an order made in the course of any action instituted under this Act.

9.0 Settlement-

In terms of section 12 of the Act, where the defendant appears in court and does not contest the decree *nisi* but admits liability and prays to liquidate the debt in installments the court shall with the approval of both parties, minute the fact on the record and thereafter, make the decree absolute. Such settlement shall operate as a stay of execution of proceeding unless the

32 Section 11
33 Section 13
34 2002 (3) SLR 25

defendant acts in breach of any of the terms of settlement in which event the institution shall be entitled to execute the decree.

10.0 Practical Scenario -

As discussed earlier, often it can be seen that the defendants who obtained a decree *nisi* still seek unconditional leave to appear and show cause even though the Act does not warrant so after the 1994 amendment. This also suggests the inference that both the litigants as well some lawyers are still not conversant with this special piece of legislation. Also the defendant's application to obtain leave from the court to appear and show cause against the decree *nisi* is required to be filed on the decree *nisi* returnable date and practice of filing only the proxy is not permitted[35]. However, in practice sometimes it does not happen, and surprisingly even the plaintiff (lending institution) does not object for that and the court also tend to accept only the proxy and grant dates to show cause. Sometimes appeals are lodged contrary to the provisions of the Act and if the original case record has been sent to the higher court, it is difficult to proceed the original case in terms of section 16 of the Act. Consequently, it may take a considerable time to conclude the case.

11.0 Conclusion-

As it is manifest from the above, the DRA has in certain terms provided for a faster method and a special procedure for the recovery of debts by lending institutions. However, in the practical scenario sometimes it may take a considerable time to conclude the cases as discussed above and then the very purpose of the Act may become abortive to a certain extent.

Moreover, it is evident from the above discussed judicial decisions that sometimes a defendant may experience harsh results as a result of deviating from the due process of law and aforesaid judicial decisions also suggest the inference that in determining the debt recovery matters courts should strictly adhere to the legal provisions of the Act since it has been designed for a specific purpose.

35 Se.4(3)

THE DOCRINE OF POLLUTER PAYS PRINCIPLE

Pamoda Jayasekera,
District Judge/Magistrate - Welimada.

> *"If anyone intentionally spoils the water of another let him not only pay damages, but purify the streams or cistern which contains the water"*[1]

This ancient aphorism of Plato holds a truth that is highly germane to the rational underline modern environmental laws. So as the Asian philosopher Kautilya prescribed the same in his Arthasastra (Study of Economics) as

> *"In case of damage to the ploughing or seeds in another's field, channels or a field of underwater they shall pay compensation in accordance with the damage"*[2]

Historically the doctrine of Polluter Pays Principle which is an environmental policy concept that the cost of the pollution be borne by those who cause it, is rooted in both western and eastern thoughts.

History and development of doctrine-

The concept of PPP (Polluter Pays Principle) was first mentioned by the OECD (Organisation for Economic Cooperation and Development) as a guiding principle for international economic aspects of the environmental policies in which recommended the polluter should held responsibility for the environmental pollution and damage. This concept has been laid down as principle 16 of the UN Declaration on Environmental and Development in 1992 Rio Summit.

Rio Declaration on environment and development principle 16

> *National authorities should endeavour to promote the internalisation of environmental cost and the use of economic instruments taking into account the approach that the polluter should bear the cost of pollution with due regard to the public interest and without distorting international trade and investment.*

1 Plato, The dialogues of Plato, The Laws, 4th ed, Benjamin Jowett, trans. And ed. Oxford: Clarendon Press 1953, Vol 4.

2 R.P.Kangle, Kautiliya Arthassatra (Part 2, English Translation) Delhi: Mitial Banarasidass, 1986

Many nations have incorporated PPP into their own national legal systems and there is growing international acceptance for it. The wide spectrum of opinion expressed in favour of this doctrine alone indicate that there is an increasing number of international conventions refer to it are all strong arguments in favour of the reconnaissance of PPP as a general principle of law. This concept promotes personal responsibility, that implies polluter has the responsibility to safeguard the health of fellow members of the society and environment at large. This also have served as a blue print for environmental policy in which ensure social welfare as well as economic efficiency.

Furthermore, the concept aimed at answering that the polluter bears the mitigation burden together with the adaptation burden by paying the cost of environmental restoration through the combines efficiency requirements (internalisation of external effects) with equity (charging the cost to the responsible party). The rational underlines the principle can be truly described as one based on economic, judicial and political good sense.

Environmental law regime is considered as a consistence of international norms and coating of the multinational treaties. After the Organisation for Economic Co-operation and Development recommendations in the 1970s, there was a boom in public interest in environmental issues which resulted in pressure on the various governments and other institutions to introduce rules and regulations to protect the environment. This led to various international level discussions and conferences where nations got together to find solutions to environmental degradation. The basic principle that a State should ensure payment of prompt and adequate compensation for hazardous activities could be traced back as early as the ***Trail Smelter Arbitration case between the United States and Canada***[3]. Thereafter, this speculation was first accepted and included in Brundtland Commission[4] report in which states as fallows;

> *'Legal regimes are rapidly outdistanced by the accelerating pace and scale of impacts on the environmental base development. Human law must be reformulated to human activities in harmony with unchanging and universal laws of nature'.*

Later, the doctrine of Polluter Pays Principle has recognised in a number of international conventions from 1990 International Convention on Oil Pollution, to 2020 Paris Convention on Climate Change. Many countries have introduced this concept into their national legal system directly through the

3 Trail Smelter Arbitration (United States. v. Canada) (1938-1941) 3 R.I.A.A. 1905

4 Brutland Gecd 1987. Our common future- the world commission on environmental and development.

legislation as well as by judicial activism. This doctrine was first introduced to Sri Lankan law regime in Eppawala Phosphate Mining case[5] where his Lordship Justice Amerasinghe states that,

> *"Today environmental protection in the light of the generally recognised Polluter Pays Principle no longer be permitted to be externalised by economists merely because they find it too insignificant or too difficult to include it. In my view be borne by the party that causes such harm rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmental degrading effects of a project".*

The concept of PPP has also been incorporated in many domestic legislations such as National Environmental Act, Forest Ordinance, Coast Conservation Act, Marine Pollution Prevention Act, and Mines and Minerals Act.

The main instrument enacted by parliament envisioned to prevent all environmental pollution in Sri Lanka is National Environmental Act[6]. According to sections 23 H 3(b) and 23K 3(b), every person caused pollution to inland waters of Sri Lanka or caused atmospheric pollution contradict to the section 23 H or 23K, other than to the fines impose, Court shall order to bear the expenses that may have been incurred of the damage already caused as a consequence of the commission of such offence.

Marine Pollution Prevention Act[7] is the prime legislation that has adopted the concept of Polluter Pays Principle in emphatic terms. In recent times Sri Lankan waters became an abandoned places for maritime casualties in which this legislation acted as a main tool to recover damages and compensation from maritime pollution caused by vessels. Section 40 of the Act expresses the provisions and precautions in relation to prevention of pollution when engaged in exploration of natural resources including petroleum whereas the section 41 mentioned any person who contravenes the privations of section 40 in addition to the penalties imposed, Court shall reimburse expenses incurred in clean-up process. This Act further contains provisions to recover damages in a civil suit in addition to the penalties imposed under the Act.

As per the provisions of sections 6 (2), 7 (1), and 20 (1) of the Forest Ordinance[8] any person who has been convicted of a forest offence, in addition

5 Bulankulama and others V. Secretary, Ministry of industrial development and others (2000)3 Sri.L.R 306

6 National Environmental Act No.47 of 1980 (As amended by Act No. 56 of 1988)

7 Marine pollution prevention Act No. 35 of 2008

8 Forest Conservation Ordinance (As amended by Act No. 65 of 2009)

to offender been sentenced to imprisonment or fine, Court may award compensation for any damages caused to the forest. Section 63 1A of Mines and Minerals Act[9] goes even further enacting provisions in addition to fine or imprisonment, to order the convict to restore the damage land to its former condition.

However, it is interesting to note that in Marine Pollution Prevention Act and National Environmental Act restorations are ordered in mandatory terms by using the word "shall" while Forest Ordinance and Mine and Minerals Act restorations are discretionary as the word "may" is used.

Coast Conservation Act[10] is another legislation which laid down the concept of Polluter Pays Principle where in section 25 (3) of said act empowers the Director General of Coast Conservation to recover all expenses of corrective measures from the person held responsible for adversely affected acts to the coastal zone. Furthermore, section 31(4) of the Act empowers the Director General of Coast Conservation to demolish all unauthorised structures in the coastal zone and recover the cost incurred in the process from the persons who is responsible.

Scope and the limitation of the doctrine-

The doctrine of Polluter Pays Principle consists of three main subdivisions (the three Ps) called;

A. What is **P**ollution
B. Who is **P**olluter
C. Who **P**ays for what

What is Pollution?

The commonly accepted definition or meaning of pollution is "the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment." Thus, it is evident from these regional as well as international definitions that the emphasis is on the fact that pollution must have a tendency to cause harm, or must actually cause harm. Nonetheless, pollution is a trespass under common law as well. If the trespass is so nominal that it creates no harm, it will normally be

9 Mines and Minerals Act No. 33 0f 1992 (As amended by Act No.30 of 2009)
10 Coast Conservation Act No. 57 of 1981 (As amended by Act No. 49 of 2011)

tolerated. Hence, as the definition of pollution is commonly understood, for the pollutant to result in or cause pollution there must be some consequent harm or threat of harm.

Different jurisdictions have decided various circumstances as pollution in which fit for applying Polluter Pays Principle, in the case of ***Watte Gedera Wijebendara vs. Conservator General of Forest and others***[11] Courts recognise illegal mining activities, whereas in ***Centre for Environmental Justice Ltd. vs. Conservator General of Forest and others***[12](Wilpattu case) Courts observed illegal removal of forest and illegal re settlement done by encroaching to forest reserve are harms fit for applying the PPP. In the case of ***Ravindra Gunawaradena Kariyawasam vs. Central Environmental Authority and others***[13] polluting ground water by operations of thermal power plant was considered as a harm. Indian apex Courts recognise in ***M.C. Mehta vs. Kamal Nath and others***[14] turn the course of the river Beas, create a new channel and divert the river's flow was a harm. Failure to handling and discharge of hazardous waste and other substances with utmost responsibility as well as damages caused by discharging highly toxic untreated waters into environment were considered as harms in ***Indian Council for Enviro-legal action and others vs. Union of India and others***[15] and ***M.C. Mehta vs.Union of India***[16].

Who is Polluter?

Though many legislations explain what is pollution they are extremely silent as to who is polluter. Identifying the correct polluter is a significant challenge in modern day complicated environmental cases, this may vary from individual person, cooperate body, government authority, off Shore Company or even to another government. Case laws of different jurisdictions have provided the necessity of a causal connection between activities and pollution, who can be considered a polluter, and possibilities to differentiate contributions from categories of polluters. Both Sri Lankan and Indian Courts are more likely to consider polluter pays principle as an absolute liability. In the case of ***Watte Gedera Wijebendara vs. Conservator General of Forest and***

11 (2009) 1 Sri.L.R 337
12 CA Writ 291/2015
13 SC/FR 141/2015
14 (1997) 1 SCC 388
15 (1996)AIR146
16 (1987) AIR 965

others[17]court recognized that the respondent company has absolute liability to restore illegal mining site, same was adapted in ***Ravindra Gunawaradena Kariyawasam vs. Central Environmental Authority and others***[18] where court has ordered respondent thermal power plant to pay compensations to the residents of affected area.

The Bhopal gas tragedy is contemplated as one of the biggest industrial catastrophe in India. This led background to the landmark judgement of ***M.C.Mehta vs. Union of India[19] (Oleum Gas Leak case)*** where Indian courts were reluctant to accept the concept of strict liability which was laid down by the English Courts in ***Ryland vs. Fletcher[20]*** which states that "any person who keeps any hazardous substances on his premises will be held responsible if such substance escape the premises and causes any damage but subject to certain exceptions to the rule such as Act of god, plaintiff's fault and third party fault". Indian courts decided to come up with the principle of absolute liability by which held that any person involved in inherently dangerous or hazardous activity or any harm is caused to anyone because of any accident occurred during carrying out those activities would be absolute responsibility. This decision of the Indian Supreme Court has been subsequently referred to large number of cases including ***Indian Council for Enviro-legal action and others vs. Union of India and others[21]*** and ***Vellore citizen's welfare forum vs. Union of India***[22]**.**

Nonetheless, European Court of Justice held a different view in this perspective whereas the ***Erika Oil spill case[23]*** states that the producer of hydrocarbons which became waste due to an accident at sea could be held liable for the clean-up cost in accordance with polluter pays principle, however offender ship is not liable unless it has contributed through its conduct to the risk of pollution steaming from the shipwreck.

In situations where pollution was caused by more than one party, a joint effort of all polluters will be required in order to reduce pollution and restoration. In these situations, fair burden sharing between the different

17 Wattegedara, supra note 10
18 Kariyawasam, supra note 12
19 M.C.Mehta, supra note 15
20 [1868] UKHL 1, (1868) LR 3 HL 330
21 Indian council, supra note 14
22 (1996) 5 SCR 241
23 Commune de Mesquer v Total France SA and Total International Ltd (Case C-188/07), European Court of Justice,
24 June 2008.

categories of polluters will be required. The polluter pays principle provides guidelines for such fair burden sharing. In the European Court of Justice's ***Dieter Janecek vs. Freistaat Bayern (Janecek case)***[24], where the Court decided that with regard to the content of an air quality action plan that are capable of reducing to minimise the risk, Member States had some discretion in the identification of measures. Member States were obliged to take adequate measures, taking into account the balance which must be maintained between the objective of reducing to a minimum the risk of the limit values and the duration of such an occurrence, and the various opposing public and private interests.

The Polluter Pays Principle puts the responsibility for combating pollution primarily on the polluter. However, in some cases it is difficult to establish a clear causal link between the activities of one specific, individual polluter and the pollution. In practice, water quality and ambient air quality may be affected by multiple pollutants, originating from many different sources in such situation burden sharing among all polluters might be useful tool.

In the ***Centre for Environmental Justice Ltd. vs. Conservator General of Forest and others***[25]***(Wilpattu case)*** while issuing a mandamus writ, ordering respondent Conservator General of Forest to re-instate the forest land to the forest reserve and organise forest replanting programme, made a consequential order directing the 7th respondent to bear the full cost of such tree planting programme in which help to creatively broaden the scope and limitation of polluter pays principle in the Sri Lankan context. This instance may be somewhat closer to the concept of burden sharing.

There were occasions where courts have recognized burden sharing even among generations. ***New York v. Shore Realty Corp***[26] was a land mark judgement of United States, which speaks about the responsibility on clean-up efforts. The respondent Shore Realty Company was an owner of the land in New York which the company wanted to build condominium. Shore Realty Company bought the land from a third party even though company knew there were more than 700,000 gallons of hazardous waste already on the site. The courts had to decide who holds the responsibility for clean up hazardous substance. The second circuit federal Courts of Appeals in United States held respondent company was liable to the government for all of the clean-up for

24 European Court of Justice, C-237/07
25 Center for, supra note 12
26 759 F.2d 1032 (2d Cir. 1985)

the purposes of statute[27]. Further it was held that the respondent company might be free to sue other previous owners who might be more liable.

Who pays for what?

In theory, the polluter pays principle is aimed at ensuring that the polluter bears the mitigation burden, as well as the adaptation burden by paying the cost of environmental restoration. But when determining the damaged caused there might be several facts to consider. On the one side due to the pollution Environmental, Social, Economic as well as cultural effects and on the other side how the polluter contribute to the damages and legal limitation.

If a polluter causes damage, it is logical to make him pay for it. However, there might be situations where restoration of damage is meaningless in the case of serious irreversible effects which do not admit of true compensation, some environmental damages may last long several hundred years. Then the assessment of damage is beset with well-known difficulties such as ignorance of the long-term effects, tracing indirect effects. Even the best expertise is unable to figure it out approximating the money cost of damage to the cost of restoring it. In the environmental law regime, it is highly considered that the restoring damage is often economically wasteful, prevention is better than cure. Apart from above said drawbacks pollution control involves other costs such as the administrative cost of implementing an anti-pollution policy, the cost of the measuring and checking arrangements, the cost of research and development in anti-pollution technologies are far more costly than initial assessment and it is highly likely that a large part of the administrative cost would be charged to the taxpayers but not to the polluter.

In the Nigerian case of ***Shell Petroleum Development Co. Ltd. V Farrar***[28] the court held that the polluter will be liable to the victims for the cost of reparation, restitution or compensation determinable by agency and enable the government to recover from responsible parties the cost of their pollution activities and renders responsible for remedying the harmful conditions they created.

M.C. Mehta V Kamal Nathand others[29] The court observed that pollution is a civil wrong and it is a tort committed against the community as a whole. Thus, any person guilty of causing pollution has to pay damages for the

27 Comprehensive Environmental Response Compensation and Liability Act (CLECLA)
28 (1995) 3 NWLR (PT 382) 148
29 M.C.Mehta, supra note 14

restoration of the environment and ecology. Under the Polluter Pays Principle, it is not the government to meet the costs involved in either prevention of such damages or in carrying out remedial action because the effects of this would be to shift the financial burden of the pollution incident to taxpayers. On the other hand, the crucial factor the court has to consider whether the polluter is only responsible for the pollution to which he contributes. The polluter does not have to pay for the elimination and prevention of pollution to which he does not contribute. In cases where pollution originates from different sources, all categories of polluters must contribute to the abatement of the aggregate pollution and polluters can only be obliged to contribute to the abatement of pollution in proportion to their contribution to the aggregate problem. Parties who do not pollute or have not contributed to (the risk of) pollution are not to be burdened by the application of the Polluter Pays Principle.

Drawbacks and criticism to Polluter Pays principle

The Principle of Polluter Pays has also been subjected to criticism as well. The prime argument of the critics is that if the polluter fails to take responsibility for the pollution caused by them, the total process of internalisation will fail in consequence. To a certain extent, this point of view is acceptable where the cost of damages alone is not given a burden upon the actual polluters, where it will, in return, be a burden for the whole society at large to bear.

Another environmental conservation-based criticism is this concept will generalize the right to pollute in which means that adopting these kinds of principles will give a window of opportunity to a polluter by mere payment of damages to the public and may carry on the same pollution act in the future without any other consequences.

Conclusion

The Polluter Pays Principle, might far from perfect, does offer many advantages for environmental justice, as it can be a good framework for establishing legal recourse against a polluter. In Sri Lanka, Polluter Pays Principle is considered an important and inherent part of environmental law and has been applied to many cases to render justice. Many nations use this principle to protect the environment from the people who are polluting it and degrading its quality. In the global arena, this concept is more and more intrinsically being defined by judicial decisions and will in the future continue to be one of the main pillars of sustainability.

TABLET COMPUTER AND INTELLECTUAL PROPERTY RIGHTS - SOFTWARE, DESIGN AND TECHNOLOGY

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ABSTRACT

Tablet computer is one of most demanding novel products of human intellectual endeavour. It is a smooth and simple product useful in everyday life. The extreme simplicity of the tablet is striking and everything is being now compressed in its memory. Its software, design and technology are protected by copyright, design right and patent embodied in the intellectual property law which recognizes, protects and enforces such rights of tablet inventors. If the overall impression produced by a tablet on the informed user, is found different from the product in question, then there is no infringement of design rights. There is an emerging trend of granting patents for tablet software with technical effect in other jurisdictions which has not yet been settled in Sri Lankan context.

Keywords: tablet, computer, technology, software, copyright, industrial design, patent, intellectual property

1. INTRODUCTION

Tablet computer is a computer in the form of a flat surface with a plate of glass which accepts input through fingertips or stylus. It has a very thin rim and a blank back, and a crisp edge around the rim and a combination of curves, both at the corners and the sides.[1] It has three main features; the software, design and technology which are protected by three main intellectual property rights; the copyright, design right and patent embodied in the Intellectual Property Act No.36 of 2003 (the IP Act) for the protection and enforcement of IP rights of tablet inventors and settle the disputes therein. This article provides a brief overview of the provisions of the IP Act governing the design, technology and software of tablet.

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1 *Samsung Electronics (UK) Ltd v. Apple Inc* [2012] EWHC 1882 (Pat) [182] (Birss J).

2. TABLET SOFTWARE AND LAW

2.1 COPYRIGHT OF TABLET SOFTWARE

There are three types of software installed in tablets; the Operating System (OS) software, application software (apps) and firmware. For instance, the OS could be iOS, Android or Windows and there could be many apps like Maps, Mail, Calendar, Notes, Health, Weather, Docs, iTunes, Face-Time and Podcasts etc. The 'firmware', are programmes permanently embedded by way of chips and integrated circuits inside tablets. A sound example of firmware is BIOS (Basic Input/ Output System) which manages data flow between the OS and the hardware of a tablet.

Tablet software is protected under the domain of literary, artistic or scientific works in Section 6 (1) of the IP Act.[2] Such works are protected by the sole fact of their creation and irrespective of their mode or form of expression, as well as of their content, quality and purpose as mentioned in Section 6 (2).[3]

However, in order to seek copyright, the software of tablet should be 'original' intellectual creations.[4] The requirement of originality is mentioned in section 6 (1) of the IP Act 2003.[5] In the matter of ***Wijesinghe Mahanamahewa v. Austin Canter,*** the Court held that, the originality relates to the expressions of thought and that the expressions need not be original nor in a novel form. The only requirement is that the work should not be copied from another work and it should originate from the author.[6]

As held in ***University of London Press Ltd. v. University Tutorial Press Ltd***, the word 'original' means that, the work should not be copied from another work and it should originate from the author.[7] As held in ***L.B (Plastics) Ltd. v. Swish Products Ltd*** and ***Interlego A.G. v. Tyco Industries Inc***, the reproduction of a pre-existing work does not obviously receive copyright protection, as it is merely a copy of a an existing work and not an original creation.[8]

According to Section 13 (1) of the IP Act, the economic and moral rights of tablet software shall be protected during the life time of the author and for

2 IP Act No.36 of 2003 of Sri Lanka s 6 (1).
3 ibid s 6 (2).
4 ibid s 6 (1).
5 ibid s 6 (1).
6 (1986) 1SLR 620.
7 (1916) 2 Ch. 601- 608 – 609.
8 (1988) RPC 343.

a further period of seventy years from the date of his death.[9] According to Section 14 of the IP Act, the author who created the work shall be the original owner of economic rights.[10]

The owner of copyright of tablet software shall have the exclusive right to carry out or to authorize the reproduction, translation, adaptation, arrangement or other transformation of the work, the public distribution of the original and each copy of the work by sale, rental or export of the work.[11] Not only by the copyright owners but also by any person authorised by the copyright owner is entitle to sell the work.[12]

In addition, copyright owner of tablet software shall have exclusive right to rental of the original or a copy of a computer program, a data base or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned, importation of copies of the work, public display of the original or a copy of the work.[13]

Copyright of tablet software could be assigned by licensing agreements which could be executed even with the permission for sub-licensing. The owner of a copyright could grant licence to a physical person or legal entity to carry out all or any of the acts relating to the economic rights. In addition, he could assign or transfer in whole or any part of such economic rights.[14]

Furthermore, the author of tablet software has moral rights defined in Section 10 of the IP Act independent to his economic rights even where he is no longer the owner of such economic rights. For instance, he has a moral right to have his name indicated prominently on the copies and in connection with any public use of his work, as far as practicable.[15] Then he has right to use a pseudonym and not have his name indicated on the copies and in connection with any public use of his work.[16] He can object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his work which would be prejudicial to his honour or reputation.[17] Moral rights cannot be transferred but may pass under a testamentary disposition or operation of

9 IP Act No.36 of 2003 of Sri Lanka, s 13 (1).
10 ibid s 14.
11 ibid s 9.
12 ibid s 9 (4).
13 ibid s 9.
14 ibid s 16 (1).
15 ibid s 10 (1) (a)
16 ibid s 10 (1) (b)
17 ibid s 10 (1) (c)

law.[18] Author may waive any of such moral rights in writing and specifying clearly. After his death, the successor of such rights is also entitled to such waiver.[19]

The exception of 'fair use' is available in the IP Act covering the areas of copyright in the field of computer programs. This exception is available (i) for use of the computer program with a computer for the purpose and extent for which the computer program has been obtained; and (ii) for archival purposes and for replacement of the lawfully owned copy of the computer program in the event that the said copy of the computer program is lost, destroyed or rendered unusable.'[20] No copy or adaptation of a computer program shall be used for any purpose other than those specified in paragraph (a).[21]

Not only tablet software itself but also, any derivative databases are protected under the derivative works in the IP Act based on selection, co-ordination or arrangement of their contents.[22] The copyright owner of tablet software has right to rental of the original or a copy of computer program, a data base. In ***Waterlow Publishers Ltd v. Rose***,[23] Court held that, any compilations or databases contain within a software are protected under copyright law. However, in ***British Horseracing Board v. William Hill***, a database was excluded from the protection of the *sui generis* database law due to lack of independent material in the database.[24]

2.2 Enforcement of Copyright of Tablets

There are civil remedies and criminal sanctions available to enforce copyrights of tablets. According to Section 22 (1) of the IP Act, any person who infringes or is about to infringe the copyright may be prohibited from doing so by way of an injunction and be liable to damages.[25] In addition, the owner of such rights is entitled to seek such other remedy as the court may deem fit.[26] Section 22 (2) of the IP Act defines the jurisdiction of the court in such claims.[27]

18 ibid s 10 (2)
19 ibid s 10 (3)
20 ibid s12 (7) (a).
21 ibid s12 (7) (b).
22 ibid s 7 (1) (b).
23 [1995] F.S.R. 207
24 [2005] EWCA Civ863, [48] (Pill LJ).
25 IP Act No.36 of 2003, s 22 (1).
26 ibid s 22 (1).
27 ibid s 22 (2).

The civil remedies are further explained in Section 22 (2) (f) which should be read with Chapter XXXV of the IP Act. Accordingly, the copyright owner could claim injunctions and interim injunctions restraining the infringement as mentioned in Sections 170 (1) and (6) , damages under Sections 170 (1), (3) (i) and (10) and such other relief as the Court, may deem just and equitable as mentioned in Section 170 (1). In addition, Court shall have the power to order the infringing goods to be disposed of outside the channels of commerce or to be destroyed under Section 170 (3) (ii).

In matters of ***American Cyanamid v Ethicon Limited***[28] and ***Series 5 Software v Clarke 1996***[29] Courts, laid down the principles relevant to the grant of an interim injunction. Firstly, claimant should have a reasonable meritorious claim. For instance, mere financial compensation would be inadequate to succeed the claim. Secondly, court should check who will suffer the least disadvantage which cannot be redressed by subsequent financial compensation (test of balance of inconvenience). Thirdly, court should check whether the interim injunction could preserve the situation evident at the time of issuing proceedings (status quo). Similar principles have been established in Sri Lankan cases ***Felix Dias Bandaranayake v. The State Film Corporation and Another***[30] and ***Hotel Galaxy (Pvt) Ltd v. Mercantile Credit Ltd.***[31] These principles have been adopted even in recent cases ***Santak Power (Pvt) Ltd v. Janatha Estate Development Board and others***[32] and ***Mahawattage Dona Chanika Diluni Abeyratne v. Jaykay Marketing Services (Pvt) Ltd.***[33] ***Pradeshiya Sabhava of Mawanella v. Weligalle Wedarallage Devar Ashoka Gunawardena***.[34]

The criminal sanctions are explained in Section 22 (2) (g) which should be read with Chapter XXXVIII and XLI of the IP Act. According to Section 178 (1) of the Chapter XXXVIII, if any person who wilfully infringes any of the rights protected under Part II of the IP Act shall be guilty of an offence.[35] In addition, if any person knowing or having reason to believe that copies have been made in infringement of the rights protected under Part II of the IP Act, sells, displays for sale, or has in his possession for sale or rental or for

28 [1975] AC 396
29 [1996] 1 AER 853
30 (1981) 2 SLR 287
31 (1987) 1 SLR 5
32 SC/Appeal/227/16 (Decided on: 20.05.2021)
33 SC APPEAL No. 199/12 (15.2.2017)
34 SC Appeal No. 95/2010 (30.11. 2016)
35 ibid s 178 (1).

any other purpose of trade any such copies, shall be guilty of an offence under Section 178 (2) of the IP Act.[36]

If any person knowingly or having reasons to believe that he is in possession or has access to a **computer program** infringing the rights of another person, and wilfully makes use of such program for commercial gain, shall be guilty of an offence under Section 178 (3) of the IP Act.[37]

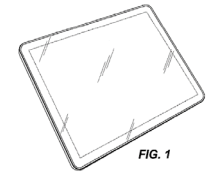
Further, there are remedies available to restrain import and export of **pirated copyright goods** or any other goods in contravention of the provisions of the IP Act. (Please see the remedies discussed under the enforcement of industrial design rights of tablets)

3. TABLET DESIGN AND LAW

3.1 Industrial Design Rights of Tablets

Industrial design is an ornamental or aesthetic aspect of an article rather than its technical features.[38] Thus, ornamental aspect of a Tablet could be considered an industrial design. Following is an excerpt of a registered industrial design of a tablet.

" **Design No.** D504,889 **Electronic Device** **Inventors**: …Steve Jobs, Palo, Alto, CA (US);… **Assignee**: Apple Computer, Inc. **Claim**: "…The ornamental design for an electronic device, substantially as shown and described". "



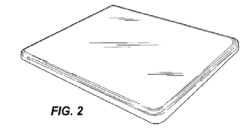


Table 1.0- Registered Industrial Design of Tablet[39]

Industrial Designs have been defined in Section 30 of the IP Act. Accordingly, any composition of lines or colours or any three dimensional

36 ibid s 178 (1)

37 ibid s 178 (3)

38 World Trade Organisation, 'Industrial designs, layout-designs of integrated circuits, undisclosed Information, anti competitive practices '<https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules6_e.pdf> accessed 10 May 2021.

39 An excerpt from U.S. Design Patent No. D 504, 889 registered under Section 171 of the U.S. Patents Act (Designs).

form, whether or not associated with lines or colours, that gives a special appearance to a product of industry or handicraft and is capable of serving as a pattern for a product of industry or handicraft shall be deemed to be an industrial design.[40]

In order to seek protection under the IP Act, the industrial design of tablet should be new[41] and different from earlier industrial designs.[42] The right to obtain protection of an industrial design belongs to its owner.[43] The owner of an industrial design or his successor in title is its creator.[44] The person who makes the first application for the registration of an industrial design or the person who first validly claims the earliest priority for his application shall be deemed to be the creator of such industrial design.[45] The registration procedure of an industrial design is defined in Section 36-44 of the IP Act.[46]

The registration of an industrial design expires on the completion of five years from the date of receipt of the application for registration.[47] Such registration could be renewed for two consecutive terms of five years each, on an application made on behalf and on payment of the prescribed fee as mentioned in Section 46 of the IP Act.[48]

The rights of the registered owner of an industrial design are explained in Section 47 of the IP Act. Accordingly registered owner of an industrial design has exclusive rights to (a) reproduce and embody such industrial design in making a product; (b) import, offer for sale, sell or use a product embodying such industrial design; (c) stock for the purpose of offering for sale, selling or using, a product embodying such industrial design; (d) assign or transmit the registration of the industrial design; (e) conclude licence contracts.[49]

Industrial design may be assigned or transmitted and such assignment or transmission shall be in writing signed by or on behalf of the contracting parties.[50] However, no such assignment or transmission shall have effect against third parties unless so recorded in the register.[51]

40 Intellectual Property Act No.36 of 2003 of Sri Lanka, s 30.
41 ibid s 31 (3).
42 ibid s 29 (b).
43 ibid s 32 (1).
44 ibid s 32 (2).
45 ibid s 32 (4).
46 ibid s 36-44.
47 ibid s 45.
48 ibid s 46.
49 ibid s 47.
50 ibid s 49 (1).
51 ibid s 49 (4).

Furthermore, the owner of an industrial design of tablet could prepare licensing contracts granting further licenses. According to Section 54 (1) of the IP Act, in the absence of any provision to the contrary in the licence contracts, the licensor may grant further licenses to third parties in respect of the same industrial design or on behalf of himself do any or all of the acts referred to in sub-paragraphs (a), (b) and (c) of subsection (1) of Section 47.[52]

However, if the license contract provides that the license is exclusive, and unless it is expressly provided otherwise in such contract, the licensor shall not grant further licenses to third parties in respect of the same industrial design or not execute any of the acts referred to in sub paragraphs (a), (b) and (c) of subsection (1) of Section 47 or cause to be executed.[53]

The Licensee of an industrial design of tablet is entitled to do any or all of the acts referred to in paragraphs (a), (b) and (c) of subsection (1) of Section 47 within Sri Lanka, during the period of validity of the registration of the industrial design, inclusive of the period of renewal if any.[54] However, according to Section 53 (b) of the IP Act, licensee is not entitled to assign or transmit his rights under the licence contract or grant sub-licenses to third parties.[55]

3.2 The Layout Design of Integrated Circuits of Tablet

There are integrated circuits (IC) located within the hardware of a tablet. They intend to perform an electronic function.[56] The layout design of such circuits is protected under the IP Act. Layout designs are three dimensional dispositions, illustrates interconnections of integrated circuits.[57]

The right to protection of a layout design of ICs in tablet, shall belong to the creator of such design.[58] Such right of a layout design made or created in the performance of a contract of employment or in the execution of a work shall, unless the terms of such contract of employment or contract for the execution of such work otherwise provides, belong to the employer or the person who commissioned the work, as the case may be.[59]

52 ibid s 54 (1).
53 ibid s 54 (2).
54 ibid s 53 (a).
55 ibid s 53 (b).
56 ibid s159.
57 ibid s 159.
58 ibid s 146 (1).
59 ibid s 146 (2).

In order to seek IP protection, the layout design should be original.[60] Such design is considered original if (a) it has not been produced by the mere reproduction of another layout design or of any substantial part of such design; and (b) it is the result of an intellectual effort of a creator and is not common place among creators of layout designs and manufacturers of integrated circuits at the time of the creation of such layout design.[61]

The scope and exceptions to the protection of layout design of ICs are defined in Section 148 of the IP Act. For instance, such protection shall not extend to the reproduction of the protected layout design for the purpose of evaluation, analysis, research or non profit teaching or education.

The duration of the IP protection provided for layout design is ten calendar years from the date of commencement of such protection[62] by following the registration procedure as mentioned in Sections 150-151.[63]

3.3 'Freedom of Design' of Tablets

One of the issues in the area of Tablet design is the conflict between the freedom of design and the rights of the registered industrial design owner. If the overall impression produced by a tablet on the informed user, is found different from the product in question, then there is no infringement of design rights. In ***Samsung Electronics (UK) Ltd v. Apple Inc,***[64] the Court of Appeal of England and Wales has made an effort to strike a balance between the freedom of design and the exclusive rights of the registered owner of the design by applying the test of 'different overall impression'.[65]

In the said matter Sir Robin Jacob held that,

> *"...There is some design freedom as regards ornamentation, the rim, the overall shape (rectangular or with some curved sides) but not a lot. And the main thing, the screen itself was something with which the informed user would be familiar..."*[66]

When the matter was taken at the High Court of Justice, it was held that, Samsung Electronics (UK) Limited's Galaxy Tablet Computers, namely the Galaxy Tab 10.1, Tab 8.9 and Tab 7.7 do not infringe Apple's registered

60 ibid s 147 (1).
61 ibid s 147 (1) (a) and (b).
62 ibid s 149 (1) and (2).
63 ibid s 150-151.
64 [2012] EWCA Civ 1223.
65 ibid Sir Robin Jacob [39].
66 ibid [39].

design No. 0000181607-0001. The said judgement was upheld by the Court of Appeal. In the High Court of Justice, Birss J, held that,

> *"…I remind myself that the informed user is particularly observant, shows a relatively high degree of attention and in this case conducts a direct comparison between the products."*[67]

The overall impression of both Apple and Samsung Galaxy Tablets on informed user has been compared by the High Court in the said case and Birss J, further held that,

> *"…The informed user's overall impression of each of the Samsung Galaxy Tablets is the following. From the front they belong to the family which includes the Apple design; but the Samsung products are very thin, almost insubstantial members of that family with unusual details on the back. They do not have the same understated and extreme simplicity which is possessed by the Apple design. They are not as cool. The overall impression produced is different."*[68]

Therefore, when there is a conflict between the freedom of design and the rights of the registered industrial design owner of tablet, the overall impression of the informed user should be considered. Accordingly, if there is no confusion in the minds of the informed user regarding the ornamental aspects of two competing tablet designs, then designer's freedom would prevail over the registered owner's rights.

3.4 Enforcement of Tablet Design Right

There are civil remedies and criminal sanctions available to protect tablet designs. Among the civil remedies, owner of the industrial design right of tablet could claim injunctions restraining the infringement as mentioned in Sections 170 (1) and (6), damages under Sections 170 (1) and (3) (i) and (10) and such other relief as the Court, may deem just and equitable as mentioned in Section 170 (1). In addition, Court shall have the power to order the infringing goods to be disposed of outside the channels of commerce or to be destroyed under Section 170 (3) (ii).

Not only the right holder but also the assignee of an industrial design of a tablet would be able to claim injunction restraining unauthorised commercial exploitation of such design. In ***St. Regis Packaging (Pvt) Ltd v. Ceylon Paper***

67 [2012] EWHC 1882 (Pat) [183] (Birss J).
68 ibid [190] (Birss J).

Sacks Ltd, Court held that, an assignee of a patent would be in a position to seek relief under the Code of Intellectual Property Act."[69]

When taken into consideration the criminal sanctions imposed by the IP Act, according to Section 179, any person who wilfully infringes the rights of any registered owner, assignee or licensee of an industrial design shall be guilty of an offence.[70] In addition, false representation of such design is also considered an offence under the Act under Section 180 of the Act.[71]

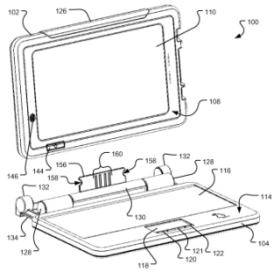
Furthermore, there are remedies available to restrain infringement of industrial design rights of tablets during import and export. According to Section 206 of the Intellectual Property Act, the Section 101 of the Customs Ordinance has been amended by including unauthorised import and exports of IP. In addition to that, by Section 207 of the IP Act, a new provision has been inserted as Section 125A in the Customs Ordinance to prohibit the importation of counterfeit IP goods in contravention of the provisions of the IP Act and include such goods among the goods the importation of which, are prohibited under Sections 43 and 44 of the Ordinance and included in Schedule B.[72] As a result of the said amendment, any tablets with industrial designs in contravention of the provisions of the IP Act could be even destroyed[73] suspend of the release,[74] prohibition of re-exportation.[75]

4. TABLET TECHNOLOGY AND LAW

4.1 Patentability of Tablet Technology

Tablet is a computer which process and convert input data into meaningful information. In order to achieve the said task, it uses technology and hardware which are patentable considering their novelty.[76] The patent rights defined in the IP Act could be used to protect tablet technology as well. Following is an excerpt of an abstract of a registered patent of tablet.

69 2001 (1) SLR 36, 41 (Bandaranayake J).
70 Intellectual Property Act No.36 of 2003 of Sri Lanka, s 179.
71 ibid s 180.
72 s 207 of the IP Act 2003 reading with Section 125A (1) and (2) of the Customs Ordinance.
73 ibid s 125A (3) of the Customs Ordinance.
74 ibid s 125B (1) of the Customs Ordinance.
75 ibid s 125B (9) of the Customs Ordinance.
76 Charlotte Waelde, Graema Laurie, Abbe Brown, Smita Kheria, Jane Cornwell, *Contemporary Intellectual Property Law and Policy* (3rd edn, OUP 2013) *11-12, para 1.37-1.38.*



Abstract

"A tablet computer is composed of a tablet component and a keyboard component. The tablet component houses all of the essential hardware of tablet computer including the central processing unit (CPU), the memory, the power supply, and a touch screen display…"

Table 2.0 - Registered Patent of Tablet[77]

The term 'computer' has been defined in the IP Act as an electronic or similar device having information processing capabilities.[78] An invention is patentable if it is new, involves an inventive step and is industrially applicable.[79] Novelty is defined in Section 64 of the Act as an invention which is not anticipated by prior art.[80] In ***Ramawickrema Gamachchige Ravindra v. Riyad Ismail and Director General of Intellectual Property***, Commercial High Court Judge Ruwan Fernando explained the standard of novelty as following,

"The concept of novelty under the Intellectual Property Act encompasses any written or oral disclosure, including through use anywhere in the world. Section 64 (1) of the Sri Lankan Act defines the concept of novelty and states that an invention is new if it is not anticipated by prior art and section 64 (2) (a) of the Sri Lankan Act defines the 'prior art'. The prior art consists of everything disclosed to the public, anywhere in the world, by written publication, oral disclosure, use or in any other way, prior to the filing or, where appropriate, the priority date of the patent application claiming the invention (worldwide novelty). This seems to suggest that ***Sri Lanka has taken an absolute novelty standard*** *in the IP Act of Sri Lanka."*[81]

An invention shall be considered as involving an inventive step if, having regard to the prior art relevant to the patent application claiming the invention, such inventive step would not have been obvious to a person having ordinary skill in the art.[82] In the matter of ***Hallen Co. and Anr. v. Brabantia (UK) Ltd***,

77 An excerpt from U.S. Patent No. 8,208,245 B2 registered under U.S. Patents Act.
78 ibid s 5.
79 Intellectual Property Act No.36 of 2003 of Sri Lanka, s 63.
80 ibid s 64.
81 H.C (Civil) No. 01/2010/IP (Decided in February, 07, 2018)
82 ibid s 65.

the Court developed a test to interpret the term 'obvious'.[83] Accordingly, said term should be interpreted depending on the facts of each case. An invention shall be considered industrially applicable if it can be made or used in any kind of industry.[84]

Furthermore, the protection granted by a patent is generally valid only for twenty years after the filing date.[85] However, if the patent holder does not commercially exploit the patent within a reasonable period of time, then a third party may obtain a non-exclusive licence from the Director General of IP to exploit the patent. This process is referred to as compulsory licensing method where a third party could make an application to the Director General of intellectual property for the purpose of obtaining a licence to exploit a patent.[86]

If such a party could prove that he has made efforts to obtain approval from the right holder on reasonable commercial terms and conditions and such efforts have not been successful within a reasonable period of time, then a licence could be issued to the said applicant.[87] Hence, due to the application of compulsory licensing method, the right to charge a payment from the licensee could be deprived on the grounds of unfair terms in the licence.[88]

The owner of a tablet patent shall have an exclusive right to conclude licence contracts.[89] If a patent is a subject matter of a business contract, then even if the contract is terminated, the rights remain until the patent expires. The protection of intellectual property is available even during the patent pending stages considering its status. In ***Global Flood Defence Systems Ltd v. Van Den Noort Innovations BV***, [90] Court had provided an opportunity to enforce the rights of a defendant who had acquired the patent during Court proceedings before the trial date.

One of the main benefits of tablet patent is the ability of assignment. The owner of a patent shall have an exclusive right to assign or transmit the patent.[91] Once an assignment is recorded in the register, the assignee has all the rights of the proprietor of the patent.[92]

83 [1991] R.P.C. 195,212.
84 ibid s 66.
85 IP Act No.36 of 2003 of Sri Lanka, s 83 (1).
86 ibid s 86 (2) (a).
87 ibid s 86 (2) (b).
88 Bently (n 6) 302, para 7.1.
89 IP Act No.36 of 2003 of Sri Lanka, s 84 (1) (c).
90 [2015] EWHC 153 (IPEC) [48] [49].
91 IP Act No.36 of 2003 of Sri Lanka, s 84 (1) (b).
92 [2001] 1 Sri LR 36.

4.2 Patentability of Tablet Software

Although tablet software is copyrightable, such protection is considerably weaker than in patents.[93] The main issue in the realm of tablet software is whether it is patentable or not. Following is an overview of the Sri Lankan perspective and other jurisdictions regarding this issue.

4.2.1 Sri Lankan Perspective

In the IP Act No.36 of 2003, mathematical methods and schemes are excluded in the patentable subject matter. According to Section 62 (3) (a) of the IP Act, discoveries, scientific theories and **mathematical methods** are not patentable.[94]

According to Section 62 (3) (c), **schemes**, rules, or methods for doing business, performing purely mental acts or **playing games** are not patentable. Computer source codes are generally based on mathematical methods, words, codes and schemes. The term 'computer program' has been defined in Section 5 of the IP Act as,

> *'A set of instructions expressed in words, codes, **schemes** or in any other form, which is capable, when incorporated in a medium that the computer can read, of causing a computer to perform or achieve a particular task or result'*[95]

When reading above Section 5 along with Sections 62 (3) (a) and (c), computer programs (software) are not patentable as they are expressed in the form of **mathematical methods and schemes**. In addition, any computer games installed in tablets are also not patentable as 'playing games' are excluded in patentable subject matter under Section 62 (3) (c).

According to the above discussion, though the IP Act does not expressly exclude the computer programs in patentable subject matter, yet it is not patentable due to the interpretation and application of Section 5, read along with Sections 62 (3) (a) and (c). When considering the practical circumstances, even the opinion of the patent examiners in the National Intellectual Property Office, is that computer programs are not patentable in Sri Lanka.[96]

93 Charlotte Waelde, Graema Laurie, Abbe Brown, Smita Kheria, Jane Cornwell, *Contemporary Intellectual Property Law and Policy* (3rd edn, OUP 2013) 12 para 1.39.

94 ibid s 62 (3) (a).

95 ibid s 5.

96 Nissansala Abhayaruwan, Patent Examiner, National Intellectual Property Office of SL, Presentation- Overview of the Patent System and Procedure in Sri Lanka, Slide Page No. 13. Published on World Intellectual Property Organisation <https://www.wipo.int/edocs/mdocs/aspac/en/wipo_ip_cmb_17/wipo_ip_cmb_17_1.pdf> Accessed 10 May 2021.

Although, computer programs are not patentable in Sri Lanka, they are currently protected under the copyright law.[97] In other words, they are fairly and squarely placed under the copyright regime.[98] Hence, innovators in the field of tablets could use procedures laid down in the statutory law of copyright, instead of patent to protect their rights in Sri Lankan context.

4.2.2 Other Jurisdictions

(a) Tablet Software is not Patentable

When considering the decided case law regarding issue of patentability of tablet software, in United Kingdom, ***In the Matter of Fujitsu Limited,*** Court held that, a computer program modelling a crystal structure was not patentable as it was compiled by mathematical methods and not by hardware functions.[99] In the said matter Court referred to Section l of the Patents Act 1977 of UK and Section (2) (a) which excluded, discoveries, scientific theories and mathematical methods from patentability.[100]

In the Matter of Fujitsu Limited, In ***Merrill Lynch's Application,*** a method of automated trading of securities was judged to be not patentable.[101] In ***Gale's Application,*** it was held that, a method of calculating square roots using software stored in a ROM chip was not patentable.[102] In the case of ***Aerotel Ltd v. Telco Holdings Ltd,*** Court had decided that a business model based on telephone operating software system was not patentable.[103] In addition, a line of reasoning was reinforced in ***AT & T Knowledge Ventures LP and CVON Innovations Limited v. Comptroller General of Patents***[104] where Court had applied the same rule in respect of a software-based business model and decided that a digital media hosting service was not patentable.

In Australia, in ***Apple Computer Inc v. Computer Edge Pty Ltd,*** Courts held that, computer programs even in object code form were protected by copyright as literary works.[105] In Canada, in ***Apple Computer, Inc. v.***

97 Kolitha Dharmawardena, 'Legal Protection of Computer Information :A Special Law Regime in Criminal Law & Intellectual Property Rights Law' [1995] Vol. VI Part I. The Bar Association Law Journal, Page 1, 4.
98 K. Kanag-Isvaran, 'Software as Intellectual Property' [2007] Vol. XIII Bar Association Law Journal 19, 20.
99 [1997] EWCA Civ 1174, (1996) RPC 511 (Aldous LJ).
100 ibid (Aldous LJ).
101 [1989] RPC 561.
102 [1991] RPC 305.
103 [2007] R.P.C. 7 [8] [31] (Jacob LJ).
104 [2009] EWHC 343.
105 1984 FSR 481.

Mackintosh Computer Ltd, the Court held that, a hexadecimal version of the programme which has been saved on a microchip could be considered as software and could be protected by Section 3(1) of the Copyright Act of Canada.[106] In ***Research Affiliates LLC v Commissioner of Patents***, a software system that constructed and weighted an index of assets for fund managers was found to be unpatentable.[107]

In Europe, in the matter of ***Vicom***, it was held that, a computer program would not be patentable if there is no technical effect produced by a mathematical method used in the invention.

(b) Tablet Software is Patentable

In United States, in ***WMS Gaming, Inc. v. Int'l Game Tech,***[108] Court has accepted patentability of software in the USA.[109] In ***Diamond v. Diehr***, it was held by the Courts that processes or apparatus that use software as a component of the overall invention found to be a patentable. Court further held that, an invention could not be denied a patent solely because its claims contained mathematical formula.[110] The Court required considering the invention as a whole[111] In ***In re Alappat,*** it was held that, software and algorithms were patentable because they limit a general purpose computer to a specific purpose.[112] In ***Arrhythmia Research Technology v. Corazonix Corporation,*** a software analysing electrocardiograph signals was granted patent.[113] After a series of cases ***In Re Freeman,***[114] ***In re Walter,***[115] and ***In re Abele,***[116] a test has been developed named as 'Freeman-Walter-Abele test'. Accordingly, if an algorithm is applied in any manner to physical elements of process, the steps would render that algorithm to be considered as a patentable subject matter.

Australian Federal Court, in ***RPL Central Pty Ltd v. Commissioner of Patents,***[117] has decided that a software system that calculated the competency of a user against a certain skill set, was patentable. ***In IBM v Commissioner of***

106 [1990] 2 S.C.R. 209 at 215.
107 [2013] FCA 71
108184 F.3d 1339.
109 ibid 1348-49 (Fed. Cir. 1999).
110 450 U.S. 175, 187 (1981).
111 ibid at 192-93.
112 In re Alappat, 33 F.3d 1526, 1545 (Fed. Cir. 1994).
113 958 F.2d 1053, 22 USPQ2d 1033.
114 573 f. 2d 1237.
115 618 F.2d 758.
116 684 F.2d 902.
117 [2013] FCA 871

Patents, the Federal Court found that software was patentable. The invention ruled upon was software that produced an image of a curve. The invention was found to be patentable since it was a new application of a particular mathematical method using a computer.[118]

In Europe, in the matter of ***Vicom***, the EPO Board of Appeal held that, in a situation where a computer process has a merely abstract, and mathematical effect are distinguished from those which a computer process has a technical effect and should therefore be subject to patentability.[119]

4.3 Enforcement of Tablet Patents

There are civil remedies as well as criminal sanctions available in the process of enforcement of tablet patents. Among the civil remedies, the patent owner of the tablet could claim injunctions and interim injunctions restraining the infringement as mentioned in Sections 170 (1) and (6) , claim damages under Sections 170 (1), (3) (i) and (10) and such other relief as the Court, may deem just and equitable as mentioned in Section 170 (1). In addition, Court shall have the power to order the infringing goods to be disposed of outside the channels of commerce or to be destroyed under Section 170 (3) (ii).

Not only the right holder of the tablet patent but also the assignee is able to claim injunction restraining unauthorised commercial exploitation of such patent. In ***St. Regis Packaging (Pvt) Ltd v. Ceylon Paper Sacks Ltd,*** Court held that, an assignee of a patent would be in a position to seek relief under the Code of Intellectual Property Act.[120]

In the case of criminal offences, under Section 181, any person who wilfully infringes the rights of any registered owner, assignee or licensee of a patent shall be guilty of an offence. Under Section 182, false representation of a patent is also considered as an offence. In addition, unlawful disclosure of information relating to patents is also considered an offence under Section 183.

Further, there are remedies available to restrain import and export of any patentable tablets in contravention of the provisions of the IP Act. (Please see the remedies discussed under industrial design rights of tablets).

118 (1991) 33 FCR 218
119 1987 2 EPOR 74.
120 2001 (1) SLR 36, 41. (Bandaranayake J).

5. CONCLUSION

Tablet computer is one of the most demanding novel products of human intellectual endeavour, which has its own unique software, design and technology. These three main features are protected by copyright, industrial design right and patent as embodied in the intellectual property law in order to recognize, protect and enforce the said rights. These rights could be simultaneously exercised to safeguard the inventors' rights.

Tablet software is copyrightable and technology is patentable under the IP Act. In the grant of a patent to a tablet what is considered important is its novelty while in the case of a copyright, it is the originality that matters. The protection provided in the copyright law does not provide an absolute monopoly on the innovation, and is weak when compared with patent. In addition to software, databases stored in tablets are also protected as derivative works under the IP Act.

There is an issue whether tablet software is patentable or not. Although IP Act expressly provides protection for software under the copyright law, the Act has neither excluded nor included software under the patentable subject matter. On the other hand, since mathematical methods and schemes are not patentable in the present law, tablet software in such fields is not patentable in Sri Lankan context.

In the recent past, there has been an obvious ongoing development in the grant of patents to software with technical effects, as held by the Courts in other jurisdictions. In this backdrop, Sri Lankan Courts could either refer to the said standard or remain within the plain meaning of the IP Act, where the software is only copyrightable under the domain of literary and scientific creations.

The industrial design and layout design of integrated circuits of tablets are protected by the provisions of industrial design rights and the layout design rights of integrated circuits embodied in the IP Act. Compared with patents, it is impossible to maintain an absolute monopoly over the tablets by using the design rights.

Efforts have been made by the Court to strike a balance between the designers' freedom and the exclusive rights of the registered design owners by applying the test of 'different overall impression'. Accordingly, when the overall impression created by a tablet on the informed user, found different from the product in question, then there is no infringement of design rights.

EFFECTIVE REGULATION OF THE CONDUCT OF THE FINANCE INSTITUTIONS IN THE EYES OF PUBLIC

Harshana de Alwis,
District Judge/Magistrate Kebithigollawa.[1]

As demonstrable in a recent series of illegal and irregular conduct of the finance institutions including murders during illegal vehicle seizures and constant unrest under liquidity crisis a revision of the implementation regime of financial regulatory frame work is urgently required. Dilemma concerning the liquidity crisis of finance companies is traceable decades back to Pramuka Bank collapse, Golden Key Credit Card Company debacle, Sakvithi House Construction fraud, Celinco Shriram capital Management Services Limited, F & G real-estate Real Estate Company (Private) Limited failures to recent culmination of Edirisinghe Trust Investment or Swarnamahal Financial Services scams etc. and the same seemed to have reached epidemic proportions especially during current *Covid 19* pandemic. It is impractical to expect the ordinary depositor public mostly inclusive of senior citizens who place their hard-earned money in finance companies/institutions to keep vigilance on Central Bank notifications, warnings and assesses investment risks. Another facet of finance crisis is the oppressive conduct of finance companies engaged in the finance leasing business against their client who in desperation resort to such finance companies whether regulated or unregulated. This suppression includes blatantly unjust contractual terms on finance leasing of vehicles inclusive of heavy penal rates, forcible seizures in violation of Finance leasing Act, contractual uncertainty as to governing laws etc. These finance corporations are extensively regulated under a series of laws ranging from Monetary Board Law[2], previous Finance Companies Act[3], and Finance Business Act No. 42 of 2011, Finance Leasing Act[4] to series of regulations and directions issued by Central Bank of Sri Lanka (CBSL). Despite the new Finance Business Act with wide range of power being entrusted on CBSL

1 BA(Kelaniya), LLB (Sri Lanka)
2 Monetary Board Law Act No. 58 of 1950
3 Previous Finance Companies Act No. 78 of 1988 (as amended by Act No. 23 of 1991)
4 Finance Leasing Act No. 56 of 2000 as mended by Act No. 24 of 2005 and Act No. 33 of 2007

or Director of Department of Non-Banking Supervision (Director NBSD) and judicial view of said powers reflected in cases in past like *Benedict v. Monetary Board of CBSL (Pramuka Bank case)*[5], *Okanda Finance Private Limited vs. Director NBSD*[6]etc. from inception of liquidity crisis reviewing extensive discretionary powers of CBSL while recognizing dynamic scope of supervisory powers of CBSL, catastrophic liquidity failures seemed to have become inevitable. This invariably depicts insufficiency of precautionary perspective of financial supervisors like CBSL although high potent legal tools are entrusted on them to acts as proactive guardians of the rights of vulnerable public. Simultaneously, a series of moratorium circulars have been issued by CBSL and Monetary Board to protect public under the pandemic. However, it is a controversial issue whether these circulars have served their purpose. The other formidable issue common to both liquidity crisis and finance leasing business dilemma is high profile directing minds of finance corporations like directors managing to manipulate legal system, escape liability and even escape from the country pending crisis. Therefore, from the perspective of public who resort to finance leasing facilitates being exposed to oppressive conduct of both authorized and unauthorized finance institutions, a legal mechanism to bring the high-profile wrongdoers, who hide under the corporate veil, must urgently be reviewed both in criminal law sphere and in civil law sphere as remedial measures. Thus, this paper is focused on the following objectives:

1. Analyzing the nature of current liquidity crisis in relation to Non-Banking Financial Corporations, modes of oppressions conducted by finance companies engaged in the leasing business and the legal provisions governing Finance Companies;
2. Reviewing effective remedial measures to liquidity crisis concerning Non-Banking Finance Companies in the sphere of judicial review under Article 140 of the Constitution and fundamental rights jurisdiction of the Supreme Court with empathy on precautionary point of view;
3. Ascertaining an appropriate mechanism to invoke criminal liability as well civil liability against real wrongdoers or *alter ego* of finance companies who hide under corporate veil as a remedial pressure strategy.

5 *Benedict v. Monetary Board of CBSL*[2003] 3 Sri LR [68]
6 *Okanda Finance Private Limited vs. Director NBSD*[2004] 2 Sri LR [60]

Nature of the Finance Company Crisis:

The history of financial scandals resulting in liquidity crisis could be traceable to the collapse of Pramuka Bank, which was a Central Bank approved savings and development Bank in 2002 with a widespread criticism over the manner and extent of supervision conducted by the Central Bank[7]. Thereafter, Sakvithi House Construction Limited, which was owned and managed by Sakwithi Rananasighe had been investigated by CBSL under Section 11 of the Finance Companies Act and on 25th September 2008 CBSL noticed to public that same is not a registered finance company and is unauthorized to carry on finance business[8]. Golden Key Credit Card Company Limited (GKCCL), a member of the Ceylinco Group confronted a liquidity crisis resulted in failure in December 2008. The Supreme Court for the first time in the history directed the CBSL on 23.3.2009 and on 30.3.2009 to determine that the GKCCL had been carrying on finance business without authority and to take action under Section 11 of the Finance Companies Act along with further directions *inter-alia* to obtain assets and liabilities declarations from the directors of GKCCL[9]. It appears that this crisis could have been averted if the CBSL had carried out its functions more effectively. By the order dated 11th May 2009, in SCFR 191/2009, the Supreme Court appointed a Committee of Charted Accountants and Auditors to formulate a scheme of repayment of depositors based on declaration of assets GKCCL and its directors.

Edirisinghe Trust Investments Finance Limited popularly known as ETI Finance founded by the veteran entrepreneur E.A.P Edirisinghe far back in 1967 and subsequently registered under Finance Companies Act No. 78 of 1988 also failed in liquidity position in 2011 being accused of not honouring depositors' request for withdrawals. In 2018, CBSL warned temporary regulatory under Finance Business Act No. 42 of 2011. On 13th June 2020 arrest warrants were issued against the directors of the company for failure to appear in court and the licenses of ETI Finance and its subsidiary Swarnamahal Financial Services were suspended by CBSL following meeting of the Monetary Board[10].In January 2021, it was announced in the media that the Attorney General has decided to file indictments against the directors of

7 Parabath Jayakody, 'Financial Stability: Who Takes the Responsibility'*The Sunday Times*.

8 Vithanage, L.M.P. 'Responsibility, Immunity and Liability: Are Financial Supervisors Liable for Depositors' Losses? A Sri Lankan Case Study' (2018) 48(1)Staff Studies 67, 78.

9 *Ibid*, 88.

10 'ETI Finance' Wikipedia<https://en.wikipedia.org/wiki/ETI_Finance>

ETI Finance and Swarnamahal Financial Services for alleged commission of criminal offences under Section 386,389 and 403 of the Penal Code and Section 3(1) of the Prevention of Money Laundering Act No. 05 of 2006[11].

However, tragic scenario in relation to said financial frauds ascertained hereinabove is that despite the persistent attempts by the Sri Lankan Superior Courts and subsequent regulatory measures by the CBSL, none of the debacles have up to date been settled to the satisfaction of the depositors who were deprived of their hard-earned money.

Finance Leasing Business Dilemma:

Registration under Section 2 of the Finance Leasing Act No. 56 of 2000 as amended by Act No. 24 of 2005 and Act No. 33 of 2007 is mandatory in order to carry on Finance business that only such registered entities are subjected to the supervision and control of the CBSL. However, no-such registration is required for hire-purchase of vehicles under Consumer Credit Act No. 29 of 1982. Thus, moratorium circulars by the CBSL under the current pandemic do not apply to unregistered entities.

One most drastic instances of oppressive conduct of the Finance Companies, could be observed in the alleged brutal killing of the chairman of the Self-employed Three-wheel Driver Association, Mr. Sunil Jawardena in his efforts to intervene an illegal seizure of vehicle by an unregistered finance institution. This alleged murder was even vehemently condemned by the Finance Houses Association, which is the apex association with 41 registered finance companies[12]. In a recent action instituted against UB Finance based on a forcible seizure of vehicle due to wrongful repossession by the company, where the finance company failed to provide original of the lease agreement to the plaintiff, the District Court of Colombo held against the finance company that same had played a role of unjust enrichment[13]. Legal strategy adopted by the finance companies in covering up wrongful seizures is to lodge criminal actions against lessees for simple or grievous hurt and claim possession of the vehicle that constitute production in a Magistrate Court action. In most contexts, this practice of finance companies is an abuse of process of courts since the same is in violation of all procedures in the Finance Leasing Act. With the climax of oppressive conduct by finance companies demonstrable in

11 Dilshan Tharaka, 'Four ETI Finance Directors Arrested' *Daily News* (Colombo, 9 January 2021)
12 *Daily FT*(Colombo, 13 June 2020)
13 'Court Blocks Company Seizure of Leased Vehicles' *Daily News* (Colombo, 26 August 2019)

the aforesaid murder of the chairman of three-wheel driver association during a forcible seizure, the situation seemed to have reached epidemic proportions.

In the circumstances, Monetary Board of CBSL issued a series of moratoriums and a committee on Irregularities and Illegal Activities of Finance and Finance Leasing Business handed over to the governor of CBSL contained the following short-term proposals, which demonstrate the nature of misconducts by the finance companies:

1. Prevention of use of force in recovering possession of equipment
2. Abolition of illegal leasing institutions
3. Regulation of forms used for entering into lease agreements
4. Awareness of public and police on finance leasing
5. Actively regulate value paid by lessee for an equipment in a finance lease
6. Issuing directions regarding substantial failure
7. Issuing directions defining the word "Notice" given under Section 39 of the Finance Leasing Act
8. Issuing directions to specify whether a facility is a hire-purchase facility or finance lease.
9. Regulation of the penal rates
10. Regulation of valuation related to a finance lease[14]

Long term proposals extended to following proposals to the Finance Leasing Act:

1. Expediting the process of recovery of possession of equipment though court
2. Make concealment of equipment a criminal offense
3. Streamline provisions relating to "Offense" in the Finance Leasing Act
4. Prevent use of the word "Leasing" by the Illegal operators
5. Transfer or assignment of lessee's rights

The scheme of long terms proposals emphasized the need for broader consumer protection in the finance sector.

14 'Committee on Irregularities and Illegal Activities of Finance and Finance Leasing Business hands over report to CB Governor' *Ada Derana* (Colombo, 8 July 2020)

Express Legal Provisions Governing Finance Business and Finance Leasing

The liquidity crisis in relation to said crash of unregulated financial institutions laid bare weaknesses of the supervisory system and the enforceability of law to curb financial instability. Hence, the Finance Companies Act No. 78 of 1988 was overhauled and the Finance Business No. 42 of 2011 was enacted with "more teeth" to the supervisor[15].

The scheme of Finance Business Act No. 42 of 2011 read with Monetary Board Law Act seek to regulate the finance business with a wide scope of powers over finance companies ranging from licensing powers, extensive inquiring powers, initiating investigations in obtaining orders from court in order to assist investigations to prosecuting powers being vested in the Director NBSD of the CBSL.

The most harmful mischief having drastic effects on society at large is the conducting of unauthorized finance business and unauthorized deposit taking. Carrying on finance business and accepting deposits without authority is defined as an offence in terms of Section 2 of the Finance Business Act. The Director of NBSD or any authorized officer of the CBSL is entitled to investigate by requiring the directors, managers, employee, partner, secretary or auditor to provide information deemed necessary, requiring such officers of the unauthorized company to books record, accounts etc., obtaining the assistance of inspector general of police or deputy inspector general of police and to report findings to the Monetary Board[16]. One of the decisive controls vested on the Director of NBSD is to take winding up action against such entities and taking actions to declare such persons as insolvent upon review of contractual documentation, assets liabilities and creditors[17]. If the persons or entities are noticed to produce information fails or refuses to produce same, the Director NBSD is entitled to seek order from the Magistrate's Court compelling such person or director, partner, member, secretary, manager, employee, agent or contractor to produce required documentation[18]. Director NBSD is also empowered to issue freezing orders against such person, entity or officers like directors, managers or partners prohibiting disposal of assets, mobilizing deposits and entering into transactions and these freezing orders could be confirmed High Court in giving effective validity and in obtaining

15 Ibid 8, 69.

16 The Finance Business Act No. 42 of 2011 - Sections 42(1)(a) - (d), 42(2)(a), 42(2)(b), and 42(3).

17 *Ibid* Section 42(8).

18 *Ibid* Sections 43(1)(a) and 43(1)(b).

extensions. Further orders could be obtained in order to impound passports of such persons or directors, managers and secretaries of such body corporate upon application to Magistrates' Court as assistance to investigation.

Carrying on unauthorized finance business and accepting deposits without authority under Section 2 of the Finance Business Act read with Section 56(1) is an offense indictable to High Court punishable upon conviction for a term not exceeding five years or fine not exceeding five million rupees or both fine and imprisonment and settle all liabilities to depositors and creditors. Since the Act does not provide express provisions relating to bail the persons and/or officers accused of such offense can only seek bail from the High Court.

Directors, mangers, members, secretary or partner along with the body corporate or firm are vicariously liable in respect of Section 53 of the Finance Business Act.

Regulation of Licensed Finance Companies

Demonstrably in the scheme of Finance Companies Act, licensed finance companies are explicitly regulated that the Director NBSD is empowered to issue directions concerning terms and conditions of deposit taking, maximum rates of interests, terms and condition in providing loan and credit facilities, minimum ratio of liquid assets to satisfy total deposit liabilities, maintenance of cash balance with the ÇBSL, the amount of core-capital requirement, payment to directors, requirement of academic and professional qualifications of the key management personnel etc. in terms of Section 12 of the Finance Business and non-compliance with such directions permits the Monetary Board upon report by the Director NBSD formulate the opinion that such company is engaged in improper or unsound financial practices to the detriment of the depositors and impose broad corrective measures like imposing, fines, removing directors, direct cease of business etc.[19]

Supervision is strengthened with the mandatory requirement under Section 29 of the Finance Business Act to transmit income statement and the compulsory requirement to publish key financial data and key financial indicators. This control further includes list of competent and qualified auditors being specified by the Director NBSD approved by the Monetary Board and specific mandatory criteria to be compiled by the auditors including the ascertaining compliance with the law, ascertaining records relating to

19 The Finance Business Act No. 42 of 2011 - Sections 12 and 25.

deposits, ascertaining accounts and records are duly maintained for financial purposes and ascertaining whether the audited statements account reflect true and fair view of the affairs of the company[20].In addition to ascertaining the audited statements, clarification sought or upon receipt information from the finance company, Director NBSD shall reports the same to the governor CBSL for submission of the same to Monetary Board and if the opinion is framed to the effect that such finance company is unlikely to meet the demands of the depositors and/or is in the verge of insolvency, the Monetary Board can suspend the operation and take charge of the books, record and assets of the company. The Director NBSD is also empowered to institute winding up proceedings against such finance company in the Commercial High Court, which is winding up by supervision of court[21].

Criminal liability provisions against *alter ego* or any past or present director, chief executive, manager, employee, agent, contractor of a finance company for wrongful gain and wrongful loss to the finance company seems vital safeguard in protection of public. The powers of the Monetary Board at its discretion to require restoration of wrongfully gained property or requiring compensation is another crucial element of criminal elements of supervision[22]. Direct liability criminal liability of *alter ego* like director, secretary, chief executive officer, manger, or auditor, for failing to take reasonable steps to secure compliance of the Finance Business Act, failing comply with the direction or rule issued by the Monetary Board, making false entry in the any book, record, file or register, altering records or concealing any entry in a book, omitting to make an entry in a book etc. illustrate the scheme of the finance business act[23]. Simultaneously, vicarious liability of director, manager, secretary or partner pertaining to offenses committed by the Finance Company in terms of Section 53 of the Finance Business Act constitute a major aspect of the supervisory regime.

Express Provisions in relation to Finance Leasing Business:

Express Provisions concerning Unregistered Finance Leasing Corporations

Discernably most controversial element of unauthorized finance business or carrying on finance business without a certificate of registration

20 *Ibid*, Section 30.
21 *Ibid*, Sections 31 and 32.
22 *Ibid*, Section 51.
23 *Ibid*, Section 52.

under the Finance Leasing Act No. 56 of 2000 as amended Act No. 24 of 2005 and Act No. 33 of 2007 is defined an offense under Section 2 of the same. The director NBSD is entitled to require such person to provide information including documentation and upon being satisfied of such fact, the Director NBSD shall notice immediate ceasing of such unauthorized carrying on of business. If the person noticed fails to provide required information such persons is liable to be prosecuted in the High Court and the Director NBSD is entitled to obtain injunctions from the High Court restraining such persons from carrying on unauthorized leasing business until a valid registration is obtained under the Act[24]. Unauthorized carrying of finance leasing business under Section 2 read with Section 39 and Section 41 of the Finance Leasing Act is liable for offense punishable by the Magistrate Court for a fine not less than ten thousand rupees and not exceeding 250,000/= or imprisonment for a term not exceeding two years. In terms of Section 41(2) of the Finance Leasing Act, every manger director or secretary is vicariously liable. Although under proviso to Section 42(2), the defense of excising due diligence is made available to such directors, managers and secretaries it is noteworthy that in case of an unauthorized conducting of finance leasing business such defense cannot be maintained.

Regulation of the Licensed/Authorized Finance Leasing Business:

Regulation over authorized persons conducting finance leasing business is fundamentally regulated in the following manner:

a. Operating compulsory requirement of operating manual covering duration of finance lease, method of recovery of payment due on the finance lease and protection by the lessor of the rights of the lessee[25]

b. Power of the Director NBSD to order cancellation or suspension of finance leasing business *inter alia* on carrying on business in a manner likely to be detrimental to the interests of lessees, inability to meet the obligations to its lessees, creditors, suppliers etc., acting in contravention of the provisions of the act and regulations or any conditions imposed by the Director NBSD, furnishing false misleading or inaccurate information etc.[26]

24 Finance Leasing Act No. 56 of 2000 as amended by Act No. 24 of 2005 - Sections 32(1), 32(2)(a), 32(2)(b) and 32(5).
25 *Ibid*, Sections 7 and 4.
26 *Ibid*, Section 9.

c. Imposition of implied terms to the Finance Leasing contract under Part II of the Finance Leasing Act 'Duties of Lessors, Lessees and Suppliers' including the following:

i. right to undisturbed possession of lessee for the leased equipment under Section 11

ii. defining specific procedure in connection with accelerated payment or termination with notice to the lessee under Section 20 and 21

iii. provisions computation of damages under Section 22

iv. defining specific procedure for recovery of possession of equipment if resistance is not offered without resorting to court under Section 27

v. Specific procedure in the nature of summary procedure being laid down to recover equipment through court if force is anticipated under Section 28 of the Finance Leasing Act

d. The Director NBSU in terms of Section 34 of the Finance Leasing Act shall have power to issue directions for the purpose of ensuring that efficient standard and duties are compiled by the registered establishments in respect of *inter alia* on maximum rate of payment levied, method of collecting payment, form and manner of maintaining books of records, terms and conditions of finance leases, minimum paid up capital and reserves etc.

e. Direct criminal liability in terms of Section 40 on *alter ego* of a finance company such as director, managers, officer or employee of a registered establishment for willful causing of false entry in a book or record, willful omission of entry and willfully altering, abstracting, concealing or destroying any entry of book or record

f. General criminal liability and vicarious criminal liability of *alter ego* like director, manager, secretary or partner under Section 41 of the Act strengthens the supervisory regime

In the recent case of CA 473/96(F) *Senkadagala Finance Company Ltd. Vs. W.M Karunasena CA Minutes dated 18th February 2018*, where under the hire-purchase agreement was unlawfully seized and alienated to a third party in violation of clause 13 of the agreement and Section 20 of the Consumer Credit Act No. 29 of 1982 without recourse to an action and despite payment in excess of 75 percent of the hire-purchase price, upholding the judgement of the District Judge that the Defendant Finance Company had seized the vehicle

without terminating the agreement, his lordship Jannak de Silva discerned in the Court of Appeal as follows:

> "*There are some general principles of the law of contract governing repudiation. When parties contract party autonomy empowers them to give effect to these general principles. The legislature has also at times incorporated these general principles with or without modifications. That is what is garnered when one considers Clause 4(g) of the Agreement, which imposes duty on the hirer (Plaintiff) not to sell with Clause 12(2) of the Agreement and Section 18(2) of the Consumer Credit Act. There can indeed be repudiation where the Defendant sold the vehicle to a third party. However, an unaccepted repudiation is a thing writ in water (Per Asquith LJ in Howard vs. Pickford 1951 1 KB 417at 421). Clause 12(2) of the Agreement and Section 18(2) of the Consumer Credit Act sets out how repudiation should be accepted if the Owner (Defendant) wishes to do so. Defendant should have given the Plaintiff not less than thirty days' notice in writing specifying the particular breach or act which the entitled the owner to terminate the hire under the Agreement. In these circumstances, it is the Defendant who has breached the Agreement. ….*"

The question of insufficiency of notice and the rationale of Section 18 of the Consumer Credit Act, which requires the owner to give two notices of termination with one when the hirer makes more than one default and the other indicating the culmination of the process of termination, his lordship J.A.N Silva in *LB Finance vs. Welgama*[27] held as follows:

> *"The proviso to Section 18(1) of the Consumer Credit Act provides the hirer the right to pay back arrears without facing rejection and ensuing termination. The owner at the same time is prevented from terminating the agreement. These rights and disabilities only exist during the pendency. At its expiration the hirer loses the right and the option of termination is available to the owner.*
>
> *By the deprivation of full notice period of two weeks, the owner has deprived the hirer full extent of his rights of repayment and created unto himself the entitlement to terminate the agreement earlier than at the date he would have been entitled to originally. Therefore, it is clear that the owner has encroached the rights of the hirer"*

27 *LB Finance vs. Welgama* [2011] 2 Sri LR 182

Remedial Measures for the Finance Business Crisis:

As ascertained in the introduction majority of the depositors of non-banking financial institutions as well as the public who resort to finance leasing business are constantly vulnerable especially due to in equality of bargaining power. While being pressurized by their hard-earned money and assets at a loss maintaining lengthy legal action against finance institutions equipped with high profile legal services is an impractical scenario. Therefore, ensuring that the legal or statutory duties of financial supervisors like the Director NBSD are implemented at the optimum constitutes an integral element in the regulation from a legal point of view. Moreover, structuring prosecutions focusing on *alter ego* officers like directors of finance company being exposed to legal process from the outset is another effective remedial approach. Therefore, the three-dimensional remedial legal regime in the eyes of the venerable general public is as follows:

1. Ensuring that the statutory legal duty entrusted on the major financial supervisors like Monetary Board of the CBSL and the Director of Department of Non-Banking Supervision (NBSD) by writs of *mandamus* or orders in the nature of writs in terms of article 140 of the Constitution in pursuance of protecting the venerable public;
2. Structuring criminal prosecutions with empathy on vicarious liability provisions and direct liability of superior officers or *alter ego* like directors of culpable finance corporations from the outset as a pressure approach;
3. Ascertaining the possibility of obtaining damages both against wrongdoing finance companies and *alter ego* of those companies imputed with legal duty upon *delictual* causes of action under *acqulian* action or upon statutorily imputed implied contractual terms;

Most frequently resorted remedy by the depositor public in a liquidity crisis is the judicial review against CBSL, Monetary Board or Director NBSD by way of orders in the nature of writ under Article 140 of the Constitution and fundamental rights application under Article 126 of the Constitution. In the historical *Pramuka Bank* case, *Benedict and others vs. Monetary Board of the Central Bank of Sri Lanka*[28] case where writs of *certiorari* were sought to quash the cancellation license of the Pramuka Bank and Monetary Board decision to liquidate the same, ascertaining the fundamental question whether

28 *Benedict and others vs. Monetary Board of the Central Bank of Sri Lanka* [2003] 3 SLR 68

the discretion of the Monetary Bank is used reasonably, fairly and justly his Lordship Sri Pavan in the Court of Appeal discerned as follows:

> "*One has to consider whether the first respondent did in fact take positive step to amalgamate the bank with another institution and/ or make arrangements to bring in fresh capital and/or consider reconstituting board of directors and/or closing down unviable sections and/or transferring the ownership of shares nominated by the 1st respondent as suggested by the 4th respondent in the report…….It is the duty of the court to strike a balance between executive/administrative efficacy and legal protection of citizen*"

Ascertaining the Wednsdbury theory of unreasonableness in this regard His Lordship Sripavan Held as follows:

"Judicial review means review of the manner in which the decision was made. Lord Green MR expounded his theory in *Associated Provincial Picture House Limited vs. Wednesbury Corporation*[29] as follows:

> *"It is true the discretion must be exercised reasonably. Now what does it mean? Lawyers familiar with phraseology used in relation to the exercise of statutory discretion often use the word "unreasonable" in rather comprehensive sense. It has frequently been used and is frequently used as a general description of things that must be done. For instance, a person entrusted with a discretion must do so, speak, direct himself properly in law.* ***He must call for his own attention to the matter which he is bound to consider.*** *He must exclude from himself the matters which are irrelevant. If he does not obey those rules, he may truly be said, and often said, to be acting unreasonably."*

Analyzing the question of whether it is appropriate to interfere with the decisions of the Monetary Board in the exercise of vast discretion and expertise His Lordship Sripavan further discerned quoting G.P.S de Silva J in *Premachandra vs. Jayawicrema*[30] *"There is no-absolute or unfettered discretions in public law. Discretions are conferred on the public functionaries in trust for public, to be used for public good, and propriety of exercised by of such discretion is to be judged by reference to the purposes for which they were entrusted."*

The above quoted extract is reflecting the public trust doctrine is based on Article 3 of the Constitution. The said Article 3 upholds that the sovereignty is

29 *Associated Provincial Picture House Limited vs. Wednesbury Corporation*[1948] 1 KB 223, 229
30 Premachandra vs. Jayawicrema [1993] 2 SRI LR 90, 101.

in the people and is inalienable that the same shall be exercised by the manner specifically enumerated in terms of the Article 4 of the Constitution through legislature, executive, judiciary, fundamental rights and franchise.

In *Okanda Finance (Private) Limited vs. Director, Department of Supervision of Non-Banking Financial Institutions*[31], where the Okanda Finance sought writs of certiorari to quash notices issued by the Director NBSD requiring to show cause why action should not be taken against Okanda Finance under Section 36(1) of the Finance Act for its failure to furnish information required under Section 11, His Lordship Saleem Marsoof, the President of the Court of Appeal held that

"In this context it is necessary to stress that the primary objective of the Finance Companies Act is to provide a comprehensive system for the compulsory registration, control and supervision of public companies carrying on finance business in Sri Lanka." Quoting *Dawson Silva vs. The Monetary Board of the Central Bank of Sri Lanka et al* "main object of the act is to safeguard the interests of the depositors" The said Act confers on the Director NBSD, which is the department of Central Bank to which the subject of finance companies is assigned and the Monetary Board important powers and functions with respect to finance companies is entrusted. In terms of Section 11(1) of the Act, the said Director or any officer authorized by him may require any person or body of persons to furnish him with such information as he may consider necessary to ascertain whether such person or body persons carrying on finance business.

In this context, as ascertained in the preceding chapters herein, hyper extensive discretionary powers vested in the CBSL, Monetary Board and Director NBSD ranging from explicitly detailed investigating powers including obtaining orders from court for impounding passports , power to make freezing orders, obtaining confirmation of freezing from court, extending to suspension and cancellation of business and even to instituting winding up proceedings in court are to be exercised cautiously in the appropriate instance in the best interest of the public. Even the power to maintain criminal proceedings with the assistance of inspector general of police or by way of private plaints constitute an integral element of the said wide discretionary powers that are to be resorted in protecting the vulnerable public. Failing to exercise such statutorily entrusted hyper powers with diligence when the

31 *Okanda Finance (Private) Limited vs. Director, Department of Supervision of Non-Banking Financial Institutions* [2004] 2 Sri LR 60.

finance system and interest of financial stability demands inevitably exposes the CBSL, Monetary Board and Director NBSD to judicial review under article 140 of the Constitution and arbitrariness appealing to fundamental rights jurisdiction of the Supreme Court.

Financial statements, income statements and audited accounts required in terms of Part IV of the Finance business Act permits the CBSL and Director NBSD to speculate and forecast possible finance tragedies in advance and proactively prevent the same. Banking is founded on trust and confidence, hence preserving the integrity of the system by making it impenetrable by fraudulent, incompetent and financially unsound persons is a key requirement of supervision[32]. Although this may provide the implication that supervision is considerably disclosure based especially in the context where Director NBSD is entitled to question validity of such documents and prescribe standards over the same with its dynamic scope of powers inevitably exposes conduct of supervisors amenable to judicial review.

This remedial regime is more effectively implemented in the fundamental rights jurisdiction in terms of Article 126 of the Constitution read with chapter III of the Constitution. This is because the in terms of Article 126(4) of the Constitution the Supreme Court shall have power to grant relief or make such directions as it may deem just equitable and said powers reflects a wide range of powers. This is strengthened by the Article 4(d) of the Constitution, which states that the fundamental rights, which are by the Constitutions declared and recognized shall be respected, secured and advanced by all organs of the state and shall not be abridged, restricted or denied except in the manner provided in the Constitution.

The fundamental rights application *SCFR 192/2009 Gerald Ranasinghe vs. The Monetary Board*, was instituted alleging negligence on the part of CBSL and Monetary Board for failing to protect public from the illegal scheme operated by the Golden Key Credit Card Company Private Limited (GKCCL). The Supreme Court for the first time directed the CBSL on 23.3.2009 and 30.3.2009 to determine that the GKCCL had been carrying on finance business without authority and to take action under Section 11 of the Finance Companies Act and the Supreme Court further directed obtaining assets and liabilities declarations from its directors and suspension of their bank accounts. The Court appointed a committee of charted accountants on

32 *Ibid* 8, 76.

the 18th May 2009 to prepare a list of depositors and formulate a scheme of payment and thereafter a task force was appointed to identify the assets of the company, sell the same and make payments to the depositors[33].

Imputing Direct Criminal Liability and Vicarious Liability on *alter ego* or Directing Mind of Wrongdoing Entities

The fundamental rule in criminal law is that the burden proving of mental element or the *mens rea* of a crime is on the prosecution. However, the exceptional form of statutes like Finance Business Act, Finance Leasing Act, Food Act, Excise Ordinance etc. develop certain exceptional instances where offenses of quasi criminal nature are committed by a company or body of persons the burden of exculpating oneself from criminal liability is placed on the high officers of such accused company.

In the CA(Writ) 52/2008 *Hariharan Selvaratthan, Lion Brewary Ceylon PLC vs. Director General of Customs et al* [34], which is a Court of Appeal writ application under article 140 of the Constitution where writs of certiorari was sought to quash the decision of the Director General of Customs to prosecute the Directors of the 10th Petitioner Lion Brewery Ceylon PLC and the Company in the Magistrates Court under Section 12 of the Excise (Special Provisions) Act No. 13 of 1989 for failure to pay excise duty or said Directors cannot be deemed to be in default of payment, her ladyship Rohini Marasinghe held as follows:

> *The doctrine of vicarious liability for offenses described as "quasi criminal' are where certain acts are forbidden by the law under a penalty*[35] *and Atkin J defined as offense wherein legislature prohibit an act or enforce a duty in such word as to make the prohibition or duty absolute. These are offenses arising out of statutes which are under consideration, Food Act, Exchange Control Act and much other wide range of similar statutes. In most statutes the burden of proving the guilty mind or mens rea is always on the prosecution. But in some statutes for instance in the Food Act, the Exchange Control Act No24 of 1953 and Excise (Special Provisions) Act No. 13 of 1989 the burden of exculpating oneself from criminal liability is on the defendant. In these statutes there is found a provision, which enacts*

33 *Ibid* 8, Pg. 88.

34 *Hariharan Selvaratthan, Lion Brewary Ceylon PLC vs. Director General of Customs et al* - unreported case bearing No. CA(Writ) 52/2008 CA, Minutes dated 18th June 2012.

35 *Parks, Gunston and Tee vs. W ard* [1902] 2 KB 1, 11 (Channel J)

> *a provision which enacts that where an offense under the act is committed by a body corporate, every person who at the time of commission of the offense was a director, secretary or other similar officer of that body is deemed guilty unless he proves that the offense was committed without his knowledge or he that he exercised all due diligence to prevent commission of the offense.*

Commenting on this express statutory shift of burden of proof with reference to *London Property Investments Ltd. A.G [1953] 1 ALL ER 436 at 441* her ladyship discerned as follows:

> *The burden has been placed on the defendant, which is a reversal of the fundamental rule in criminal law that the burden of proving guilt is in the prosecution. This rule is seen in many statutes and two of them in addition to this (Excise Special Provision) Act is Exchange Control Act No. 24 of 1953 and Food Act No. 26 of 1980.*

Section 53 (2) of the Finance Business Act is a similar provision establishing vicarious liability:

53 (2) Where an offence under this Act is committed by a

person that is–

(a) a body corporate, every ***director, manager,*** *or*

secretary *of that body corporate;*

(b) a firm, every ***partner*** *of that firm; or*

(c) an un-incorporate body other than a firm, ***every***

member *of such body,*

shall be guilty of such offence:

The proviso to this Section demonstrates the exception to the rule of burden of proof in criminal law, which is as follows:

> *Provided however, that no person shall be deemed to be guilty of an offence* ***if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission*** *of that offence*

Section 41 of the Finance Leasing Act also contains a similar provision:

(2) *Where an offence under this Act, is committed by a body of persons*, then—
(*a*) ***if that body of persons is a body corporate, every director, manager or secretary of that body corporat****e; (b) if that body of persons is an unincorporated*

body, every individual who is a member of such body; and (c) if that body of persons is a firm, every partner of that firm,

> ***shall be guilty of the offence unless such director, manager, secretary, individual or partner, as the case may be, proves that such offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.***

These vicarious liability provisions especially in the context of reversal of burden of proof rule could be resorted by the aggrieved individuals even by way of private plaints in terms of Section 136(a) of the Code of Criminal Procedure Act as a pressure tactic in order to expose wrongdoers who strive to hide behind corporate veil.

Alter ego Doctrine

In the aforesaid case of *Hariharan Selvarathnan, Ceylon Brewary PLC et al. vs. Director General of Customs and Excise Duty et al*, alternative dimension through which various liabilities in the context of corporate criminality could be imputed was ascertained in the following manner:

> *Another distinctive feature of corporate liability is the doctrine of alter ego. That means only acts and mental states that will be imputed to the company are those of persons who are in control of the company. It will be found in the cases where the defendant is being the managing director or being any other person holding a similar position, has delegated the management of his company to an officer who then becomes alter ego. The knowledge or lack of requisite care of that officer is attributable to a company, when a company may be convicted of offense based upon knowingly or negligently (lack of care) allowing the offense to be committed.* Her ladyship Marasinghe in this regard quoted Lord O Brien CJ in *Colon v Muldowney [1909] Ir.R.498*

Distinguishing the *alter ego* doctrine from express vicarious liability provisions, it was further ascertained in said case that the standard of care in relation to directors of companies is to be found in the Companies Act No. 20 of 2007 in Section 189. The directors are charged because the Company has committed and the persons who could be charged is prescribed in the Act itself.

As far as the provisions of Finance Business Act and Finance Leasing Act are concerned criminality in the nature of *alter ego* doctrine is given life

by express provision as ascertained hereinabove in terms of Section 52 of the Finance Business Act.

Section 52(1) "*Any person who being a director, secretary, chief executive officer, manager, officer, employee or auditor of a company*" a) fails to take reasonable steps to secure compliance by finance company with requirements of the Act b) fails to comply with directions made by the board c) fails to take reasonable steps to secure the correctness of any statement submitted by the finance company d) makes a false entry in a book, record, file register or such document relating to business affairs, transactions, conditions assets or liabilities or e) omits to make entry in such document etc. are defined as offenses

Under Section 40 of the Finance Leasing act, the *alter ego* like director, manger or officer or employee willfully making or causing false entry in a record, willful omission, willfully altering, abstracting, concealing or destroying entry book or record exposes such officer being prosecuted in the individual capacity.

Utilizing *alter ego* doctrine in terms of Civil Proceedings in the District Court or Commercial High Court

In *Hatton National Bank Ltd. Vs. Jayawardena* and others a hypothecation by *parate* execution under Recovery of Loans by Banks (Special Provisions) Act was challenged in view of celebrated *Ramachandran v Hatton National Bank* case that the *parate* proceedings does not extend to the execution of property of the guarantors His Lordship analyzed application of *alter ego* doctrine as follows:

> *"The 1st and 2ndrespondents cannot hide behind the veil of incorporation of company N whilst being the alter ego of the said Company of which the 1st respondent has been the managing directors and the 2nd respondent who is the wife of 1st respondent has been a director"*
>
> *Although the independent personality of the company is distinct from its directors and shareholders Courts have in appropriate circumstances have removed the corporate veil of incorporation. In particular Courts have been vigilant improper purpose to be used for some illegal or as devise to defraud creditors[36]"*

36 *Hatton National Bank Ltd. Vs. Jayawrdena*[2007] 1 Sri LR 181.

Whatever the current legal position in relation to *parate* execution of third-party guarantor property may be this case demonstrate how the *alter ego* doctrine could be resorted in a Civil Proceedings.

Especially in the Finance Leasing context where civil proceedings constitute an integral aspect instituting action against *alter ego* officers on behalf of the lessee harmfully affected by the conduct of Finance Leasing Company is entitled to resort to *alter ego* doctrine as a strategy of exerting pressure. Moreover, the statutory provisions under both Finance Business Act and Finance Leasing Act imposing statutory duty on the such *alter ego* demonstrate a strong basis for *delictual* damages. In the circumstances, vulnerable lessees who in desperation resort to finance are entitled to two faceted remedies in confronting oppression by finance leasing:

i. Invoking criminal liability provisions by way of private plaints under Section 136(a) of the Code of Criminal Procedure Act No. 15 of 1979 against *alter ego* officers like directors, managers, chief executive officer etc. of finance companies on the basis of vicarious liability provisions as well as on the direct criminal liability provisions;

ii. Instituting Civil Action both against finance leasing company conducting oppressive practices and the *alter ego* based on *delictua*l causes of action or on the basis of contractual damage especially in view of statutory provisions indicating implied terms imputed by Finance Leasing Act;

Rationale for Direct Institution Criminal Action Developing Pressure

In terms of Section 139 of the Code of Criminal Procedure Act, if the Magistrate is of the opinion, that there are sufficient grounds to proceed against the accused. In *Malini Guneratne. Additional District Judge Galle Vs. Abeysinghe &Another*[37], interpreting said Section His Lordship H.NG Perera observed "*When a private plaint is filed, section 139 (1) requires a Magistrate to form an opinion as to whether there is ' sufficient ground for proceeding against some person who is not in custody. The opinion to be formed should relate to the offence, the commission of which, is alleged in the complaint or plaint filed under Section 136(1).* ***The words "sufficient ground embraces both the ingredients of the offence and the evidence of its commission. Since the opinion relates to the existence of sufficient ground for proceeding against the person accused, the material acted upon by the Magistrate should withstand an objective***

37 *Malini Guneratne. Additional District Judge Galle Vs. Abeysinghe &Another*[1994] 3 Sri LR 196

assessment. *The proper test is to ascertain whether on the material before Court, prima facie, there is sufficient ground on which it may be reasonably inferred that the offence alleged in the complaint or plaint has been committed by the person who is accused of it"*

Therefore, a considerable judicial function is performed at the time of issuing process to an accused by way of summons or warrant. Rationale for this serious consideration was ascertained in the *M/S Pepsi Foods & Anr vs. Special Judicial Magistrate & others*

> *"Summoning an accused in a* ***criminal case is a serious matter. Criminal Law cannot be set into motion as a matter of course****. It is not that the complainant has to bring two witnesses to support his allegation in the compliant to have set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to facts of the case and law applicable thereto."*

The underlying reasoning of the said judgment focuses on the seriousness of summoning an accused and seriousness of undergoing a criminal motion upon being summoned or warranted.

However formidable such summoning may be, especially express provisions of the Finance Business Act, *alter ego* directors, secretary, chief executive officer, manager etc. of the wrongdoing finance company could be summoned from the inception of criminal law motion on the basis of vicarious liability provision under Section 52. Moreover, such *alter ego* officers could be summoned upon the failures perform express duties such as securing compliance with act, omission in records etc. Subjected to provisions of the Code of Criminal Procedure Act criminal motion could be maintained against company and the directors in one and the same charge sheet or as separate action depending on the context. When depositors institute criminal action by private plaints if the there is a notable delay on the part of the CBSL or Director NBSD such failure could be subjected judicial review in terms of Article 140 of the Constitution.

Section 39(f) of the Finance Business Act, where contravention with any regulation, direction or notice is defined an offense under the Act could be utilized to invoke criminal motion against superior *alter ego* like directors, secretaries, managers etc. based on the vicarious liability provisions under Section 41(2) of the Finance Leasing Act especially in the context where many finance companies act oppressively despite the pandemic irrespective of the

CBSL moratoria circulars. Although individual direct liability provisions of Section 40 of the Finance Leasing Act are not that broad in comparison with direct criminality provisions of *alter ego* directs under Section 52 of the Finance Act *alter ego* doctrine read with Section 189 of the Companies Act No. 07 2007, which require the directors to act in utmost good faith there is fertile grounds to invoke direct criminalities even in the Finance Leasing Act.

Delictual* and Contractual Causes of Action against *alter ego

Requisites of liability under *Acquilian* action are as follows:

a. Wrongful conduct by the defendant;
b. Pecuniary or patrimonial loss to the plaintiff
c. Fault on the part of the defendant *i.e* he must be guilty of either *culpa* (negligence) or *dolus* (wrongful intent)[38]

According to Jonathan Burchell, elements of modern *Acquilian* action are as follows:

a. Voluntary conduct, which is unlawful (or wrongful)
b. Capacity
c. Fault (Intention or negligence)
d. Causation
e. Loss [39]

It is obvious that under the Finance Business Act there is ample provision to institute direct action against directors seeking damages although effectiveness or practicality of instituting civil action is limited on account of the existence of other effective remedies. However, this appears an efficacious remedy in the Finance Leasing context.

Based on the doctrine of *alter ego* separate causes of action could be maintained against *alter ego* like directors, managers, etc. for violation of CBSL regulations, notices or directions. Especially on account of the statutorily imposed duty under Section 39 of the Finance Leasing Act read with Section 40 and 41 of the same, direct *delictual* action could be maintained seeking for damages.

38 RG Mckerron, '*Law of Delict*' (7th ed, 1971) 13
39 Jonathan Burchell, '*Principles of Delict*', (1993) Chapter 5.

Implied Terms Imputed by Finance Leasing Act

One of problematic form of suppression of vehicle lessees is the uncertainty in the vehicle leasing contract whether it is governed by Consumer Credit Act or Finance Leasing Act. Although usually courts are reluctant to accept imposition of implied terms to a contract statutorily implied terms are the most frequently implied form of contractual term independently of the expressly contemplated intention of the parties.

His Lordship Hon. Justice Weeramantry observes the nature of statutorily implied terms in the Law of Contract as follows:

> *Terms implied by virtue of statute law are varied and numerous. The principal illustrations are those implied by the various provisions of the Sale of Goods Ordinance, Cap 84, So also Section 33 and 34 of the Exchange Control Act, Cap 423, import into all contracts relating to foreign exchange. Another example daily gathering importance. Another example daily gathering importance is the provisions in the Industrial Disputes Act, Cap 131, by which an award of an arbitrator or of an industrial court is made by statute of the contract between employer and employee*[40].

In relation to a vehicle leasing contract governed by Finance Leasing Act, the Section 39 of the ensures that non-compliance with the regulations, notices or directions issued by the CBSL an offense. Therefore, even the moratorium circulars could be interpreted as implied terms of the vehicle leasing contract. Section 40 of the act relating to offensive willful act or omission an offense read with said Section 39 demonstrate additional implied terms. It is noteworthy that these terms are implied in addition to the clearly implied terms under Part II of the Finance Leasing Act Duties of Lessors, Lessees and Suppliers (Section 11 to Section 31), which basically governs right to undisturbed possession of leased equipment, procedure to be complied upon default by lessee, mandatory requirements of notice to accelerated payment, mandatory requirement to provide the manner of computation of damages, procedure of recovery of possession when resistance is offered, procedure for recovery of possession through court etc. When direct causes of action are averred against directors based on implied terms and consequent damages are alleged, attorneys must be mindful in establishing causation and remoteness of damages with reference to the requisites of *acquilian* action.

40 C.G Weeramantry, '*The Law of Contract*' Vol II (1999), 571.

Conclusion:

Existing legal frame work provide for explicitly detailed supervisory powers being entrusted on the CBSL, Monetary Board and Director NBSD under the Finance Business Act and Finance Leasing Act to act proactively as hyper active guardians of the rights of vulnerable depositor public and finance lessees. However, inadequacy of precautionary approach in the implementation regime have made the liquidity crisis inevitable that the wide scope of discretionary powers vested in CBSL, Monetary Board and the Director NBSD are constantly subjected to judicial review in terms of the *writ* jurisdiction under Article 140 of the Constitution and in the fundamental rights jurisdiction of the Supreme Court. Even the failure of Director NBSD to take criminal actions in the appropriate instance, failing prevent directors or *alter ego* of wrongdoing company escaping from the country, decision of Monetary Board whether to institute winding up proceedings or revive/amalgamate failed institutions etc. are subjected judicial scrutiny in respect of writs of *mandamus* and just and equitable relief in fundamental rights jurisdiction. Most formidable problematic scenario in the overall finance crisis inclusive of finance leasing business is the high-profile *alter ego* or superior officers like directors manipulating legal process and hiding for protection under corporate veil and remedial measures must keep this focused. Existing legal provisions in the Finance Business Act and Finance Leasing Act provide fertile basis to ensure that *alter ego* like directors, managers etc. are duly prosecuted or brought before court in suitable legal actions as a pressure strategy. Especially in relation to vehicles lessees under Finance Leasing Act who are exposed to oppression by finance companies, invoking criminal liability on *alter ego* like directors, managers etc. by way of private plaints while instituting civil action against such *alter ego* appears an efficacious remedial pressure approach. Civil causes of action against *alter ego* or director could be formulated based on wrongful violation of statutory duty concerning *aquilian* action or for breach of implied contractual terms additionally imputed by the Finance Leasing Act.

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