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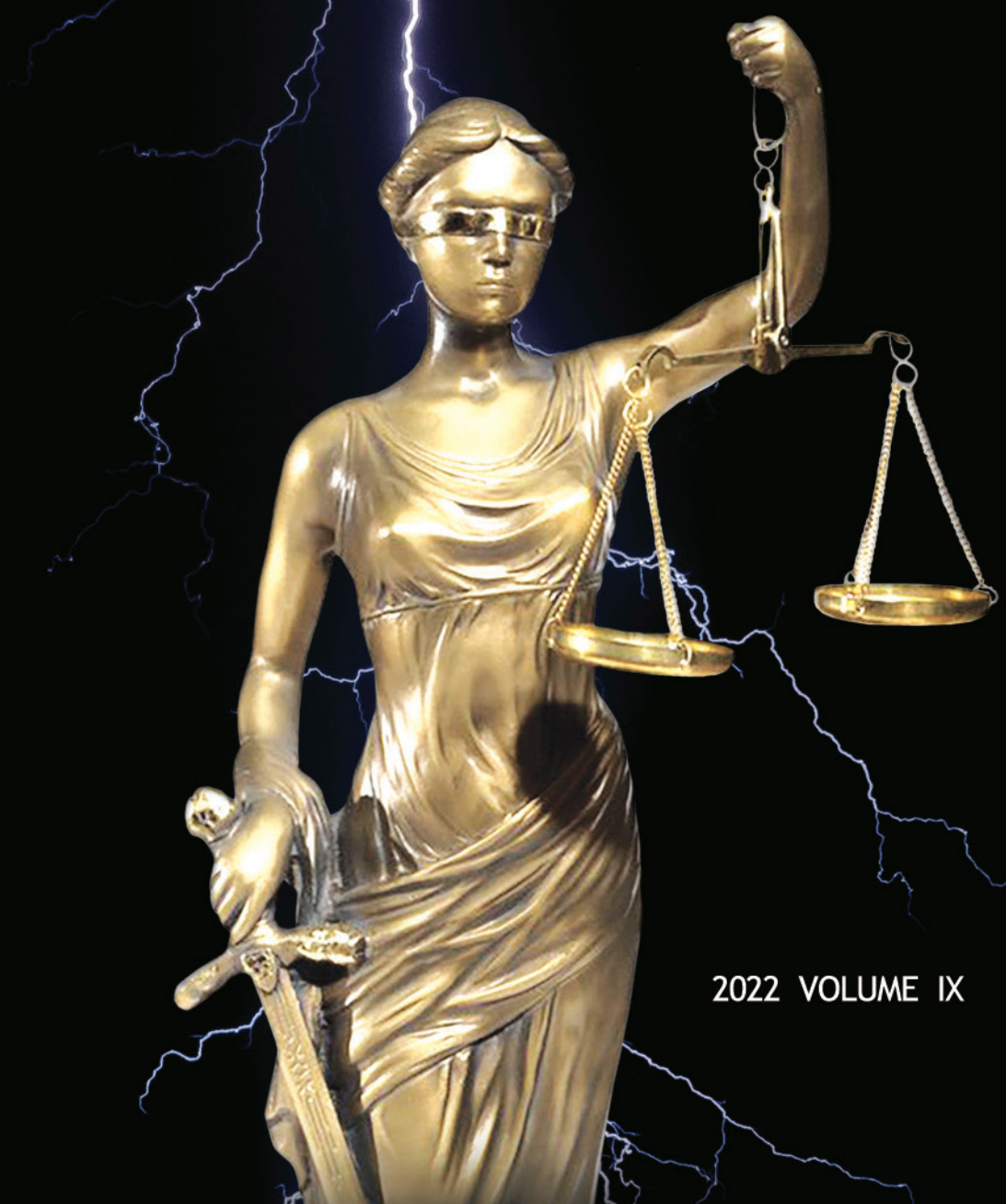

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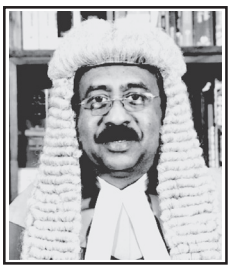
MESSAGE OF HIS LORDSHIP THE CHIEF JUSTICE



I wish to congratulate all those who joined together to make the publication of "JSA Law Journal Volume - IX", the annual publication of the Judicial Service Association of Sri Lanka, a success.

Courts that play a pivotal role in the mechanism of Administration of Justice like many other institutions had to undergo unprecedented difficulties since the onset of the Pandemic in early 2020 followed by the economic crisis. However, the strength and courage with which the members of the judiciary met with such difficulties and challenges demonstrates the capacity to minimize the adverse impact to the system and return to normalcy at the earliest possible opportunity. Unreserved public confidence is an essential ingredient for the success story of the judiciary in any jurisdiction. The maintenance of honour and dignity among members of the judiciary has a great influence on maintaining public confidence. It is said *"Judges are expected at all times to avoid indecorous, intemperate and offensive conduct and to act with a degree of sensitivity, self-control, restraint and dignity that is not expected of other persons holding public office."*

Further elaborating the conduct that is expected of a judicial officer, Sir Winston Churchill observed;

"A form of life and conduct far more severe and restricted than that of ordinary people is required from judges and, though unwritten, has been strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct. Far more freedom is granted by the convention of our way of life to Members of Parliament, to Ministers or to Privy Councillors.... The judges have to maintain, though free from criticism (in parliament), a far more rigorous standard than is required from any other class I know of in this Realm."

It is such a sacrifice that is expected from the members of the judiciary and any dilution of such high threshold could have serious repercussions.

In todays' context increasing attention is being paid to every organ of the administration of Justice and the significance of the judiciary has become ever so important. Thus, as Judicial Officers I believe you will continue to use every opportunity provided to enhance

your competencies and skills while maintaining honour and dignity at their highest levels. Such conduct no doubt would further strengthen the administration of justice mechanism.

It is encouraging to note that the Judicial Service Association is planning to recommence granting the Justice Amarathunga Memorial Award for the best article submitted by the membership after a lapse of a few years.

I also wish to take this opportunity to express my sincere appreciation to all Judicial Officers and court staff for their invaluable contributions in administering justice fairly and efficiently to the people of this country. I also wish to commend the members of the Judicial Service Association of Sri Lanka and the Editorial Board for all their untiring efforts and wish them success.

Jayantha Jayasuriya, P.C.

The Chief Justice of the Democratic Socialist Republic of Sri Lanka

14th November 2022

MESSAGE OF THE HONARABLE DIRECTOR OF SRI LANKA JUDGES' INSTITUTE

The independence of the judiciary confers not only rights on a judge but also imposes duties, including the duty to perform judicial work professionally, diligently and effectively. A judge shall take steps to maintain and enhance the judge's knowledge, skills and proficiency in the law as necessary for the proper performance of judicial duties. The trust that citizens place in the judicial system is strengthened if a judge's knowledge is deep and broad.

It is with great pleasure that I forward this message to the Judicial Service Association Law Journal 2022, Volume IX. Since the launch of the first volume in 2013, this Law Journal has been a space for judges to share their expertise, experience and perspectives on legal matters and enlighten the minds of the legal community. Through this publication, a judge can formulate principles, clarify complicated matters and suggest innovative approaches to the administration of justice for the benefit of all those who partake in the legal system.

The Journal offers to the members of the judiciary an opportunity to exercise their academic minds freely, publish research and hone their writing and analytical skills, all of which will hold them in good stead in carrying out their judicial duties and writing sound judgments.

It is not an easy task to publish a Law Journal. I extend my heartiest congratulations to the writers, the editor and all others who have spent their valuable time and energy to make this a success.

Justice Mahinda Samayawardhena

Judge of the Supreme Court,

Director of Sri Lanka Judges' Institute.

28th November, 2022

EDITOR'S NOTE

Judicial Service Association is proud to present its Law Journal, Volume IX - 2022 amidst unprecedented aftermath of the global pandemic and ongoing political, economic and social crises in the country. It is with much pleasure that, with the requests, encouragement and support of the members of JSA, we were able to publish this journal coincide with the competition for awarding Justice Nimal Gamini Amarathunga Memorial Award for the best article, after a lapse of two years.

Part I of the journal contains several scholarly articles written by the legal luminaries in different realms of law. We thank all of them who devoted their valuable time, despite their busy schedules, to contribute to this journal. Part II of the journal consists of articles written by members of the JSA and submitted for the competition. All those articles were reviewed by a panel of eminent Supreme Court Judges consisted of Their Lordship Justice Gamini Amarasekara, Justice Yasantha Kodagoda PC and Justice Janak De Silva, in order to select the best article for the award. JSA expresses its gratitude to all honourable justices of the selection panel for their dedication in the process of selecting the best article for the award.

Further, I sincerely thank all members of the JSA, who had contributed with articles for the competition despite heavy workload and the various difficulties. Moreover, I take this opportunity to express the sincere gratitude of JSA to His Lordship the Chief Justice, Honourable Jayantha Jayasuriya PC and His Lordship Justice Mahinda Samayawardhena, Judge of the Supreme Court and the Director of Sri Lanka Judges' Institute, for their valuable encouragement via the messages for this journal.

Furthermore, I extend my sincere gratitude to the President, Secretary to the JSA and the editorial committee for their invaluable assistance and guidance to make this journal a success. I owe a special appreciation to Ms.Anandi Kanagaratnam, Mr.Jayaruwan Dissanayaka, Mr.Suranga Munasinghe and Mr.Lilan Warusavithana for their roles to make this a reality. Finally, my sincere appreciation goes to Ms.Amila Sandamali Kannangara for her kind co-operation in publishing the journal.

I believe that, this Law journal has achieved its objectives by providing judicial education, providing a platform for judicial officers to enhance their writing skills and providing an opportunity for an intellectual dialogue amongst stakeholders of the justice system. I thank all the contributors to this Law journal and eventually, wish to invite and encourage members of the JSA to engage in more researches on current legal issues and pen down their thoughts for the next publication as well to make it a success.

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Part - I

SOME ASPECTS OF THE TESTAMENTARY PROCEDURE IN THE DISTRICT COURT

Justice Mahinda Samayawardhena*
Judge of the Supreme Court

This article mainly focuses on the procedure to be followed in (a) issuing probate, (b) recalling probate and (c) resolving disputed claims made in a testamentary action.[1]

In terms of section 21 of the Judicature Act No.2 of 1978 (as amended) testamentary jurisdiction is vested in the District Court. The Wills Ordinance No.21 of 1844 (as amended) lays down the substantive law regarding last wills. The Civil Procedure Code lays down the procedure to be adopted in testamentary proceedings. The testamentary procedure contained in the Civil Procedure Code is complex and complicated. This procedure has undergone a series of amendments over a considerable period of time and it will continue to change. If I may trace the recent history, the procedure was substantially changed by the Civil Procedure Code (Amendment) Law No.20 of 1977. Thereafter, the entire chapter 38 under the heading 'Testamentary Actions' was repealed and replaced with a new chapter by the Civil Procedure Code (Amendment) Act No.14 of 1993. After Act No.14 of 1993, chapter 38 was further amended by Act Nos.38 of 1998, 34 of 2000, 20 of 2002, 4 of 2005 and 11 of 2010. There are substantial differences including the content and numbering of sections between the old procedure and the new procedure and therefore cases decided under the old procedure may not be relevant although they are cited and followed without fully appreciating the differences between the two. For instance, sections 536 and 537 governed the recall of probate under the old procedure whereas under the new procedure it is sections 537 and 538 that govern the same. Hence, in referring to or citing previous decisions, care must be taken not to go by section numbers alone. A case in point might be *Shanthi Goonetilake v. Mangalika*[2] where the Court of Appeal seems to have relied on the judgments decided under the old procedure to deal with an application filed under the new procedure.

In the first place, the sections relevant to testamentary procedure cannot be found in one place in the Civil Procedure Code. They are in several places: chapter 38 under the heading '*Testamentary Actions*' with sections 516-554A is in one place whereas chapter 54 under the heading '*Of Aiding, Supervising, and Controlling Executors and Administrators*' with sections 712-722 and chapter 55 under the heading '*Of the Accounting and Settlement*

✶ Director of the Sri Lanka Judges' Institute, LLB, LLM, MPhil, DFM (Colombo), LLM (Monash).

1 This article is based on my judgment delivered in Sammuarachchi v. Siriwardena (SC/APPEAL/220/2017, SC Minutes of 17.11.2022).

2 [2006] 3 Sri LR 331

of the Estate' with sections 723-744 are in a completely different place. Chapter 38A under the heading '*Insolvent Testamentary Estates*' with sections 554F-554T, chapter 38B under the heading '*Foreign Probates*' with sections 554U-555BB and chapter 38C under the heading '*General and Transitional Provisions in Testamentary Matters*' with sections 554CC-554DD were introduced by the Civil Procedure Code (Amendment) Law No.20 of 1977.

Furthermore, the law on testamentary procedure itself has been influenced by different legal systems. 'L.J.M. Cooray in *An Introduction to the Legal System of Sri Lanka*' states; "*The offices of executor and administrator are copied from English law and the rules governing executors and administrators are to be found in the Civil Procedure Code, 1977, and have been influenced by English law. But they are given effect to in a Roman-Dutch atmosphere because Roman-Dutch rules generally apply regarding heirs and testate succession*."[3] As pointed out by Bertram C.J. in *De Zoysa v. De Zoysa*,[4] Wijeyewardene J. in *De Silva v. Jayakody*[5] and Sirimane J. in *Pathmanathan v. Thuraisingham*,[6] our testamentary law relating to chapters 54 and 55 has been taken almost verbatim from the Code of Civil Procedure of the State of New York.

All these factors have contributed to create *inter alia* redundancies, obscurities, inconsistencies, overlaps etc. within the stipulated procedure.

In terms of section 517 of the Civil Procedure Code, when a person dies leaving a last will, the person appointed therein as executor can apply to the District Court in terms of section 524 to have the will proved and the probate issued to him; or any other interested person can apply to have the will proved and letters of administration issued with the will annexed.

> *517(1). When any person shall die leaving a will under or by virtue of which any property in Sri Lanka is in any way affected, any person appointed executor therein may apply to the District Court of the district within which he resides, or within which the testator resided at the time of his death, or within which any land belonging to the testator's estate is situate, within the time limit and in the manner specified in section 524, to have the will proved and to have probate thereof granted to him; any person interested, either by virtue of the will or otherwise, in having the property of the testator administered, may also apply to such court to have the will proved and to obtain grant to himself of administration of the estate with copy of the will annexed.*

3 L.J.M. Cooray, *An Introduction to the Legal System of Sri Lanka* (Stamford Lake Publication, Third Print, 2003) at pages 26-27

4 (1924) 26 NLR 472 at 476

5 (1941) 42 NLR 226 at 229-230

6 (1970) 74 NLR 196 at 199-200

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

How the application for probate shall be made is stated in section 524 of the Civil Procedure Code. Accordingly, the application shall be made by petition and affidavit (but not by way of summary procedure) and the petition shall set out *inter alia* the matters stated in section 524(1)(a)-(d). They are: the fact of the making of the will, the detail and situation of the deceased's property, the heirs of the deceased to the best of the petitioner's knowledge, the grounds upon which the petitioner is entitled to have the will proved, and the character in which the petitioner makes the claim.

524(1). Every application to the District Court to have the will of a deceased person proved shall be made within a period of three months from the date of finding of the will, and shall be made by way of petition and affidavit and such petition shall set out in numbered paragraphs-

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

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

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

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

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

(2) If the will is not already deposited in the District Court in which the application is made, it must either be appended to the petition, or must be brought into court and identified by affidavit, with the will as an exhibit thereto, or by parol testimony at the time the application is made.

(3) Every person making or intending to make, an application to a District Court under this section to have the will of a deceased person proved, which will is deposited in another District Court, is entitled to procure the latter for the purpose of such application. Also the application must be supported by sufficient evidence either in the shape of affidavits of facts, with the will as an exhibit thereto, or of oral testimony, proving that the will was duly executed according to law, and establishing the character of the petitioner according to his claim.

(4) The petitioner shall tender with the petition proof of payment of charges to cover the cost of publication of the notice under section 529.

One of the main issues relating to the mode of application is whether compliance with all the provisions of section 524(1)(a)-(d) is mandatory or directory. If it is mandatory, for instance, failure to mention one property of the deceased or one heir of the deceased would render the entire proceedings void *ab initio*. The section requires the heirs of the deceased to be stated in the petition "*to the best of the petitioner's knowledge*". The language itself gives the indication that it is not mandatory. If the petitioner is a stranger to the family and has no personal knowledge of the heirs of the deceased, for instance, he will not be able to list out the names of the heirs of the deceased. Hence, as it was held in *Biyanwila v. Amarasekere*[7] and *Pieris v. Wijeratne*,[8] the provisions of section 524(1) (a)-(d) are directory and not mandatory. However, willful suppression of material particulars will not be tolerated by court. It is in this context that Sirimane J. in the *Biyanwila* case stated at page 494 "*I am of the view that the provisions of this section [524] are only directory, and that a failure to strictly comply with those provisions, does not render the proceedings void ab initio. They are, however, voidable, and in an appropriate case a party may ask the court for relief under section 839 of the Civil Procedure Code*." Referring to the failure to name heirs as parties to the application for probate, in the Supreme Court case of *Actalina Fonseka v. Dharshani Fonseka*,[9] Kulatunga J. stated "*However, such failure is a relevant fact in determining whether probate had been obtained by fraud.*"

Specific provisions are found in sections 537 and 538 to deal with recalling, revoking or cancelling probate, letters of administration or certificate of heirship. Section 537 deals with the grounds upon which probate can be recalled, and section 538 stipulates that such application shall be made by way of summary procedure.

What happens if the procedure is not followed in making the substantive application seeking probate or the application for recalling probate?

Unlike in a situation where there is patent or total want of jurisdiction, when the court has plenary jurisdiction to deal with a matter and the question is on invoking such jurisdiction in the right manner, a party cannot keep silent and take up an objection as to procedure when the final order is made against him. Any objection as to latent or contingent want of jurisdiction shall be taken at the first available opportunity (section 39 of the Judicature Act No.32 of 1978; *Navaratnasingham v. Arumugam*[10]). It is only if want of jurisdiction is patent that the matter can be raised at any time, even for the first time on appeal, in which event the whole proceedings including the judgment becomes a nullity *ab initio* due to *coram non judice* (*Beatrice Perera v. The Commissioner of National Housing*,[11] *Abeywickrama v. Pathirana*[12]).

7 (1965) 67 NLR 488
8 [2000] 2 Sri LR 145
9 [1989] 2 Sri LR 95 at 99
10 [1980] 2 Sri LR 1 at 5-6
11 (1974) 77 NLR 361 at 366-370
12 [1986] 1 Sri LR 120

In *Dabare v. Appuhamy*[13] the defendant sought to dismiss the plaintiff's action on *res judicata* but the objection was overruled. On appeal by the defendant, the plaintiff submitted that the dismissal of his former action was invalid as the court had followed the wrong procedure, in that, instead of summary procedure, regular procedure had been followed. At that time, the plaintiff had not objected to the wrong procedure being followed. Rejecting that argument and allowing the appeal, the court stated that notwithstanding that the wrong procedure had been followed, the order of dismissal made by the court was valid since the court had jurisdiction to hear and determine the action and the plaintiff did not take objection to the wrong procedure being followed at that time. Wrong procedure can be validated by acquiescence, waiver or inaction on the part of the parties.

I might also mention that when the court has plenary jurisdiction, it cannot dismiss an application merely because the caption in the application refers to a wrong section. If the Judge thinks that the applicant has come under a wrong section but the court has jurisdiction to make a suitable order had the application been made under the correct section, the Judge shall not dismiss the application *in limine* on that ground alone, unless such reference to the wrong section in the caption has caused prejudice to the opposite party in meeting the applicant's case in the proper context.

Bindra on The Interpretation of Statutes states: "*It is a well-settled principle of interpretation that as long as an authority has Power to do a thing, it does not matter if it purports to do it by reference to a wrong Provision of law.*"[14] In *Peiris v. The Commissioner of Inland Revenue*[15] Sansoni J. (later C.J.) stated at 458: "*It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power.*" This principle was recognised in *Solicitor-General v. Perera*,[16] *Peiris v. The Commissioner of Inland Revenue*,[17] *Jayawardane v. Ranaweera*[18] and *Kumaranatunga v. Samarasinghe*.[19]

In the case of *Jayasekera v. Lakmini*[20] the Supreme Court pointed out that even if the attention of the court has not been drawn to the relevant statutory provision through which relief could be granted, "*it is undoubtedly incumbent upon the Court to utilize the statutory provisions and grant the relief embodied therein if it appears to Court that*

13 [1980] 2 Sri LR 54
14 N.S. Bindra, *The Interpretation of Statutes*, 6th Edition (1975) at page 153
15 (1963) 65 NLR 457
16 (1914) 17 NLR 413 at 416
17 (1963) 65 NLR 457 at 458
18 [2004] 3 Sri LR 37 at 41
19 [1983] 2 Sri LR 63 at 73-74.
20 [2010] 1 Sri LR 41 at 51

it is just and fair to do so." In *Wilson v. Kusumawathi*[21] also the Supreme Court took the same view.

Should the natural heirs of the deceased be made parties to an application seeking probate or is it sufficient only to disclose their names in the body of the petition?

Section 524(5) which stated "*If the petitioner has no reason to suppose that his application will be opposed by any person, he shall file with his petition an affidavit to that effect and may omit to name any person in his petition as respondent*" was repealed, and section 524(1)(bb) which requires the petitioner to name in the body of the petition "*the heirs of the deceased to the best of the petitioner's knowledge*" was introduced by the Civil Procedure Code (Amendment) Act No.38 of 1998.

As the law stands today, in the case of proving a last will, the law does not require the petitioner (a) to name the heirs of the deceased as respondents to the application or (b) to file an affidavit with the petition to say that he has no reason to suppose that his application will be opposed by any person (thereby omitting to name any person in his petition as a respondent).

Section 524(4) was further amended by the Civil Procedure Code (Amendment) Act No.11 of 2010 whereby the requirement of tendering with the petition *"the consent in writing of such respondents as consent to his application*" under section 524(4)(b) was also removed.

The intention of the legislature is clear by looking at section 528 of the Civil Procedure Code, which sets out what an application for letters of administration or certificate of heirship (in the case of death without a last will) should constitute. Whilst section 528(1)(c) requires the petitioner to set out in the body of the petition *"the heirs of the deceased to the best of the petitioner's knowledge*", section 528(2) states that the petitioner "*shall name the next of kin of the deceased as respondents. If the petitioner has no reason to suppose that his application will be opposed by any person, he shall file with his petition an affidavit to that effect*." Section 528(3)(b) further states that "*The petitioner shall tender with the petition the consent in writing of such respondents as consent to his application*." Section 528(3) was further amended by the Civil Procedure Code (Amendment) Act No.11 of 2010 with the introduction of section 528(3)(c) which requires the petitioner to tender with the petition "*notices on the respondents who have not consented to the application, requiring them to file objections if any, to the application on or before the date specified in the notice under section 529. Such notice shall be sent by the probate officer by registered post*."

21 [2015] BLR 49

Let me reproduce section 528 for convenience:

528 (1). Every application to the District Court for grant of letters of administration or for the issue of certificates of heirship shall be made within three months from the date of death, and shall be made by way of petition and affidavit, and such petition shall set out in numbered paragraphs-

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

(b) the death of the deceased;

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

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

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

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

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

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

(2) The application shall be supported by sufficient evidence to afford prima facie proof of the material averments in the petition, and shall name the next of kin of the deceased as respondents. If the petitioner has no reason to suppose that his application will be opposed by any person, he shall file with his petition an affidavit to that effect.

(3) The petitioner shall tender with the petition-

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

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

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

This shows that the legislature did not intend to include the requirement of the naming of heirs or next of kin of the deceased as respondents in an application filed before the District Court to have the last will of the deceased proved.

Nonetheless I must add that although naming heirs as respondents is not mandatory, it is all the more salutary for any petitioner to name the heirs or at least potential contesting heirs of the deceased as respondents for transparency and to bring early finality to the

case. In my view, if there is a statutory requirement that the heirs of the deceased to the best of the petitioner's knowledge be made respondents and notice be served on them where there is no written consent to the petitioner's application, prolonged litigation in the case of testacy can be minimised. It may be recalled that in *Biyanwila* case *(supra)*, Sirimane J. at page 494 whist stating that failure to strictly comply with section 524 does not render the proceedings void *ab initio*, further remarked that; *"They are, however, voidable, and in an appropriate case a party may ask the court for relief under section 839 of the Civil Procedure Code*"; and in *Actalina Fonseka's* case (supra) at page 99, Kulatunga J. stated "*However, such failure is a relevant fact in determining whether probate had been obtained by fraud*."

If there is no resistance to the application for probate, can the District Court issue probate without considering the merits of the application?

A testamentary action is similar to a partition action. The District Judge hearing a testamentary action has a special duty to give effect to the intention of the testator in the case of testacy and make a proper distribution of property in the case of intestacy. In the full bench decision of the Supreme Court in *Adoris v. Perera*,[22] Lascelles C.J. remarked "*A judgment granting probate of a will is a judgment in rem, and is binding on the world*." Further as stated by Chitrasiri J. in *Sadhana Dharmabandu v. Mallika Homes Ltd*[23] "*The purpose of testamentary actions is to ascertain the wish of a deceased person who cannot be called to court. Therefore, a duty is cast upon Court to ascertain the intention of a deceased person irrespective of adverse interests that may arise from other individuals*." The absence of objections upon newspaper publications in terms of section 529 does not absolve the District Judge from this special duty.

For instance, in terms of section 516, when any person shall die leaving a will in Sri Lanka, the person in whose custody it shall have been deposited, or who shall find such will after the testator's death, shall produce the same to the District Court of the district in which such depository or finder resides, or to the District Court of the district in which the testator shall have died, as soon as reasonably possible after the testator's death. In terms of section 517, as I stated earlier, the person appointed executor of the last will or any interested party can make an application to the District Court under section 524 to have the will proved and probate granted to him or to have letters of administration issued to him with the will annexed. In terms of sections 518 and 519 of the Civil Procedure Code, when a will is deposited in court and no application has been made by any person to prove the will and the probate issued, it is the duty of the court to take appropriate steps to appoint a person to administer the estate of the deceased or, if there is no fit and proper person to be so appointed, to appoint the public trustee as the administrator.

22 (1914) 17 NLR 212 at 214

23 [2009] 1 Sri LR 151 at 157

As a general rule the onus is on the propounder of the will to prove affirmatively that the will is the act and deed of the free and capable testator by removing all suspicious circumstances, if any, attached to the will. However I hasten to add that it is not the duty of the court to see that a testator makes a just distribution of his property. As long as it is affirmatively proved that the testator executed the will intending it to be his last will, the court cannot refuse to make a declaration that the will is proved on the ground that the distribution of the property in the will is *prima facie* unjustifiable and therefore the will is shrouded in suspicious circumstances (*Peries v. Perera*[24]). After the recent amendment to the Wills Ordinance by Wills (Amendment) Act No.29 of 2022, this is now expressly stated in section 2(2) of the Wills Ordinance.

> *Every testator shall have full power to make such testamentary disposition as he shall feel disposed, and in the exercise of such right to exclude any child, parent, relative, or descendant, or to disinherit or omit to mention any such person, without assigning any reason for such exclusion, disinheritance, or omission, any law, usage, or custom now or herefore in force in Sri Lanka to the contrary notwithstanding.*

In terms of section 531(1), if no objections are received within the stipulated time after the newspaper publications, the court shall make order declaring the will proved if the court is satisfied that the evidence adduced is sufficient to afford *prima facie* proof as to the due making of the will and the character of the petitioner. What is necessary is *prima facie* proof and not strict proof by leading oral evidence.

> *531(1). If no objections are received in relation to any application received under section 524 and 528 in response to a notice published under section 529, on or before the date specified in such notice in respect of such application, the court shall-*
>
> *(a) in the case of an application under section 524, if the court is satisfied that the evidence adduced is sufficient to afford prima facie proof as to the due making of the will and the character of the petitioner, it shall made order declaring the will to be proved and if the applicant claims-*
>
> *(i) as the executor or one of the executors of the will and asks that probate thereof be granted to him the order shall declare that he is executor, and shall direct the grant of probate to him accordingly, subject to the conditions hereinafter prescribed; or*
>
> *(ii) in any other character than that of executor, and asks that the administration of the deceased's property be granted to him, then the order shall include a grant to the applicant of a power to administer the deceased's property according to the will with a copy of the will annexed; or*

24 (1947) 48 NLR 560

(b) in the case of an application under section 528-

(i) make order for the grant of letters of administration to the petitioner subject to the conditions hereinafter prescribed; or

(ii) make order for the issue of a certificate of heirship in form No. 87A in the First Schedule, to each of the heirs mentioned in the application, stating also the share of the estate which each heir is entitled to receive, if agreed to by the heirs;

(c) in the case of an application under section 528 for the issue of certificates of heirship, make order for the grant of letters of administration, instead, to some person entitled to take out administration, subject to the conditions hereafter prescribed, if in the opinion of court it is necessary to appoint some person to administer the estate.

(2) The certificates of heirship issued under subsection (1) (b) (ii) above shall be sufficient proof of the true heirs of the deceased referred to therein, and may be produced for the purpose of claiming any share in respect of any right, title or interest, accruing upon intestacy.

(3) For the purpose of making an order under subsection (1), the Probate Officer shall submit all papers, relevant to the application in question, to the District Judge in Chambers on the day following the date specified in the notice published under section 529, in respect of such application and the court shall forthwith make an appropriate order.

Although section 531(3) enacts that "*For the purpose of making an order under subsection (1), the Probate Officer shall submit all papers, relevant to the application in question, to the District Judge in Chambers on the day following the date specified in the notice published under section 529, in respect of such application and the court shall forthwith make an appropriate order*", the District Judge is not expected to make a mechanical order that the will is proved. Section 531(3) requires the Probate Officer to submit papers to the District Judge for the latter to make an "*appropriate order*".

Section 531(1)(a) states that "*if the court is satisfied that the evidence adduced is sufficient to afford prima facie proof as to the due making of the will*", the court shall declare that the will is proved.

What is meant by "*the due making of the will*"? The constituent elements of the due execution of a will are set out in section 4 of the Prevention of Frauds Ordinance No.7 of 1840.

4. No will, testament, or codicil containing any devise of land or other immovable property, or any bequest of movable property, or for any other purpose whatsoever,

> *shall be valid unless it shall be in writing and executed in manner hereinafter mentioned ; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses, who shall be present at the same time and duly attest such execution, or if no notary shall be present, then such signature shall be made or acknowledged by the testator in presence of five or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.*

What is meant by *prima facie* proof? In *Velupillai v. Sidembram*[25] Drieberg J. stated;

> *"Prima facie proof" in effect means nothing more than sufficient proof-proof which should be accepted if there is nothing established to the contrary; but it must be what the law recognizes as proof, that is to say, it must be something which a prudent man in the circumstances of the particular case ought to act upon-s.3, Evidence Ordinance.*

Section 3 of the Evidence Ordinance in describing what is meant by 'proved' states; "*A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man might, under the circumstances of the particular case, to act upon the supposition that it exists.*" (*vide* also *Wickremasuriya v. Dedoleena*[26])

The District Judge shall exercise his judicial mind to consider whether the petitioner had *prima facie* proved the due making of the will before he decides to issue probate to the petitioner. Merely recording in the Journal Entry that, "*proof of publication is tendered; no objections; probate is issued in favour of the petitioner*" is not sufficient. It is not a curable procedural defect but non-compliance with a mandatory provision of the law. The order shall reflect due consideration of the evidence adduced by the petitioner.

It is similar but not identical to an *ex parte* judgment entered under section 85(1) of the Civil Procedure Code where the plaintiff is required to place evidence before the court in support of his claim by affidavit or oral testimony to the satisfaction of the court. Section 531 requires adducing sufficient evidence to afford *prima facie* proof of the due execution of the will, while section 85 requires placing evidence by affidavit or oral testimony to satisfy the court. Both under sections 85(1) and 531 of the Civil Procedure Code, the court cannot make a mechanical order without going into the merits of the application merely because the application is *ex parte* and there is no contesting party before court.

25 (1929) 31 NLR 97 at 99

26 [1996] 2 Sri LR 95 at 101-102

In an application filed before the District Court seeking to recall probate, if fraud is alleged in the execution of the last will and state, for instance, that the last will which is not an act and deed of the deceased has been prepared in the handwriting of the petitioner herself who is the sole beneficiary of it, it excites the suspicion of the court, and the District Court shall give consideration to it.

In *Pieris v. Wilbert*,[27] an application for probate of a will was resisted on the ground that the testator was not in a fit state of mind at the time the will was executed. The petitioner was nominated in the will as executor and also as the sole heir of all the estate of the deceased. It was not disputed that the petitioner took an active part in getting the will executed. Against this backdrop, the Supreme Court at page 247 relied on the following passage from the judgment of Baron Parke in the Privy Council case of *Barry v. Butlin*.[28]

> *The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal and they have been acquiesced in on both sides. These rules are two: The first that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.*

The same point, i.e. if a party writes or prepares a will under which he takes a benefit the court ought not to pronounce in favour of it unless the suspicion created by that act is removed, was highlighted in a number of cases including *The Alim Will Case*,[29] *Arulampikai v. Thambu*,[30] *Sithamparanathan v. Mathuranayagam*,[31] *Ratnayake v.Chandratillake*.[32]

It is undeniable that the most appropriate time to object to the last will or grant of probate or letters of administration is within a date not earlier than sixty days and not later than sixty-seven days from the date of the first newspaper publication. The relevant section is section 529 of the Civil Procedure Code.

> *529 (1). Every application to a District Court under section 524 or 528 shall be received by the Probate Officer of the District Court, and shall be registered in a separate*

27 (1956) 59 NLR 245
28 [1838] 2 Moo. P.C. 480 at 482-483
29 (1919) 20 NLR 481
30 (1944) 45 NLR 457
31 (1970) 73 NLR 53
32 [1987] 2 Sri LR 299

register to be maintained for that purpose by the Probate Officer who shall thereafter cause the required publications to be made in terms of subsection (2).

(2) The Probate Officer of a District Court shall, on any day of the week commencing on the third Sunday of every month cause a notice in form No. 84 in the First Schedule to be published in a prescribed local newspaper in Sinhala, Tamil and English, relating to-

(i) every application under section 524 or 528 received by that District Court in the preceding one month; and

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

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

(3) The notice published under subsection (2), shall call upon persons having objections to the making of an order declaring any will proved, or the grant of probate or of letters of administration with or without the will annexed, or the issue of certificates of heirship to any person specified in the application made under section 524 or 528, to submit their written objections, if any, supported by affidavit, before such date as is specified in the notice, being a date not earlier than sixty days and not later than sixty seven days from the date of the first publication referred to in subsection (2).

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

However, this is not the only occasion an objection could be raised against a declaration that the will is proved or against the grant of probate or letters of administration.

The following dicta contained in the Court of Appeal judgment in *Shanthi Goonetilake v. Mangalika*[33] and made use of to dismiss applications *in limine* that "*The first publication in terms of section 529(2) was done on 23.04.2003. Objections to the granting of letters of administration could be entertained in terms of section 529(3) of the Civil Procedure Code only if such objections are submitted not earlier than 60 days and not later than sixty seven days from the date of the first publication referred to in section 529(2). However, the petitioner has not filed any objections to the order made by Court to grant letters of administration to the respondent as prescribed in section 529(2). When a period of time is*

33 [2006] 3 Sri LR 331 at 334

specified by law before the expiration of which any act has to be done by a party in a Court of law, that Court has no jurisdiction to permit that act to be done after the expiration of that time within which it had to be done (Ceylon Breweries v. Fernando [2001] 1 Sri LR 270). Therefore when the petitioner has not made an application to recall the letters of administration within the period prescribed in section 529(3) of the Civil Procedure Code, the petitioner's application cannot be entertained" does not, with respect, represent the correct position of the law. The law has provided for various opportunities to intervene, object and make applications for recall of probate or letters of administration etc. beyond the period stipulated in the newspaper publications. In point of fact, a person cannot make an application to recall the probate or letters of administration within the period prescribed in section 529(3) since at that time the court has not issued probate or letters of administration.

According to section 536, any person interested in the will or the deceased's property can intervene by filing in the same court a caveat before the final hearing of the petition.

> *536. At any time after the notice published under section 529 and before the final hearing of the petition, it shall be competent to any person interested in the will or in the deceased person's property or estate, though not a person specified in the petition, to intervene, by filling in the same court a caveat as set out in form No.93 in the First Schedule against the allowing of the petitioner's claim or a notice of opposition thereto, and the court may permit such person to file objections, if any, and may adjourn the final hearing of the petition.*

In terms of section 537, probate, letters of administration or a certificate of heirship can be recalled, revoked or cancelled upon the court being satisfied that (a) the certificate should not have been issued or that the will ought not to have been held proved, (b) that the grant of probate or letters of administration ought not to have been made, or (c) that events have occurred which render administration impracticable or useless.

> *537. In any case where a certificate of heirship has issued, or probate of a deceased person's will or administration of a deceased person's property has been granted it shall be competent to the District Court to cancel the said certificate, or recall the said probate or grant of administration, and to revoke the grant thereof, upon being satisfied that the certificate should not have been issued or that the will ought not to have been held proved, or that the grant of probate or of administration ought not to have been made; and it shall also be competent to the District Court to recall the probate or grant of administration, at any time upon being satisfied that events have occurred which render the administration hereunder impracticable or useless.*

There is no time limit for an application under section 537 to be made but if the applicant says he was unaware of the newspaper publication calling for objections,

such an application shall be made at the earliest possible opportunity of such applicant becoming aware of the case. The test is objective, not subjective.

In *Biyanwila v. Amarasekere* (supra), the appellant became aware of the fact that the respondent, her mother had obtained the probate as executor of the last will in 1952 but about 9 years later in 1961 she came to court challenging the last will as a forgery. Whilst dismissing the appeal, Sirimane J. observed *inter alia* at 494:

> *In this case however one cannot disregard the long delay on the part of the appellant which places the respondent at an obvious disadvantage. An order revoking probate after the lapse of such a length of time, may even place the rights of third parties in jeopardy. Williams on Executors and Administrators says at page 81 of the 14th edition "Where a party who is…entitled to call in the probate and put the Executor to proof of the Will chooses to let a long time elapse before he takes this step he is not entitled to any indulgence at the hands of the Court."*

Prior to the Civil Procedure Code (Amendment) Act No.14 of 1993 by which the whole chapter 38 under the title '*Testamentary Actions*' was repealed and replaced with a new chapter, the testamentary procedure had *inter alia* the following conspicuous features:

(a) application for probate or letters of administration shall be made by way of summary procedure – sections 524(1), 530(1)

(b) if the court is *prima facie* satisfied with the application, order *nisi* shall be issued in the first instance – sections 526, 531

(c) such order *nisi* will be served on the respondents and such other persons as the court shall think fit – sections 526, 531

(d) order *nisi* shall be published in newspapers – section 532

(e) if the petitioner has no reason to suppose that his application will be opposed by any person, he can file with his petition an affidavit to that effect and omit to name any person in his petition as respondent – section 525(1)

(f) in the case of an application for probate, if no respondent is named in the petition, the court may in its discretion make the order absolute in the first instance – section 529(1)

Except for (e) above, all these features were removed by the Civil Procedure (Amendment) Act No.14 of 1993, and (e) was removed by the Civil Procedure (Amendment) Act No.38 of 1998.

Under the repealed procedure, as held by the Full Bench of the Supreme Court in *Adoris v. Perera* (supra) "*When an issue of probate has followed upon an order nisi (and not upon an order absolute in the first instance), the summary procedure for the recall of probate provided in section 537 does not apply, and all parties are concluded by the issue of probate.*

But where there is fraud in connection with the obtaining of probate even upon an order nisi, an independent action might be brought to set aside the probate."

When fraud is alleged in obtaining probate on a (purported) last will, whether under the old procedure or new procedure, institution of a separate action to unravel the fraud and cancel the probate is permissible. The same will apply in the case of letters of administration. This does not mean that the question of fraud cannot be adjudicated on in the testamentary proceedings itself; everything depends on unique facts of each case.

In *Actalina Fonseka's* case (*supra*) the Supreme Court allowed a separate action to be maintained seeking a declaration that the last will was a forgery and probate had been obtained by fraud. At page 102, Kulatunga J. stated:

> *An allegation that a will was forged intentionally to mislead the Court to granting probate for the administration of an estate which has in fact devolved on intestate heirs and that probate has been obtained by persons who forged such will without disclosing the heirs has to be viewed differently from an allegation that probate has been obtained by mere perjury. If it were otherwise it is not clear why our Courts have held that the proper procedure to impeach probate obtained on a forged will is by separate action - Tissera v. Gunatilleke Hamine 13 NLR 261; Adoris v. Perera 17 NLR 212; Biyanwila v. Amarasekera 67 NLR 488.*

Fraud cannot be suppressed by technicalities. Bertram C.J. in *Suppramaniam v. Erampakurukal*[34] citing *Black on Judgments* Vol 1, Section 292-293 states; "*Fraud is not a thing that can stand even when robed in a judgment*". In *Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands*,[35] Justice Vythialingam at page 66 and Justice Weeraratne at page 140 quoted with approval the following dicta of Lord Denning in *Lazarus Estates Ltd v. Bearely*:[36]

> *No Judgment of a Court or order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is specially pleaded and proved. But once it is proved it vitiates judgments, contracts, and all transactions whatsoever.*

In *Pieris v. Wijeratne*,[37] Jayawickrama J. held "*although according to section 536 of the Civil Procedure Code an application to recall the probate could be made only where an order absolute in the first instance has been made, in an appropriate case, depending on the circumstances, a court has jurisdiction to act under section 839 of the Civil Procedure Code and make an order as may be necessary for the ends of justice or to prevent abuse of the process of the Court*."

34 (1922) 23 NLR 417 at 435
35 (1974) 80 NLR 1
36 (1956) 1 All ER 341 at 345
37 [2000] 2 Sri LR 145 at 152

As the law stands today, when applications are filed seeking probate or letters of administration, the adoption of summary procedure, issuance of order *nisi* etc. are inapplicable (except in instances where anapplication for recalling probate or letters of administration is subsequently made under section 538). The parties have to follow neither the summary procedure (as contemplated in chapter 24 of the Civil Procedure Code) nor strictly the regular procedure (by way of plaint and answer) but rather a special procedure in that the application is made by way of petition and affidavit. The court makes substantive orders in the nature of order absolute in the first instance, not order *nisi*.

Interventions in testamentary actions are sought not only to challenge last wills and issuance of probate or letters of administration. Such applications are made by various persons interested in the estate for various purposes by adopting various procedures. It is not my intention to list out all such instances but I will highlight a few for better understanding of the nature and complexity of such applications.

For instance, under section 718(1), "*A creditor or any person interested in the estate, may present to the court in the action in which grant of probate or administration issued, proof by affidavit that an executor or administrator has failed to file in court the inventory and valuation, and account (or sufficient inventory and valuation, or sufficient accounts) required by law within the time prescribed therefor.*" It may be noted that this kind of application can be made by "*a creditor or any person interested in the estate*" by presenting "*proof by affidavit*"(not necessarily petition and affidavit). The correction of the inventory and accounts can be challenged in terms of section 718 (*De Zoysa v. De Zoysa*[38]).

Section 720 provides another example: "*In either of the following cases a petition, entitled as of the action in which grant of probate or administration issued, may be presented to the court which issued the same, praying for a decree directing an executor or administrator to pay the petitioner's claim, and that he be cited to show cause why such decree should not be made (a) by a creditor, for the payment of a debt, or of its just proportional part, at any time after twelve months have expired since grant of probate or administration; (b) by a person entitled to a legacy, or any other pecuniary provision under a will, or a distributive share, for the payment or satisfaction thereof, or of its just proportional part, at any time after twelve months have expired since such grant.*" It may be noted that this kind of application can be made by "*a creditor*" or "*by a person entitled to a legacy, or any other pecuniary provision under a will, or a distributive share*" by presenting "*a petition*" (not necessarily a petition and affidavit).

Most intervention applications are in relation to claims on properties listed and unlisted in the inventory. Such movable and immovable property claims are not directly

38 (1924) 26 NLR 472

relevant to the main inquiry and are made from the time the action is instituted until the termination of the proceedings. These claims can be made *inter alia* by the parties to the case, heirs, third parties who have purchased rights from the heirs, persons claiming prescriptive rights, or any person interested in the estate.

The original petitioner shall set out in the original petition the details and the situation of the deceased's property as a requirement under sections 524(1)(b) and 528(1)(d), but this is not the inventory. The inventory is filed under section 539(1) after the court makes order on entitlement to probate or letters of administration and after the taking of the prescribed oath by the executor or administrator but before the issuance of probate or letters of administration.

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

Any application seeking inclusion or exclusion of properties before the inventory is filed under section 539 is premature. Such applications shall not be an impediment to decide the main application (i.e. proof of the last will if any and the finding of in whose favour probate or letters of administration should be issued).

In *Harold Fernando v. Fonseka*[39] the Court of Appeal citing *Fernando v. Fernando*,[40] *Kathirikamasegara Mudaliyar*[41] and *Kantaiyar v. Ramoe*[42] rightly held that the grant of probate or letters of administration is a distinct preliminary step in testamentary proceedings independent of claims to the estate by the heirs, and the question of entertaining claims to the estate on the ground that the claimant is an heir could form the basis of an inquiry at a subsequent stage of the proceedings.

What happens if the testator includes properties in the last will which do not belong to him and what happens if the executor disposes of such properties by way of executor conveyances? According to section 2(1) of the Wills Ordinance, the testator can include "*any property which belong to him at the time of death*".

39 [1998] 3 Sri LR 301
40 (1914) 18 NLR 24
41 (1900) 5 NLR 29
42 (1904) 8 NLR 207

> *It shall be lawful for any person who has reached the age of eighteen years and residing within or outside Sri Lanka to execute a will bequeathing and disposing any movable and immovable property and all and every estate, right, share or interest in any property which belong to him at the time of death and which, if not so devised, bequeathed or disposed would devolve upon his heirs of such person not legally incapacitated from taking the same as he shall seem fit*.

Inclusion in the last will of properties that the testator is not the owner, does not give any rights to the purported beneficiaries. Anybody can include others' properties in his last will and bequeath them to his next of kin as he pleases, but that does not mean that after the death of the testator the beneficiaries can stake a claim on such properties on the strength of the last will.

In *Roslin Nona v. Herat*[43] it was held that even if the executor or administrator sells such properties with the authority of the court, the buyer does not get title to such properties. In *Rosalin Nona's* case, the administratrix of the estate of a deceased intestate applied to the District Court for authority to sell certain immovable properties that allegedly belonged to the deceased. Two parties intervened in the testamentary case objecting to the sale on the basis that they had conclusive title to two of the lands by partition decrees. These objections were dismissed by the District Court. On appeal, the Supreme Court upheld that order. H.N.G. Fernando J. (later C.J.) with the agreement of T.S. Fernando J. whilst dismissing the appeal stated:

> *The usual restriction contained in a grant of letters, which prohibits the sale of immovable property by an administrator without the authority of the Court, is a measure designed for the protection of the estate and the heirs, and not for the protection of other interests. The grant of leave to sell is merely a release of the Administrator from the restriction imposed in the letters, and is neither an adjudication upon the title, if any, of the intestate or the Administrator, nor anything equivalent to an order for a sale in execution enforceable with the aid of the process of the court.*
>
> *The common law does not prevent a person from executing a transfer of property which may, in fact, belong or turn out to belong to another, although, of course, the transferee in such a case acquires no title as against the true owner. A transferee from an Administrator cannot claim to be in any better position on the score that the transfer was executed with the leave of the Court. If, therefore, an administrator claims any property as being the property of estate or as being liable to be sold in order to repay the debts of the estate or the expenses of administration, the court does not in the testamentary proceedings have jurisdiction to determine disputes*

43 (1960) 65 CLW 55

> *as to title between the administrator and third parties. The Appellants had no right to call upon the court to adjudicate upon their claims of unencumbered title to the two lands in question. The action, if any, which they should take at this stage to protect their interests is not a matter upon which they can be advised by this court.*

Conversely, failure to include in the inventory a property that actually belonged to the deceased does not deprive the heirs of making a claim to that property on succession (*Fernando v. Dabarera*[44]).

The question whether a disputed proprietary claim can be decided summarily (e.g.section 718) or later in the same proceedings by way of a judicial settlement (e.g. section 736) or whether a separate action needs to be filed on that claim is a vexed question. Such disputed proprietary claims are one of the main reasons for the delay in concluding testamentary actions in the District Court. The answer to this question depends on the nature and scope of the particular claim and the stage at which it is made. The decision needs to be taken on the unique facts and circumstances of each individual application. Broadly speaking, if the claim is by a party to the case or by an heir of the estate and the claim is not a complicated one, it can be decided in the testamentary case itself. But if it is by a third party and the claim is a complicated one with distinct causes of action which require raising issues and leading evidence of several witnesses, it is prudent that it be decided in a separate action. It is not practically possible to hear a case within a case.

However, in certain instances, deciding the issue in the case itself is mandatory. Section 736(2) provides for one such instance and enacts; "*Where a contest arises between the accounting party and any of the other parties respecting any property alleged to belong to the estate, but to which the accounting party lays claim, or respecting a debt alleged to be due by the accounting party to the testator or intestate, or by the testator or intestate to the accounting party, the contest must be tried and determined in the same special proceeding and in the same manner as any issue arising on a civil trial*." In *Suppammal v. Govinda Chetty*[45] it was observed "*These words are clear and peremptory. They require that, if at the stage of a judicial settlement, a question such as arose here, arises between an accounting party, that is to say, between an executor or administrator, and any of the other parties, that is to say, other parties to the testamentary suit, such as the widow in this case, that question must be determined "in the same special proceeding", that is to say in the proceeding for the judicial settlement*." The reference to *"the other parties"* in section 736(2) was construed as the other parties to the action, not third parties.

In the matter of the last will and testament of Don Cornelis Dias[46] it was held that in the case of a petition under section 712 to discover property withheld from an executor, if the respondent in terms of section 714(3) puts in an affidavit claiming to be the owner

44 (1971) 77 NLR 127
45 (1943) 44 NLR 193 at 195
46 (1986) 2 NLR 252

of such property, the only thing for the court to do is to dismiss the petition remitting the parties to the machinery of an ordinary action for the determination of their rights.

Conversely, when an application is made by a creditor under section 720 seeking a decree directing the executor or administrator to pay such claim, if the executor or administrator files an affidavit setting forth facts which show to the satisfaction of the court that the validity of the claim is doubtful, then the court can dismiss the application.

In *De Silva v. Gomes*[47] it was held "*An administrator, who is not prepared to admit the claim of a creditor, is not entitled to place upon the court the responsibility of a decision on the matter. In such a case it is left to the creditor to establish his claim by regular proceedings against the estate*."

In *De Silva v. Jayakody*[48] it was held "*Where a petition is presented to court by a creditor under section 720 of the Civil Procedure Code praying for a decree directing an executor or administrator to pay the creditor's claim and the respondent denies the validity and legality of the claim, the court is debarred from acting under the section and compelling payment of the disputed claim.In such a case the petition should be dismissed without prejudice to the creditor's right to bring a separate action*."

In *Suppammal v. Govinda Chetty (supra)* it was held "*Where an application was made by an heir of an estate for a direction to the administrator to have the inventory filed by him amended so as to include certain sums of money which the administrator claimed as his own the application fell within the scope of section 718 of the Civil Procedure Code. Where a question such as the above arises between the accounting party (i.e., the executor or administrator) and any of the other parties to the testamentary case, that question may be determined in the proceeding for judicial settlement and not by separate action. It would be within the discretion of the Court to direct amendment under section 718 or to refer a party to the procedure of section 736, viz., judicial settlement, according to the nature and scope of the particular application and the stage at which it is made*." This was quoted with approval in *Jayantha de Soysa v. Naomal de Soysa*.[49]

Filing the final account is a significant step in bringing the proceedings to termination.

In terms of section 551 every executor and administrator shall file in the District Court, on or before the expiration of twelve months from the date upon which probate or grant of administration is issued or within such further time as the court may allow, a true and final account of his executorship or administration verified on oath or affirmation. The form of the final account is found in Form No.118A in the First Schedule to the Civil Procedure Code. It may be noted that distribution of the property is part of the final account.

47 (1928) 30 NLR 249
48 (1941) 42 NLR 226
49 [1997] 3 Sri LR 65

In terms of section 724A, if the executor or administrator has failed to file the final account in court, any person interested in the estate can make an application to court in that regard and the court shall take appropriate steps. Further, while in terms of section 724B the court can discharge the executor or administrator if he files the final account together with other documents to establish that the entire estate has been duly administered and distributed, if objections arise the court shall direct a judicial settlement of the account in terms of section 724B(7).

Judicial settlement of such account plays a vital role in the termination of testamentary proceedings. Sections 725 and 726 provide how the procedure in relation to judicial settlement of such account can be invoked. Section 729 allows an executor or administrator to move for a judicial settlement of the account as well.

> *725. In any of the following cases, and either upon the application of a party mentioned in the next section or of its own motion, the court may from time to time compel a judicial settlement of the account of an executor or administrator:-*
>
> *(a) where one year has expired since grant to him of probate or administration;*
>
> *(b) where such grant has been revoked, or for any other reason his powers have ceased;*
>
> *(c) where he has sold or otherwise disposed of any immovable property of the testator, or devisable interest therein, or the rents, profits, or proceeds thereof, pursuant to a power in the will, where one year has elapsed since the grant of probate to him.*
>
> *726(1). The application for a judicial settlement in the last section mentioned shall be by petition, entitled as of the action in which grant of probate or administration issued, and may be presented by a creditor, or by any person interested in the estate or fund, including a child born after the making of a will; or by any person in behalf of an infant so interested; or by a surety in the official bond of the person required to account, or the legal representative of such surety.*
>
> *(2) Upon the presentation thereof, citation shall issue accordingly; but in a case specified in paragraph (a) of the last preceding section the court may, if the petition is presented within less than eighteen months after the issue of probate or administration, entertain or refuse to entertain it in its discretion.*

However, all the complicated proprietary issues in relation to the case cannot be settled and decided by a judicial settlement of the account alone.

In *Holsinger v. Nicholas*[50] it was held "*The object of a judicial settlement is that all matters that may arise in the course of the administration of the estate between the accounting party and the beneficiary should be dealt with promptly and in an expeditious manner, so that the whole question might be finally wound up in those proceedings. If the Judge thinks that the matter is of such complication and importance that it can only be inquired into by a regular action, he might suspend the settlement until that matter is determined by a regular action, or conclude the settlement subject to the determination of that matter*."

This judgment was referred to in *Zain v. Sheriff*[51] when the court decided "*Proceedings for a judicial settlement are not appropriate for the purpose of deciding a question which could not be finally determined without other persons who are not parties to the testamentary suit*."

In *Pathmanathan v. Thuraisingham*[52] it was held *"Disputed claims cannot be adjudicated upon in an inquiry relating to the judicial settlement of the accounts of executors and administrators under Chapters 54 and 55 of the Civil Procedure Code. In such proceedings, therefore, a legatee cannot claim as a creditor that a certain sum of money is due to him from the estate of the testator, if the claim is disputed by the executor. Such a disputed claim can only be made by way of a separate action*." This was reiterated in *Imbulmure v. The Public Trustee.*[53]

50 (1918) 20 NLR 417
51 (1937) 40 NLR 310
52 (1970) 74 NLR 196
53 [2012] 2 Sri LR 413

SOME IMPORTANT ASPECTS OF THE LAW OF CONTRACT

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In *First Energy (UK) Ltd v Hungarian International Bank Ltd [1993] 2 Lloyds Rep 194* Steyn LJ said that;

> *"a theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of our law of contract. It affords no licence to a Judge to depart from binding precedent. On the other hand, if the prima facie solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness".*

What is a Contract?

A contract is an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration. Since the law of contracts is at the heart of most business dealings, it is one of the three or four most significant areas of legal concern and can involve variations on circumstances and complexities. The following factual elements are required for the existence of a contract:

a) an offer;
b) an acceptance of that offer which results in a meeting of the minds (*Consensus ad idem*);
c) a promise to perform;
d) a valuable consideration (which can be a promise or payment in some form);
e) a time or event when performance must be made (meet commitments);
f) terms and conditions for performance, including fulfilling promises;
g) performance.

A unilateral contract is one in which there is a promise to pay or give other consideration in return for actual performance. (I will pay you $500 to fix my car by Thursday; the performance is fixing the car by that date).

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A bilateral contract is one in which a promise is exchanged for a promise. (I promise to fix your car by Thursday and you promise to pay $500 on Thursday). Contracts can be either written or oral, but oral contracts are more difficult to prove.

The parties to a contract must have agreed on the essential terms or have provided the method by which these are to be determined, and these must reasonably be certain, otherwise there is no contract. A mere agreement to agree or an agreement to negotiate is not considered to have any legal force. However, if the essential terms have been agreed, the fact that the parties have agreed to negotiate as to the remaining terms does not preclude the establishment of a contract; particularly in the case where the agreement contains within itcriteria or machinery that the court can use in order to resolve the point or points which the parties have left open.[1] The courts are particularly reluctant to conclude that a contract is too uncertain to be enforced where the parties have acted in reliance upon the agreement for a period of time.[2]

In order to determine whether, in any case given, it is reasonable to infer the existence of an agreement, it has long been usual to employ the language of offer and acceptance. In other words, the court examines all the circumstances to see if the one party may be assumed to have made a firm offer and if the other may likewise be taken to have accepted that offer. These complementary ideas present a convenient method of analysing a situation, provided that they are not applied too literally and that facts are not sacrificed to phrases.

However, there can be cases where the court will certainly hold that there is a contract even though it is difficult or impossible to enlarge the transaction in terms of offer and acceptance.

Lord Wilberforce in *New Zealand Shipping Co Ltd v. A. M. Satterthwaite & Co Ltd [1975] AC 154 at 167 / [1974] 1 All ER 1015* at 1020 made the following observation:

> *English Law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.*

Privity of Contract

"The doctrine of privity means that a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it."

1 Sudbrook Trading Estate v Eggleton [1983]1 AC 444 / [1982] 3 All ER 1

2 G Percy Trentham Ltd v Archital Luxfer Ltd [1993] Lloyd's Rep 25,27

The common law reasoned that:

1. Only a promisee may enforce the promise meaning that if the third party is not a promisee he is not privy to the contract.

   Dunlop Tyre Co v. Selfridge [1915] AC 847 - The plaintiffs sold tyres to Dew & Co, wholesale distributors, on terms that Dew would obtain an undertaking from retailers that they should not sell below the plaintiffs' list price. Dew sold some of the tyres to the defendants, who retailed them below list price. The plaintiffs sought an injunction and damages. The action failed because although there was a contract between the defendants and Dew, the plaintiffs were not a party to it and "only a person who is a party to a contract can sue on it," (per Lord Haldane).

2. There is the principle that consideration must move from the promisee.

   Tweddle v. Atkinson (1861) 1 B&S 393 - The fathers of a husband and wife agreed in writing that both should pay money to the husband, adding that the husband should have the power to sue them for the respective sums. The husband's claim against his wife's fathers' estate was dismissed, the court justifying the decision largely because no consideration moved from the husband.

The two principles of privity and consideration have become entwined but are still distinct. There are exceptions to this doctrine which I will discuss later in this paper.

Offer

The first task of the plaintiff is to prove the presence of a definite offer made either to a particular person or, as in advertisements or rewards for services to be rendered, to the public at large. In the case of *Carlill v. Carbolic Smoke Ball Co [1892] 2 QB 484* it was argued that an effective offer cannot be made to the public at large.

In that case the defendant, who was the proprietor of a medical preparation called "The Carbolic Smoke Ball", issued an advertisement in which they offered to pay £100 to any person who succumbed to influenza after having used one of their smoke balls in a specific manner and for a specific period. The defendant added that it had deposited a sum of £1,000 with its banker Alliance Bank 'to show their sincerity'. The plaintiff on the faith of the advertisement bought and used the ball as prescribed, but succeeded in catching influenza. She sued for £100.

The defendant argued that the transaction was a bet within the meaning of the Gaming Act, that it was an illegal policy of insurance, that the advertisement was a mere 'puff' never intended to create a binding obligation, that there was no offer to any particular person, and that, even if there were, the plaintiff had failed to notify her acceptance. The Court of Appeal rejected these pleas. Bowen LJ made the following observations;

> *It was also said that the contract is made with all the world – that is, with everybody, and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of argument. It is an offer made to all the world; and why should an offer be made to all the world which is to ripen a contract with anybody who comes forward and performs the condition?.... Although the offer is made to the world, the contract is made with that limited portion of the public who comes forward and perform the condition on the faith of the advertisement.*

Offer Distinguished from Invitation to Treat

An offer is different from an invitation to treat. An offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound, provided that certain specified terms are accepted. The offeror must have completed his share in the formation of the contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving the offeree the option of acceptance or refusal. He must not merely have been feeling his way towards the agreement, not merely initiating negotiations from which an agreement might or might not in time result. He must be prepared to implement his promise, if such is the wish of the other party.

The distinction is sometimes expressed in judicial language by the contrast of an "offer" with that of an "invitation to treat". Referring to the advertisement in the Carlill case, Bowen LJ said:

> *It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate – offers to receive offers – offers to chaffer.*

The application of this distinction has long agitated the courts. It arose first in the law of auctions, where the problem may appear in at least three forms.

First is, the auctioneer's request for bids a definite offer which will be converted into an agreement with the highest bidder, or is it only an attempt to 'set the ball rolling? The latter view was accepted in *Payne v. Cave (1789) 3 Terms Rep 148, [1789] EngR 2443, (1789) 100 ER 502 (B)*. In this case the defendant's bid for a worm-tub, and a pewter worm was highest at the auction, but he withdrew his bid before the hammer fell. The auction was under standard conditions.

It was held that no contract had been made. The bid was an offer which could be withdrawn at any time before acceptance by the auctioneer's hammer. The auctioneer's request for bids is not an offer which can be accepted by the highest bidder.

Secondly, does an advertisement that specified goods will be sold by auction on a certain day constitute a promise to potential bidders that the sale will actually be held?

A negative answer was given to this question in *Harris v. Nickerson (1873) LR 8 QB 286*. In that case the plaintiff failed to recover damages for loss suffered in travelling to the advertised place of an auction sale which was ultimately cancelled. His claim was condemned 'as an attempt to make a mere declaration of intention a binding contract'.

In the words of Blackburn J:

> *This is certainly a startling position and would be excessively inconvenient if carried out. It amounts to saying that anyone who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire or travelling expenses.*

Thirdly, does an advertisement that the sale will be without reserve constitute a definite offer to sell to the highest bidder?

Auction without reserve is an auction in which the goods may not be withdrawn unless no bid is received within a reasonable time.

Barry v. Heathcote Ball & Co (Commercial Auctions) Ltd [2001] 1 All ER 944:

> *At an auction held by the defendant auctioneers, the lots for sale included two new engine analyser machines which could be obtained from the manufacturers at a price of £14,521 each, but were being sold, without reserve, by the Customs and Excise in satisfaction of a value added tax (VAT) liability. The auctioneer announced that the machines were to be sold on behalf of the VAT office, and that each was worth £14,000. After unsuccessfully trying to obtain bids of £5,000 and £3,000, the auctioneer asked what bids there were for the machines. The claimant, Barry, who wished to use the machines in his business, then bid £200 for each of them. When no other bid was made, the auctioneer withdrew the machines from the sale, believing that he could obtain a higher sum later by other means. A few days later the machines were sold for £750 each after being advertised in a magazine. Subsequently, Barry brought an action for damages against the auctioneers on the basis that he was the highest bidder. His claim was upheld by the judge who awarded him damages of £27,600, i.e. the difference between the amount that Barry had bid and the sum that he would have been required to spend to obtain the machines in the ordinary way. The auctioneer appealed, contending, inter alia, that there was no contract between them and Barry, and that, in any event, an agent could not be liable on a contract where he acted for a disclosed principle.*[3]
>
> *Held - Where a lot was auctioned without reserve, the auctioneer would be in breach of contract to the highest bidder if he withdrew the lot from sale. An auctioneer who*

3 A principal that the other party to a transaction knows (1) that the agent is acting on behalf of and (2) the identity of the principal; a disclosed principal is solely liable for any such transaction.

> *stated that an auction was without reserve entered into a collateral contract with the highest bidder. On such an auction, there was a collateral contract between the auctioneer and the highest bidder, consisting of an offer by the auctioneer to sell to the highest bidder and an acceptance of that offer when the bid was made. Consideration for the auctioneer's promise came in two forms, namely a detriment to the bidder, since his bid could be accepted unless and until it was withdrawn, and a benefit to the auctioneer as the bidding was driven up. Moreover, attendance at the sale was likely to be increased if it were known that there was no reserve. Thus on an auction without reserve, the highest bid could not be rejected merely because it was not high enough.*

Harvela Investment Ltd v. Royal Trust Co of Canada Ltd [1986] AC 207, [1985] 2 All ER966 - The first defendants held some 12% of the shares of a company as trustees of a settlement. They wished to sell the shares. The two obvious buyers were the plaintiffs who owned 43% of the shares and the second defendants who owned 40%, since if either brought the shares they would obtain control of the company. The first defendants decided to dispose of the shares by sealed competitive tender and sent identical telexes to the plaintiffs and the second defendants inviting tenders and stating, 'We confirm that if the offer is made by you is the highest offer received by us we bind ourselves to accept such offer providing that such offer complies with the terms of this telex'. The plaintiffs bid $2,175,000. The second defendants bid $2,100,000 or '$100,000 in excess of any other offer which you may receive which is expressed as a fixed monetary amount whichever is higher'. The first defendants accepted the second defendants' offer.

The House of Lords held that the first defendants were legally obliged to accept the plaintiff's offer. In coming to this conclusion their Lordships analysed the problem and adopted a two-contract approach. The telex was treated as an offer of a unilateral contract to accept the highest bid which would be followed by a bilateral contract with the highest bidder. It was held further that a referential bid such as the second defendants' bid was inconsistent with an obligation to accept the higher of the two sealed bids.

Pharmaceutical Society of *Great Britain v. Boots Cash Chemists (Southern) Ltd [1952] 2 QB 795, [1952] 2 All ER 456*–

> The defendant adapted one of their shops to a 'self-service' system. A customer, on entering, was given a basket, and having selected from the shelves the articles he required, put them in the basket and took them to the cash desk. Near the desk was a registered pharmacist who was authorised, if necessary, to stop the customer from removing any drug from the shop.
>
> The Court had to decide whether the defendants had broken the provisions of section 18 of the Pharmacy and Poisons Act 1933, which made it unlawful to sell any listed poison 'unless the sale is effected under the supervision of a registered

> pharmacist'. The vital question was at what time the sale took place, and this depended in turn on whether the display of the goods with prices attached was an offer or an invitation to treat. According to the plaintiffs, it was an offer, accepted when the customer put an article into his basket, and, if the article was a poison, it was therefore 'sold' before the pharmacist could intervene. According to the defendants, the display was only an invitation to treat. An offer to buy was made when the customer put an article in the basket, and this offer the defendants were free to accept or to reject. Lord Goddard decided that the display was only an invitation to treat so that the law had not been broken. The Court of Appeal upheld the decision and adopted his reasoning.
>
> The transaction is in no way different from the normal transaction in a shop in which there is no self-service scheme. I am quite satisfied it would be wrong to say that the shop keeper is making an offer to sell every article in the shop to any person who might come in and that person can insist on buying any article by saying 'I accept your offer'. I agree with the illustration put forward during the case of a person who might go into a shop where books are displayed. In most book-shops customers are invited to go in and pick up books and look at them even if they do not actually buy them. There is no contract by the shopkeeper to sell until the customer has taken to book to the shopkeeper or his assistant and said 'I want to buy this book' and the shopkeeper says 'Yes'. That would not prevent the shopkeeper, seeing the book picked up, saying: 'I am sorry I cannot let you have that book; it is the only copy I have got and I have already promised it to another customer'. Therefore, in my opinion the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy, and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price.

In *Fisher v. Bell [1961] 1 QB 394 at 399, [1960] 3 All ER 731 at 733* it was held:

> *It is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a sale.*

There are certain other matters of daily life in which the legal position remains doubtful.

If a passenger boards a bus, is he accepting an offer of carriage or is he himself making an offer in response to an invitation to treat?

Wilkie v. London Passenger Transport Board [1947] 1 All E.R. 258; 63 T.L.R. 115– The action of an intending passenger in boarding an omnibus is something done not by virtue of a contract but by virtue of the implied licence given him by the bus company to get

to the position where he may make a contract with the company. A person holding a free travelling pass boards a bus as a pass-holder. The plaintiff, a person holding a free travelling pass, was injured by the negligence of the bus company by being thrown on to the ground in the act of boarding the bus. The pass contained a condition exempting the company from liability for injury however caused. The plaintiff contended that the condition did not come into operation until he was being conveyed as a passenger is conveyed. Held, that the pass was merely a revocable licence without contractual effect.

Lord Greene thought that a contract is made when an intending passenger puts himself either on the platform or inside the bus. This opinion was obiter, but if it represents the law it would seem that the corporation makes an offer of carriage by running the bus and that the passenger accepts the offer when he gets properly on board. The contract would then be complete even if no fare is yet paid or ticket is given.

The different between offer and invitation to treat was illustrated in *Gibson v. Manchester City Council [1979] 1 All ER 972, [1979] 1 WLR 294*.

> In September 1970 the council adopted a policy of selling council houses to council tenants. On 16th February 1971 the City Treasurer wrote a letter to Mr Gibson stating that the council 'may be prepared to sell the house to you at the purchase price of £2, 725 less 20% = £2, 180 (freehold)'. The letter invited Mr. Gibson to make a formal application, which he did. In the normal course, this would probably have been followed by the preparation and exchange of contracts but before that process had been completed, control of the council changed hands as a result of the local government elections of May 1971. The policy of selling council houses was reversed and the council decided only to complete those transactions where exchange of contracts had taken place. Mr. Gibson claimed that a binding contract had come into existence but the House of Lords held that the Treasurer's letter was at most an invitation to treat and that therefore Mr. Gibson's application was an offer and not an acceptance.

The Fact of Acceptance

Whether there has been an acceptance by one party of an offer made to him by the other may be collected from the words of documents that have passed between them, or may be inferred from their conduct. The task of inferring an assent and of fixing the precise moment at which it may be said to have emerged is one of the obvious difficulty, particularly when the negotiations between the parties have covered a long period of time or are contained in protracted or desultory correspondence.

Brogden v. Metropolitan Railway Company (1876–77) L.R. 2 App. Cas. 666 – Mr. Brogden, the chief of a partnership of three, had supplied the Metropolitan Railway Company with coal for a number of years. Brogden then suggested that a formal contract should be

entered into between them for longer term coal supply. Each side's agents met together and negotiated. Metropolitan's agents drew up some terms of agreement and sent them to Brogden. Brogden wrote in some parts which had been left blank and inserted an arbitrator who would decide upon differences which might arise. He wrote "approved" at the end and sent back the agreement documents. Metropolitan's agent filed the documents and did nothing more. For a while, both acted according to the agreement document's terms. But then some more serious disagreements arose, and Brogden argued that there had been no formal contract actually established.

Lord Blackburn held:

> *I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound. If a man sent an offer abroad saying: I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must ship the first cargo as soon as you get this letter, there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea, it would go to the bottom of the sea at the risk of the party who placed the order. So again, where, as in the case of In re Imperial Land Company of Marseilles, ex parte Harris*[4]*, a person writes a letter and says, I offer to take an allotment of shares, and he expressly or impliedly says, if you agree with me send an answer by the post, there, as soon as he has sent that answer by the post, and put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound, I agree the contract is perfectly plain and clear.*

A counter-offer is a final rejection of the original offer. In the case of *Hyde v. Wrench (1840) 3 Beavan's Reports 334,* the defendant on 6th June offered to sell an estate to the plaintiff for £1000. On 8th June, in reply, the plaintiff made an offer of £950, which was refused by the defendant on 27th June. Finally, on 29th June, the plaintiff wrote that he was now prepared to pay £1000.

It was held that no contract existed. By his letter dated 8th June the plaintiff had rejected the original offer and he was no longer able to revive it by changing his mind and tendering a subsequent acceptance.

Jones v. Daniel [1894] 2 Ch 332 –

> The plaintiff, W. Jones, was the owner in fee simple of some land at Llandaff, in the county of Glamorgan, subject to certain leases for ninety-nine years, and about the 6th of April, 1893, the defendant made a verbal offer of £1450 for the

4 (1872) Law Rep. 7 Ch. App. 587

property to Mr. John Jones, a member of the firm of Lewis & Jones, the plaintiff's solicitors. After some correspondence the defendant on the 22nd of April wrote Messrs. Lewis & Jones as follows:-

> "I may say in respect to this property the offer I made you of £1450 is my fullest, and in the present unsatisfactory definition of the leases, and the imperfect drainage and difficulties attendant thereon, it is more than its real value."

On the 26th of April the plaintiff's said solicitors wrote the defendant the following reply:-

> "Mr. W. Jones has considered your offer of £1450 for his reversionary interest in this property. He thinks it very low, but ... he accepts it, and we enclose contract for your signature. On receipt of this signed by you across the stamp and deposit we will send you copy signed by him."

The document enclosed in this letter comprised usual conditions of sale with memorandum of contract indorsed, partly printed and partly written, and stipulated (inter alia) for a deposit of 10 per cent on the purchase-money, for completion on the 24thof May and that the vendor's title should commence with a conveyance dated in 1865.

On the 29th of April the plaintiff's said solicitors, not having received an answer from the defendant, wrote him again:-

> "Kindly let us know whether we shall send abstract of title to you or to a solicitor for you. At the same time perhaps you will send us deposit. In order to define time for delivery of abstract and for completion, the contract sent to you had better perhaps be signed, though the correspondence is a sufficient contract. Will you please send it to us?"

And on the 3rd of May they again wrote to the defendant: -

> "We have been expecting to hear from you in answer to our letters. Kindly let us know where we are to send abstract of title so that we may proceed with the matter."

On the 4th of May the defendant wrote to the plaintiff's said solicitors, declining to purchase, and returning the document unsigned. The plaintiff thereupon brought this action for specific performance of the contract for sale, which he alleged was comprised in the above letters.

Per Romer, J: I think that the plaintiff's case fails. It is clear that there was no contract between these parties, apart from the letters, and that, if the letters do not show a concluded agreement, then there was none.

In *The Society of Lloyd's v. Geoffrey George Twinn and Gail Sally Anne Twinn (2000)* The Times, 4 April, it was held:

> *An acceptance which sought an indulgence would be effective if it was clear that the offeree was unconditionally accepting the offer. Whether an acceptance was truly unconditional, with the counter-offer being collateral to the concluded contract, or whether the counter-offer was a condition of the acceptance was an issue which would depend on the facts of the particular case. The intended effect of a purported acceptance must be judged objectively from the language used and the surrounding circumstances.*

Alpenstow Ltd & Another v. Regalian Properties plc [1985] 2 All ER 545 –

> In February 1983 the plaintiffs, who were the registered owners of a property, entered into negotiations with the defendant company who were property development consultants. As a result of the negotiations, on 12 July the plaintiff wrote to the defendants agreeing that if, following the grant of planning permission, they wished to sell any part of their interest in the property (a) they would give notice to the defendants of their willingness to sell to the defendants at a stated price (b) within 28 days of the notice the defendants would inform terms of their acceptance of the notice, subject to contract[5], and within seven days thereafter the plaintiffs would submit a draft contract for approval by the defendants and (c) within 28 days of receipt of the draft contract the defendants would approve the contract and exchange contracts within seven days thereafter. The letter concluded by stating that the plaintiffs were awaiting confirmation of acceptance of the agreement set out in the letter. The defendants duly accepted the agreement. Subsequently planning permission was granted and the plaintiff gave notice of their willingness to sell part of their interest to the defendants. The defendants accepted the contract but, on request for a draft contract as agreed, the plaintiffs contended that the letter of 12 July setting out the agreement was 'subject to contract' and accordingly was not a binding contract. The defendants sought specific performance of the agreement and registered cautions against the land concerned in order to protect their position. The plaintiffs moved to have the caution removed, and the question arose as to the effect of the words 'subject to contract' in the circumstances.
>
> Held – The words 'subject to contract' had a clear prima facie meaning, being in themselves merely conditional. The precise nature of the condition precedent to the coming into existence of a contract was that there should be an exchange

5 The words "subject to contract" is used on documents exchanged by parties during contract negotiations. These words denote that the document is not an offer or acceptance and negotiations are still going on. The expression "without prejudice" is also used in place of "subject to contract."

> of contracts in accordance with the ordinary conveyancing practice; prior to that either party could withdraw. There might, however, be a very strong and exceptional context which would induce the court not to give those words that meaning in a particular case. On the true construction of the letters and having particular regard to the fact that the liberty conferred by the agreement on either party to withdraw at any time before exchange of contracts was not compatible with the duty imposed on the parties to exchange contracts within a specified time of approval of the draft contract, such a strong and exceptional context had been shown. Accordingly the court would not give the words 'subject tocontract' their clear prima facie meaning.

Agreement may be inferred from observance of written terms. The task of the courts is to extract the intention of the parties both from the terms of their correspondence and from the circumstances which surround and follow it and the question of interpretation may thus be stated. Whenever there is evidence that the parties have acted upon the faith of a written document, the courts will prefer to assume that the document embodies a definite intention to be bound and will strive to implement its terms.

In the case of *Hillas & Co Ltd v. Arcos Ltd [1932] All ER 494*, Hillas & Co Ltd had agreed to buy from Arcos Ltd 22,000 standards of softwood goods of fair specification over the season 1930. The written agreement contained an option to buy 100,000 in 1931, but without particulars as to the kind or size of timber or the manner of shipment. No difficulties arose on the original purchase for 1930, but, when the buyers sought to exercise the option for 1931, the sellers took the point that the failure to define these various particulars showed that the clause was not intended to bind either party, but merely to provide a basis for future agreement.

The House of Lords held that the language used, interpreted in the light of previous course of dealings between the parties, showed a sufficient intention to be bound.

Lord Tomlin said:

> *The problem for a court of construction must always be so to balance matters that, without the violation of essential principle, the dealings of men may as far as possible be treated as effective and that the law may not incur the reproach of being the destroyer of bargains.*

In *G Scammell and Nephew Ltd v. HC&JG Ouston [1941] All ER 14, [1941] AC 251*, Ousten wished to acquire from Messrs Scammell a new motor-van on hire-purchase terms. After a considerable correspondence, Ouston gave a written order for a particular type of van, which included the words – 'This order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years'. The order was accepted by Messrs Scammell in general terms but the hire purchase terms were

never specifically determined. It later appeared in evidence that there was a wide variety of hire-purchase agreements and that there was nothing to indicate which of them the parties favoured.

Messrs Scammell later refused to provide the van, and Ouston sued for damages for non-delivery. Messrs Scammell pleaded that no contract had ever been concluded, and the House of Lords accepted this view.

Lord Wright said that there were two grounds on which he must hold that no contract had been made.

> The first is that the language used was so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention. The object of the Court is to do justice between the parties, and the Court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not mere synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the Court can safely act, the Court has no choice but to say that there is no contract. Such a position is not often found. But I think that it is found in this case. My reason for so thinking is not only based on the actual vagueness and unintelligibility of the words used, but is confirmed by the startling diversity of explanations, tendered by those who think there was a bargain, of what the bargain was. I do not think it would be right tohe hold the appellants to any particular version. It was all left too vague……
>
> But I think the other reason, which is that the parties never in intention nor even in appearance reached an agreement, is a still sounder reason against enforcing the claim. In truth, in my opinion, their agreement was inchoate and never got beyond negotiations. They did, indeed, accept the position that there should be some form of hire-purchase agreement, but they never went on to complete their agreement by settling between them what the term of the hire-purchase agreement were to be.

In the case of *Nicolene Ltd v. Simmonds [1953] 1QB 543, [1953] 1 ALL ER 822*, the plaintiff wrote to the defendant offering to buy from him a large quantity of large steel bars. The defendant replied in writing that he would be happy to supply them and thanking the plaintiffs 'for entrusting this contract to me'. He added: 'I assume that we are in agreement that the usual conditions of acceptance apply'. The plaintiffs acknowledged this letter and said that they awaited the invoice for the goods, but made no reference to the 'usual

conditions of acceptance'. The defendant failed to deliver the goods and the plaintiffs sued for breach of contract.

The defendant argued that, as there had been no explicit agreement on the 'conditions of acceptance', there was no concluded contract. His own letter, at the highest, was only a counter-offer which had not been accepted. The Court of Appeal dismissed the argument and gave judgment for the plaintiffs. It appeared that there were no 'usual conditions of acceptance' to which either party could refer. The words were therefore meaningless and must be ignored.

Denning LJ said:

> *It would be strange in deed if a party could be escaped from every one of his obligations by inserting a meaningless exception from some of them… You would find defaulters all scanning their contracts to find some meaningless clause on which to ride free.*

Hodson LJ said:

> *I do not accept the proposition that, because some meaningless words are used in a letter which contains an unqualified acceptance of an offer, those meaningless words must, or can, be relied on by the acceptor as enabling him to obtain a judgment in his favour on the basis that there has been no acceptance at all.*

From the cases discussed above it appears that the law demands minimal degree of certainty before it will classify an agreement as a contract. Since most contracts are not negotiated by lawyers, it is all too easy for the contract makers to fail this test, particularly as legal and commercial perceptions of certainty may well diverge. So a lawyer would regard an agreement that goods are to be supplied at a "reasonable price" as prima facie sufficiently certain but would have much more doubt about an agreement "for a price to be agreed between us". Many businessmen would be much happier with the second agreement rather than the first.

Although it is not possible to discover perfect consistency in this area, it is possible to identify certain commonly recurrent types of difficulty. First, the parties may have agreed to postpone the creation of the contract to some future date, which may never arise. The "subject to contract" cases are one example of this. Another is the "letter of intent". This is a very commonly employed commercial device by which one party indicates to another that he is very likely to place a contract with him. A typical situation would involve a contractor who is proposing to tender for a large building contract and who would need to subcontract, for example, the plumbing and electrical work.He would need to obtain estimates from the subcontractors on which his own tender would, in part, be based but he would not wish to enter into a firm contract with them unless and until his tender was successful. Often he would send a "letter of intent" to his chosen subcontractors

to tell them of their selection. More often than not such letters are so worded as not to create any obligation on either side but in some cases they may contain an invitation to commence preliminarily work which at least creates an obligation to pay for that work.

In *British Steel Corporation v. Cleveland Bridge and Engineering Co Ltd [1984] All ER 504, [1984] 1 WLR 504*, the defendants had been engaged as sub-contractors on a contract to build a bank in Saudi Arabia. The defendants were to fabricate the steelwork. The bank was an unusual design, being suspended within a steel lattice-work frame. There were requirements for nodes at the centre of the lattice-work. Apparently, no one in the United Kingdom had made such nodes before but the plaintiffs had experience of constructing similar nodes. The negotiations both as to the technical specification of the nodes and as to the terms of the contract were complex and lengthy.

On 21 February 1979 the defendants sent a letter of intent to the plaintiff. This stated their intention to place an order for the nodes at prices which had been quoted in an earlier telex from the plaintiffs. It proposed that the order be on the defendants' standard terms, which would, amongst other things, have placed unlimited liability on the plaintiff for consequential loss in the event of delay. The plaintiffs made it clear that they were unwilling to contract on the defendants' terms. Nevertheless, they went ahead with the construction of the nodes (amidst continuing discussions both as to technical and contractual matters) and by 28 December 1979 all but one of the nodes had been delivered. The final node was not delivered until 11 April 1980 owing to a national steel strike. The plaintiffs sued for the value of the nodes. The defendants counter-claimed for damages for late delivery.

Robert Goff J held that on these facts there was no contract since it was clear that the parties had never agreed on such important questions as progress payments and liability for late delivery. It followed that there could be no damages for late delivery since there was no contract to deliver. However, he held that the plaintiffs were entitled to payment on a quantum meruit basis since they had done the work at the defendants' request.

There are also cases where what the parties describe as a letter of intent gives rise to a complete contract. AC *Controls Ltd v. British Broadcasting Corporation[2003] All ER (D) 181 (Apr); (2002) 89 Con LR 52* is one of such cases.

> In 1998 the BBC was considering the installation of a centrally controlled software access system to fifty-seven of its premises. In January 1999 ACC submitted tender for £3 million, and in March 1999 they were told by the BBC that the project board had approved them as contractors. At this stage, much detail of what was to be done remained to be fixed. The BBC wished the transaction to be embodied in an elaborate formal contract but was not yet ready to complete this. On the other hand, BBC internal controls did not permit payment or work without there being a contract. As a result, a document

> described by both sides in June 1999 and this was followed by a further letter In July. Both letters instructed ACC to carry out work for payment to be fixed by an independent consultant though without defining the basis of payment.
>
> In due course the BBC abandoned the project. It was held that there was a contract to do all the survey and pre-contract work and to pay for all the work that had been done and that the provision for independent valuation necessarily meant payment of a reasonable price.

RTS Flexible Systems Ltd v. Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14; [2010] 3 All ER 1; [2010] 1 All ER (Comm) 97 – In this case the defendant is a leading diary product supplier. The claimant specialised in the supply of automated machines for packaging and product handling. There were lengthy and elaborate negotiations for the design, installation and commission of lines for the packaging of multi-packs of yoghurt. A fixed price of £1,682,000 was agreed and it was intended to have a written contract based on the form MF/1 but with substantial modifications and many schedules. The conclusion of negotiation proved elusive and it was agreed to start work in February 2005 on the basis of a letter of intent, originally to last for four weeks but later extended several times. The parties eventually fell out by which time the letter of intent had run out and some 70% of the purchase price had been paid. No written contract had ever been concluded. A preliminary issue was ordered as to the contractual position.

At first instance the parties argued for alternative views of what the contract was but on appeal RTS was allowed to argue and did argue that there was no contract. The Court of appeal accepted this argument. For the court the decisive consideration was that the parties had been negotiating around the MF/1 conditions and that clause 48 provided:

> This contract may be executed in any number of counterparts provided that it shall not become effective until each party has executed a counterpart and exchanged it with the other.

The Supreme Court allowed the Muller's appeal. They thought that on an objective analysis of the parties' behaviour it was clear that they intended to be contractually bound.

The second difficulty the parties may have reserved some major questions, such as price, for future decision. This might appear uncertain but it is commonly assumed to be valid. *Sudbrook Trading Estate Ltd v. Eggleton [1983] a AC 444; [1982] 3 All ER 1,* is a case where series of leases granted the lessee an option to purchase the freehold. The price was to be fixed by two valuers, one to be appointed by the lessor and one by the lessee, and if they were unable to agree they were to appoint an umpire. Although the documents had clearly been prepared by lawyers they failed to deal with the situation where one of the parties refused to appoint a valuer. The lessee sought to exercise the option; the lessor refused to appoint a valuer and argued that as a result the option was ineffective for uncertainty.

The majority held that the provisions for fixing of the price by valuers was a decisive indication that the price was to be a reasonable price, since valuers were professionals who would be obliged to apply professional and, therefore reasonable standards. The option agreement was, therefore, a valid contract, albeit with defective machinery. If necessary, the court could provide its own machinery.

Also read *Shell (UK) Ltd v. Lostock Garage Ltd [1977] 1 All ER 481*.

Finally, although the parties may have completed their negotiations, they may have expressed the result in such a form that it is not possible to say with certainty what they have agreed or what the agreement means.

In *Bushwall Properties Ltd v. Vortex Properties Ltd [1976] 2 All ER 283; [1976] 1 WLR 591* the defendant agreed in writing to sell 51 ½ acres of land to the plaintiffs for £250,000. The purchase price was to be paid inthree instalments: a first of £125,000, followed in twelve months by a second instalment of £125,000. It was further provided that on the occasion of each completion a proportionate part of the land shall be released forthwith to the plaintiffs. The parties provided no machinery for the allocation of the proportionate parts and the Court of Appeal held that the agreement was void for uncertainty.

Articles 14 to 24 of the UNITED NATIONS CONVENTION ON CONTRACTS FOR INTERNATIONAL SALE OF GOODS, which has been proved to be one of the most successful conventions of its kind, provide for the formation of contracts for International Sale of Goods. The offer and acceptance under this convention are very much less complicated than the offer and acceptance under the common law.

Article 14

> *(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.*
>
> *(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.*

Article 15

> *(1) An offer becomes effective when it reaches the offeree.*
>
> *(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.*

Article 16

(1) *Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.*

(2) *However, an offer cannot be revoked:*

(a) *if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or*

(b) *if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.*

Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

(1) *A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.*

(2) *An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.*

(3) *However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.*

Article 19

(1) *A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.*

(2) *However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.*

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 20

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 21

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a noticeto that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal itwould have reached the offeror in due time, the late acceptance is effective asan acceptance unless, without delay, the offeror orally informs the offeree thathe considers his offer as having lapsed or dispatches a notice to that effect.

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

Article 24

For the purposes of this Part of the Convention, an offer, declarationof acceptance or any other indication of intention "reaches" the addressee.

Consideration – Executory, Executed and Past

The accepted classification of consideration is into two categories, executory and executed. The classification reflects the two different ways in which the plaintiff may buy the defendant's promise. Consideration is called executory when the defendant's promise is made in return for a counter-promise from the plaintiff. Consideration is called executed when it is made in return for the performance of an act. An agreement between seller and buyer for the sale of goods for further delivery on credit is an example of executory consideration. At the time when the agreement is made, nothing has yet been done to fulfil the mutual promises of which the bargain is composed. The whole transaction remains in futuro.

The best example of executed consideration is the offer of a reward for an act. If 'A' offers £5 to anyone who shall return his lost dog, the return of the dog by 'B' is at once the acceptance of the offer and the performance of the act constituting the required consideration. 'B' has earned the reward for his services, and only the offeror's promise remains outstanding. But whether the plaintiff relies upon an executory or on an executed consideration, he must be able to prove that his promise or act, together with the defendant's promise, constitute one single transaction and are casually related the one to the other.

If the defendant makes a further promise, subsequent to and independent of the transaction, it must be regarded as a designated gift, and no contract will arise. It is irrelevant that he may have been induced to give the new promise because of the previous bargain. In such a case the promise is declared, in traditional language, to be made upon past consideration or, more accurately, to be without consideration at all.

Roscorla v. Thomas (1842) 3 QB 234 –

> The declaration stated that, "in consideration that the plaintiff at the request of the defendant, had bought of the defendant a certain horse, at and for a certain price, the defendant promised the plaintiff that the said horse was sound and free from vice". The plaintiff sued for the breach of this promise.
>
> The court held:
>
> (1) that the fact of the sale did not itself imply a warranty that the horse was sound and free from vice, and
>
> (2) that the express promise was made after the sale was over and was unsupported by fresh consideration.
>
> The plaintiff could show nothing but a past consideration and must fail.

Re McArdle [1951] Ch 669, [1951] 1 All ER 905:

> A number of children, by their father's will, were entitled to a house after their mother's death. During the mother's life, one of the children and his wife lived

> with her in the house. The wife made various improvements to the house, and at a later date all the children signed a document addressed to her, stating that 'in consideration of your carrying out certain alterations and improvements to the property, we hereby agree that the executors shall repay to you from the estate, when distributed, the sum of £488 in settlement of the amount spent on such improvements'.
>
> The Court of Appeal held that, as all the work on the house had in fact been completed before the document was signed, this was a case of past consideration and that the document could not be supported as a binding contract.

A distinction between executed and past consideration, while comparatively easy to state in the abstract, is often difficult to apply in practice. The courts were required to consider the position where the plaintiff had performed services for the defendant without any arrangement for remuneration and the defendant had subsequently promised to pay them. They decided that assumpsit[6] would lie if, but only if, the services were originally performed at the defendant's request.

Lampleigh v. Brathwait (1615) Hob 105 –

Thomas Brathwait killed Patrick Mahume and asked Anthony Lampleigh to do all he could to get a pardon for him from the king. Lampleigh exerted himself to do this end, 'riding and journeying to and from London and New Market' at his own expense, and Brathwait afterwards promised him £100 for his trouble. He failed to pay it and Lampleigh sued in assumps it. It was argued, inter alia, that the consideration was past, but the court gave judgment for the plaintiff on the ground that his services had been procured by the previous request of the defendant.

It was agreed that a mere voluntary courtesy will not have a consideration to uphold and assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before.

The previous request and subsequent promise were thus to be treated as part of the same transaction.

In *Pao On v. Lau Yiu Long [1980] AC 614 at 629, [1979] 3 All ER 65 at 74* Lord Scarman made the following observations:

> *An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the*

6 A promise by which someone assumes or undertakes an obligation to another person. The promise may be oral or in writing, but it is not under seal. It is express when the person making the promise puts it into distinct and specific language, but it may also be implied because the law sometimes imposes obligations based on the conduct of the parties or the circumstances of their dealings.

> *act was to be remunerated further by a payment or the conferment of some other benefit, and payment, or the conferment of a benefit must have been legally enforceable had it been promised in advance.*

Domestic Agreements

Agreements between husband and wife -

In the course of family life many agreements are made, which could never be supposed to be the subject of litigation. If a husband arranges to make a monthly allowance to his wife for her personal enjoyment, it would not normally be taken to contemplate legal relations. However, law does not preclude husband and wife from entering into legally binding contracts.

Merritt v. Merritt [1970] 2 All ER 760, [1970] 1 WLR 1211 –

> The husband left the matrimonial home, which was in the joint names of husband and wife and subject to a building society mortgage, to live with another woman. The husband and wife met and had a discussion in the husband's car during which the husband agreed to pay the wife £40 a month out of which she must pay the outstanding mortgage payments on the house. The wife refused leave the car until the husband recorded the agreement in writing and the husband wrote and signed a piece of paper which stated "in consideration of the fact that you will pay all charges in connection with the house…until such time as the mortgage repayments has been completed I will agree to transfer the property in to your sole ownership". After the wife had paid off the mortgage the husband refused to transfer the house to her.
>
> The Court of Appeal held that the parties had intended to affect their legal relations and that an action for breach of contract could be sustained.

Balfour v. Balfour [1919] 2 KB 571 –

> The defendant was a civil servant stationed in Ceylon. His wife alleged that,while they were both in England on leave and when it had become clear that she could not again accompany him abroad because of her health, he had promised to pay her £30 a month as maintenance during the time that they were thus forced to live apart. She sued for breach of this agreement.
>
> The Court of Appeal held that no legal relations had been contemplated and that the wife's action must fail.

In that case Atkin LJ made the following observations:

> *It is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example*

> *is where two parties agree to take the walk together or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife.… To my mind those agreements, or many of them do not result in contracts at all…even though there may be what as between other parties would constitute consideration… They are not contracts because the parties did not intend that they should be attended by legal consequences.*

In *Pettitt v. Pettitt [1970] Ac 777, [1969] 1 All ER 385*, several members of the House of Lords, though accepted the principle enunciated in Balfour v Balfour, thought the decision on the facts very close to the line. It was also observed that though many agreements between husband and wife are not intended to be legally binding, performance of such agreements may well give rise to legal consequences.

Lord Diplock said:

> *Many of the ordinary domestic agreements between man and wife do not possess the legal characteristics of a contract. So long as they are executory, they do not give rise to any chose in action, for neither party intended that non-performance of their mutual promises be subject of sanctions in any court. But this is relevant to non-performance only. If spouses do perform their mutual promises the fact that they could not have been compelled to do so while the promises were executory cannot deprive the acts done by them of all legal consequences upon proprietary rights; for these are within the field of law of property rather than of the law of contract. It would, in my view, be erroneous to extend the presumption accepted in Belfour v Balfour that mutual promises between man and wife in relation to their domestic arrangements are prima facie not intended by either to be legally enforceable to a presumption of a common intention of both spouses that no legal consequences should flow from the acts done by them in performance of mutual promises with request to the acquisition, improvement or addition to real or personal property… for this would be to intend what is impossible in law.*

Construing a Contract

In its broad sense, construction of a contract denotes determination of the total legal effect of the agreement concluded by the parties. This may involve two entirely distinct processes:

(i) interpretation of the language used by the parties, and

(ii) implication of terms where the contract is silent.

Interpretation

The modern approach to the interpretation of contracts is neatly encapsulated in the speech of Lord Hoffman in *Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 at 912-913*.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] AC 749, [1997] 2 W.L.R. 945)*

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201*:

> *". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."*

A number of aspects of this summary should be noted. The first is that the test applied by the courts is an objective one. This is consistent with the approach which English contract law generally takes but it is in contrast with the approach adopted in many civilian systems where greater attention is paid to the subjective understanding of the parties. Second, the reference to the "matrix of fact" has aroused some controversy in so far as it has increased the range of materials to which courts can have regard when seeking to interpret a contract. Fears were expressed that this would increase significantly the cost of litigation. Third, there is some material, such as, pre-contractual negotiations, that remains generally inadmissible. Finally, principles 4 and 5 in Lord Hoffman's summary have given rise to a degree of difficulty in that it is not entirely clear where the line is to be drawn between the adoption of a commercially sensible construction of the contract (which is permissible) and judicially re-writing of a contract (which is not).

Implication

Implication is usually stated to be a process by which the court arrives at the presumed intention of the parties, but it is clear that in many cases the intention thus attributed to the parties is fictitious since the facts generating the dispute were not within their contemplation at all and no one can tell with confidence how they would have framed the contract if they had addressed their minds to the question. In such a case the court is in truth reaching the solution by the application of external rules based on considerations of policy, though it may disguise this process by use of labels such as 'construing a contract' or 'deducing the intention of the parties'. Thus, terms implied by law, whether established by prior authority or enunciated de novo in the light of the relationship between the parties and other policy factors, will be imported into a contract without the court finding it necessary to consider what the parties would have been likely to agree if they had addressed their minds to the prospect of the terms in question.

The Parol Evidence Rule

If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made or during the time that it was in a state of preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract.

This rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. However, it does not exclude the use of such evidence for other purposes. For example, evidence of pre-contractual negotiations is admissible to establish that a fact which may

be relevant as background was known to the parties, or to support a claim for rectification or estoppel. It is well established that in construing a contract the court looks at the factual matrix, or business setting, in which it was made.

The parol evidence rule is in any event subject to numerous exceptions. It does not apply where the evidence establishes the existence of a collateral contract, or where it can be shown that the document was not intended as a complete record of the contract terms (a typical case is where the contract is partly in writing, partly oral), or where its existence or operation was dependant on some prior unexpected stipulation; or that it was procured by misrepresentation or was tainted by illegality; or that it disguised the true nature of the of the transaction. Further, the court may order rectification of a document which does not correctly record the agreement between the parties.

Void, Voidable and Unenforceable Contracts

Void Contracts - a void contract is not a contract and has no effect in a court of law and cannot be enforced in a court of law. Most commonly, a void contract will be missing one or all of the essential elements needed for a valid contract. Neither party needs to take action to terminate it, since it was never a contract to begin with.

> Example – a contract that was between an illegal drug dealer and an illegal drug supplier to purchase a specified amount of drugs for a specified amount.

Voidable Contracts – a voidable contract is a contract which may appear to be valid and has all of the necessary elements to be enforceable, but has some type of flaw which could cause one or both of the parties to void the contract. The contract is legally binding, but could become void. If there is an injured party involved, the injured party or the defrauded must take action, otherwise the contract is considered valid.

> Example – a contract entered into with a minor could be voidable.

Unenforceable Contracts - an unenforceable contract is a contract which cannot be enforced in a court of law. This could happen because the terms of the contract are ambiguous, if one party has a voidable contract or if the time limit prescribed by the statute within which an action should be brought has expired.

Illegality

A contract is affected by illegality if:

(a) the making of the contract is unlawful; or

(b) the promise or consideration stipulated is the performance of an unlawful act; or

(c) though the contract is not in itself unlawful, the purpose for which it is made or for which the subject matter s to be applied is unlawful or the intended method of performance is unlawful; or

(d) though free from any of the above defects, the contract stems from is collateral to another agreement affected by illegality.

There are various forms of illegality. They include:

(i) a contract to commit a crime, a tort, or fraud on a third party

(ii) a contract that is sexually immoral

(iii) a contract to the prejudice to the public safety

(iv) a contract prejudicial to the administration of justice

(v) a contract that tends to corruption in public life

(vi) a contract to defraud the revenue

There are three types of contract which offend 'public policy', but which are more inexpedient rather than unprincipled. They are:

(i) a contract to oust the jurisdiction of the court

(ii) a contract that tends to prejudice the status of marriage

(iii) a contract in restraint of trade

Illegality May Infect Either Formation or Performance of Contract

A distinction which has an important bearing upon the consequences of illegality is that the disregard of a statutory prohibition may render the contract either illegal as formed or illegal as performed.

A contract is illegal as formed if its very creation is prohibited, as for example one of the parties has neglected to take out licence as required by statute. In such a case it is void ab initio. It is a complete nullity under which neither party can acquire rights whether there is an intention to break the law or not.

A contract is illegal as performed if, though lawful in its formation, it is performed by one of the parties in a manner prohibited by the statute.

Anderson v. Daniel [1924] 1 KB 138 – A statue required that every seller of artificial fertilizers should give the buyer an invoice stating the percentages of certain chemical substances contained in the goods. In the instant case the seller delivered ten tons of artificial manure without complying with the statutory requirement. The sellers brought an action for the price of goods. They lost the action because the performance of the contract was illegal.

However, it must be emphasised that a contract is not automatically rendered illegal as performed merely because some statutory requirement has been violated in the course of its completion.

If the contract as performed is not expressly prohibited by statute, its alleged illegality must be based upon public policy, and in *Vita Food products v. Unus Shipping Co Ltd [1939] AC 277 at 293, [1939] All ER 513 at 523* Lord Wright remarked that "public policy is often better served by refusing to nullify a bargain save on serious and sufficient grounds".

The attitude of the courts where some statutory requirement has been infringed during the performance of a contract may be illustrated by two leading cases.

St John Shipping Corporation v. Joseph Rank Ltd [1957] 1 QB 267, [1956] 3 All ER 683 –

> The Merchant Shipping Act 1932 forbids the loading of a ship to such an extent that the loadline becomes submerged. A penalty is imposed for breach of the statute.
>
> The master of the plaintiff's ship, which had been chartered to an English firm for the carriage of grain from a port of Alabama to England, put into a port in the course of the voyage and took on bunkers, the effect of which was to submerge the loadline contrary to the act. The master was prosecuted in England for the offence and was fined £1200.00.
>
> The defendant, to whom the ownership of part of the goods had passed, withheld part of the freight due, contending that the plaintiffs could not enforce a contract which they had performed in an illegal manner.
>
> Devlin J rejected the contention. The illegal loading was merely an incident in the course of performance and did not affect the core of the contract.

Shaw v. Groom [1970] 2 QB 504, [1970] 1 All ER 702 –

> A landlord sued his tenant for arrears of rent amounting to £103 due in respect of a weekly tenancy. The tenant contended that the action must fail, since the rent book issued to him by the plaintiff did not did not contain all the information required by the Landlord and Tenant Act 1962. Such a default was punishable by a fine not exceeding £50.
>
> The Court of Appeal dismissed the contention. The contract was not to be stigmatised as illegal in its performance. The intention of the legislature was that non-compliance with the statutory requirement should render the landlord to a fine, not that it should deny him access to the courts. Unless this limited construction was placed upon the Act, the result might well be that he landlord would forfeit a sum far in excess of the maximum fine.
>
> Sachs LJ said:
>
> *It seems to me appropriate, accordingly, to allow this appeal on the broad basis that, even if the provisions of a rent book is an essential act as between landlords*

> *and weekly tenants, yet the legislature did not by … the Act of 1962 intended to preclude the landlord from recovering any rent or impose any forfeiture on him beyond the prescribed penalty.*

The Consequence where the Contract is Illegal in its Inception

The general principle, founded on public policy, is that any transaction that is tainted by illegality in which both parties are equally involved is beyond the pale of law. No person can claim any right or remedy whatsoever under an illegal transaction in which he has participated: *ex turpi causa non oritur actio.* The court is bound to refuse enforcement of a contract one it knows that it is illegal, whether the knowledge comes from the statement of the guilty party or from outside sources. Even the defendant can successfully plead *ex turpi causa non oritur actio*, and though his 'defence is very dishonest' it is allowed for the reasons given by Lord Mansfield in *Holman v. Johnson (1775) 1 Cowp (Cowper's King's Bench Reports) 341 at 343* –

> *The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; ex dolo malonon oritur actio*[7]*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both were equally in fault, potior est conditio defendentis*[8]*.*

I contract that is illegal as formed is void *ab initio*. It is treated by the law as if it had not been made at all. It is totally void and no remedy available to either party. No action lies for damages, for an account of profits or for a share of expense. Thus, in the case of an illegal contract for sale of goods, the buyer, even though he has paid the price, cannot sue for non-delivery; the seller who has made delivery cannot recover the price. A servant cannot recover the arrears of salary under an illegal contract of employment. In the case of an illegal lease, the landlord cannot recover the rent or damages for the breach of any other covenant. The position is the same not only where a contract is prohibited

7 no right of action can have its origin in fraud'

8 Better is the condition of the defendant, than that of the plaintiff.

at common law on the grounds of public policy, but also where its very formation is prohibited by statute.

Re Mahmoud and Ispahani [1921] 2 KB716 –

> The plaintiff agreed to sell linseed oil to the defendant, who refused to take delivery and was sued for non-acceptance of the goods. A statutory order provided that no person should buy or sell certain specified articles, including linseed, unless he was licensed to do so. Before the conclusion of the contract, the defendant untruthfully alleged that he held a licence and the plaintiff, who himself was licensed, believed it.
>
> Once it was established that each party was forbidden by statute to enter into the contract, the court had no option but to enforce the prohibition even though the defendant relied upon his illegality. The honest belief of the plaintiff that the defendant had a licence was irrelevant.

In *David Taylor & Son Ltd v. Barnett Trading Co [1953] 1 All ER 843* an award made by an arbitrator in respect of a prohibited contract was set aside by the court.

In *Bostel Bros Ltd v. Hurlock [1948] 2 All ER 312* it was held that a builder who does work at a cost exceeding the sum authorised by statute cannot recover the excess.

J M Allan (Merchandise) Ltd v. Cloke [1963] 2 All ER 258 – In all cases where a contract is illegal in its formation, neither party can circumvent the rule - *ex turpi causa non oritur actio* – by pleading ignorance of the law.

Although if a contract is illegal in its formation it is void, it has been held that goods may pass to the buyer under an illegal contract of sale of goods. Lord Denning in *Singh v. Ali [1960] 1 All ER 269* made the following observations:

> *There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose – and one of them transfers property to the other in pursuance of the conspiracy – then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property which has been transferred remains vested in the transferee, notwithstanding its illegal origin…. The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it – he cannot throw over the transfer.*

Belvoir Finance Company Ltd v. Stapleton [1970] 3 All ER 272 is a case where the plaintiffs brought three cars from dealers, paid for them and let them on hire purchase terms to the Belgravia Car Co who kept a fleet of cars for letting out on hire to the public. The plaintiffs never took delivery of the three cars in question, which went directly from the dealers to Belgravia Car Co. Both the contract of sale between the dealers and the plaintiffs and

the hire-purchase contracts between the plaintiffs and the Belgravia Car Co were illegal to the knowledge of all three parties as contravening statutory regulations. The Belgravia Car Co, fraudulently and in breach of the hire-purchase contracts, sold the three cars to innocent purchasers. One of these sales was effected by the defendant, the assistant manager of the Belgravia Car Co, and the plaintiff sued him personally in conversion. To succeed in the action the plaintiffs had to show that the ownership of the cars was vested in them at the time of the conversion. They had therefore to prove that despite the illegality of the original contract of sale, they had acquired and still enjoyed the 'general property' in the car. The Court of Appeal decided this issue in their favour. Lord Denning MR cited his statement in *Singh v. Ali* (supra) and said:

> *Although the plaintiffs obtained the car under a contract which was illegal, nevertheless, inasmuch as the contract was executed and the property passed, the car belonged to the finance company and they can claim it.*

It is pertinent to note that this decision was much criticised on the basis that it was contrary to the established principles which determine the effect of illegality and especially that the car in question was never delivered to the plaintiffs.

The Consequence where a Contract Lawful in its Inception is Later Illegally Exploited or Performed

The situation envisaged here is that a contract is lawful *ex facie* and is not disfigured by a common intention to break the law, but that one of the parties, without the knowledge of the other, in fact exploits it for some unlawful purpose. In these circumstances, the guilty party suffers the full impact of the maxim *ex turpi causa non oritur actio* and all remedies are denied to him.

In *Alexander v. Rayson [1936] 1 KB 169 at 182* it was held that any party to the agreement who had the unlawful intention is precluded from suing upon it… The action does not lie because the court will not lend its help to such a plaintiff.

On the other hand, the rights of the innocent party are unaffected, except in respect of anything done by him after he has learned of the illegal purpose. In *Cowan v. Milbourn (1867) LR 2 Exch 230* the defendant agreed to let a room to the plaintiff on 20 January, but when he heard that the premises were to be used for an unlawful purpose, he notified the plaintiff that the agreement would not be fulfilled. An action brought against him for breach of contract failed.

But if, after the intended purpose had come to his knowledge, he had let the tenant into possession in accordance with the contract, he could not have recovered the agreed price.

Apart from this exceptional case of acquired knowledge, however, all the normal contractual remedies are available to the innocent party. He may enforce the contract;

he may sue for quantum meruit or quantum valebant for the value of work or goods supplied before discovery of the unlawful intention; and he may recover property that he has transferred to the guilty party.

It must be noticed that this right to recover property does not conflict with the decision of the Exchequer Chamber in *Ferret v. Hill (1854)15 CB 207*, where:

> The plaintiff induced the defendant to grant him a lease of premises in Jermyn Street by falsely representing that he intended to carry on therein the business of a perfumier. His intention, however, was to use the premises for immoral purposes, and, having obtained possession he converted the premises into a common brothel, He refused to quit and was forcibly ejected by the defendant. He brought an action for ejectment to recover possession and was successful.

This decision of a common law court must not be misunderstood. The elemental facts are simple: the lease had been executed, the tenant had been let into possession, and therefore in the eyes of the law a legal estate, together with the right to possession, had become vested in him. The court did not decide that the landlord was not precluded from recovering possession.It merely decided that the tenant was not prevented by antecedent fraud from acquiring a right to possession and that his right was not automatically forfeited either by his fraud or by his immoral use of the premises. The landlord was ill-advised. He was not entitled to take the law into his own hands, to treat the lease as a nullity and to extrude the tenant from a possession recognised, at any rate for the time being, as lawful. But he would have been entitled, as indeed was assumed by the members of the court, to take proceedings in equity for the rescission of the lease.

Performance and Breach

There are many authorities where it has been stated that a party who does not perform the contract perfectly is not entitled to claim payment. In *Cutter v. Powell (1795) 6 Term Rep 320* the defendant agreed to pay Cutter thirty guineas provided that he proceeded, continued and do his duty as second mate in a vessel sailing from Jamaica to Liverpool. The voyage began on 2nd August and Cutter died on 20th September when the ship was 19 days short of Liverpool.

An action by Cutter's widow to recover a proportion of the agreed sum failed for, by the terms of the contract the deceased was obliged to perform a given duty before he could demand payment.

In *Bolton v. Mahadeva [1972] 2 All ER 1322*, the plaintiff contracted to install a central heating system in the defendant's house for the sum of £800. He installed the system but it only worked very ineffectively and the defendant refused to pay for it. The Court of Appeal held that the plaintiff could recover nothing.

The Doctrine of Substantial Performance

The courts in their desire to do justice between contracting parties, have developed what is called the doctrine of substantial performance, which in effect relaxed the requirement of exact and precise performance of entire contract. Although the law on the doctrine of substantial performance was settled by Denning LJ in *Hoenig v. Isaacs [1952] 2 All ER 176* this principle of law dates back to 1779. In the case of *Boon v. Eyre (1779) 1 Hy Bl*[9] *273* it was held that if there has been substantial though not exact and literal performance by the promisor, the promisee cannot treat himself as discharged. Despite a minute and trifling variation from the exact terms by which he is bound, the promisor is permitted to sue on the contract though he is of course liable in damages for his partial non-performance.

Hoenig v. Isaacs (supra) – Mr Hoenig was meant to decorate and furnish Mr. Isaac's flat for £750. When the work was done, there were problems with a bookcase and wardrobe, which would cost £55 to fix. Mr. Isaac refused to pay the £350 outstanding.

Somervell LJ noted each case turns on the construction of the contract. Where there is substantial performance of the contract, then money must be paid. The work was done, and then there was merely a damages claim in respect of the faulty bits.

Denning LJ gave judgment as follows.

> "This case raises the familiar question: Was entire performance a condition precedent to payment? That depends on the true construction of the contract.
>
> In this case the contract was made over a period of time and was partly oral and partly in writing, but I agree with the Official Referee that the essential terms were set down in the letter of 25thApril, 1950. It describes the work which was to be done and concludes with these words:
>
> > "The foregoing, complete, for the sum of £750 nett. Terms of payment are nett cash, as the work proceeds; and balance on completion."
>
> The defendant paid £150 on 12th April, 1950, and another £150 on the 19th April, 1950. On 8th August, 1950, the plaintiffs said that they had carried out the work in absolute compliance with the contract and demanded payment of the balance of £450. On the 30th August, 1950, the defendant paid £100, but said that there were defects and omissions in the work and that he would call in someone else to make them good and deduct the cost from the plaintiffs' bill. He did not do this but entered into occupation of the flat and used the furniture. The plaintiffs then brought this action for the balance of £350. They denied that there were any defects at all. The Official Referee found that there were defects in three of the items of furniture and that the cost of remedying them was £55.18s.2d.

9 Henry Blackstone's Common Pleas Reports [ER 126]

He deducted that sum from the £350 and gave judgment for the plaintiffs for £294.1s.10d.

The question of law that was debated before us was whether the plaintiffs were entitled in this action to sue for the £350 balance of the contract price as they had done. The defendant said that they were only entitled to sue on a *quantum meruit*. The defendant was anxious to insist upon a *quantum meruit*, because he said that the contract price was unreasonably high. He wished therefore to reject that price altogether and to pay simply a reasonable price for all the work that was done. This would obviously mean an inquiry into the value of every item, including all the many items which were in compliance with the contract as well as the three which fell short of it. That is what the defendant wanted. The plaintiffs resisted this course and refused therefore to claim on a *quantum meruit*. They said that they were entitled to the balance of £350 less a deduction for the defects.

In determining this issue the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment.

When a contract provides for a specific sum to be paid on completion of specified work, the Courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is therefore construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or alternatively set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good; see *Mondel v. Steel [1]* and the notes to Cutter v Powell in the 13th Edition of Smith's Leading Cases II., 19-21.

It is, of course, always open to the parties by express words to make entire performance a condition precedent. A familiar instance is when the contract provides for progress payments to be made as the work proceeds, but for retention money to be held until completion. Then entire performance is usually a condition precedent to payment of the retention money, but not, of course, to the progress payments. The contractor is entitled to payment *pro rata* as the

work proceeds, less a deduction for retention money: but he is not entitled to the retention money until the work is entirely finished, without defects or omissions.

In this case the contract provided for "nett cash as the work proceeds and balance on completion." If the balance could be regarded as retention money, then it might well be that the contractor ought to have done all the work correctly, without defects or omissions, in order to be entitled to the balance. But I do not think the balance should be regarded as retention money. Retention money is usually only 10 per cent, or 15 per cent, whereas this balance was more than 50 per cent. I think this contract should be regarded as an ordinary lump sum contract. It was substantially performed. The contractor is entitled therefore to the contract price, less a deduction for the defects.

Even if entire performance was a condition precedent, nevertheless the result would be the same; because I think the condition was waived. It is always open to a party to waive a condition which is inserted for his benefit. What amounts to a waiver depends on the circumstances.If this was an entire contract, then when the plaintiff tendered the work to the defendant as being a fulfilment of the contract, the defendant could have refused to accept it until the defects were made good, in which case he would not have been liable for the balance of the price until they were made good. But he did not refuse to accept the work. On the contrary, he entered into possession of the flat and used the furniture as his own, including the defective items. That was a clear waiver of the condition precedent. Just as in a sale of goods, the buyer, who accepts the goods, can no longer treat a breach of condition as giving a right to reject but only a right to damages: so also in a contract for work and labour, an employer who takes the benefit of the work can no longer treat entire performance as a condition precedent, but only as a term giving rise to damages. The case becomes then an ordinary lump sum contract governed by the principles laid down in *Mondel v. Steel* and *Dakin v. Lee*. The employer must therefore pay the contract price subject to a deduction for defects or omissions.

I would point out that in these cases the question of quantum meruit only arises when there is a breach or failure of performance which goes to the very root of the matter. On any lump sum contract, if the work is not substantially performed and there has been a failure of performance which goes to the root of it, as, for instance, when the work has only been half done, or is entirely different in kind from that contracted for, then no action will lie for the lump sum. The contractor can then only succeed in getting paid for what he has done if it was the employer's fault that the work was incomplete; or there is something to justify the conclusion that the parties have entered into a fresh contract: or the failure of

performance is due to impossibility or frustration, see *Appleby v. Myers [2]* and *Sumpter v. Hedges (1898) 1 Queen's Bench 673*, and section 1 (3) of the Frustrated Contracts Act 1943. In such cases the contractor can recover in an action for restitution such sum as he deserves, or in the words of the Act, "such sum as the Court considers just." Those cases do not, however, apply in this case, because in this case the work has been substantially performed.

Repudiation

Repudiation occurs where a party intimates by words or conduct that he does not intend to honour his obligations when they fall due in the future. Lord Blackburn in the case of *Mersy Steel& Iron Co v. Naylor Benzon & Co (1884) 9 App Cas 434* said:

> *Where there is a contract to be performed in the future, if one of the parties has said to the other 'if you go on and perform your side of the contractI will not perform mine', that in effect, amounts to saying 'I will not perform the contract'. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract.*

Repudiation must be either explicit or implicit. The repudiation is explicit where the defendant agreed in April to employ the plaintiff as his courier during a foreign tour commencing on 1st June and on 11th May he wrote that he had changed his mind and therefore would not require a courier.[10]

A repudiation is implicit where the reasonable inference from the defendant's conduct is that he no longer intends to perform his side of the contract.Thus, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted.

The result of a repudiation, whether explicit or implicit, is that the innocent party acquires and immediate cause of action.

A breach of contract caused by the repudiation of obligation not yet ripe for performance is called an anticipatory breach. Anticipatory Breach arises where a contract exists but, prior to its completion date, it becomes clear that one party cannot, or will not, complete its part of the agreement.

The Doctrine of Frustration

'Frustration' is an event that occurs outside the parties' control, which prevents the contract from being carried out.

10 Hochster v De La Tour (1853) 2 E & B 678

Frustration under English law is a doctrine, which acts as a device to discharge contracts where an unexpected event either transmutes contractual obligations impossible, or drastically modifies the party's initial purpose for entering into the contract.

The common law doctrine of frustration comes into play to discharge contractual obligations when no party is at fault. What actually happens is that an intervening event occurs that disables the performance of a contract. This event turns performance physically, commercially or legally impossible or transforms the obligations of the contract profoundly different from those, which were agreed at first place.

In *Krell v. Henry [1903] 2 KB 740* the plaintiff agreed to let a room to the defendant for a day upon which Edward VII was to be crowned. Both parties understood that the purpose of the letting was to view the coronation procession, but this did not appear in the agreement itself. The procession was postponed owing to the illness of the king.

The Court of Appeal took the view that the procession was the foundation of the contract and that the effect of its cancellation was to discharge the parties from the further performance.

Among the circumstances which will usually frustrate a contract where there is no fault on either side are:

(a) accidental destruction of the subject matter;

(b) supervening physical disability in contracts of personal service;

(c) supervening illegality;

(d) supervening impossibility through government interference;

(e) inability to procure a necessary consent of a third party, e.g. a government department whose approval is required;

(f) a fundamental change in the basis of the contract.

When deciding whether or not a contract has been frustrated, the courts apply what has been described as a 'multi-factorial' approach;[11] they will have regard to the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, the nature of the supervening event and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.

The essence of the doctrine is that there must be a break in identity between the contemplated and new performance and the courts will not lightly conclude that there has been such a break.[12]

11 Edwinton Commercial Corporation v. Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The 'Sea Angel') [2007] EWCA Civ 547.

12 CTI Group Inc v. Transclear SA[2009] 2All ER (Comm) 25

But the rules providing for frustration in the above cases are far from absolute in their application. The terms of the contract may indicate that the party pleading frustration was assuming a strict responsibility so that, for example, he had bound himself to obtain an export licence and not merely to take reasonable steps to obtain it, and cannot therefore rely on a refusal of his application as producing frustration.[13]

Walton Harvey Ltd v. Walker & Homfrays Ltd [1931] 1 Ch 274 –

> A hotel owner entered into a contract with an advertising agency enabling them to put illuminated advertisements on the roof of their hotel. The hotel was then compulsorily purchased by the Local Authority and demolished. The advertising agency sued for breach of contract and the hotel argued the contract had become frustrated.
>
> Held – The contract was not frustrated as the hotel owners were aware that the Local Authority was looking to purchase the hotel at the time they entered the contract. They should have foreseen the fact that this could happen in the life time of the contract and made provision in the contract for such an eventuality. They were therefore liable to pay damages for breach of contract.

Maritime National Fish v. Ocean Trawlers [1935] AC 524 –

> The claimant owned five fishing vessels one of which was chartered to the defendants. The fishing vessels were all fitted with otter trawler nets. New legislation was introduced requiring licences to be held by those using otter trawl nets. The claimant applied for five licences but was only granted three. He had to name which vessels the licence would be used on. He named his own vessels and excluded the vessel which the defendant was using. This meant that the defendant was unable to use the vessel for fishing. The claimant sued the defendant for the price of hire and the defendant in his defence stated the defendant had committed a breach in not providing a licence so he was not obliged to pay for the cost of hire. The claimant argued there was no breach as the failure to provide a licence was a frustrating event in that the decision to grant licences rested with the secretary of state.
>
> Held – The contract was not frustrated since the claimant had chosen to keep the three licences granted for himself rather than using one to fulfil his contractual obligation. He had therefore induced the frustrating event and was therefore in breach of contract.

The Eugenia (or *Ocean Tramp Tankers Corp v. V/O Sovfracht) [1964] 2 QB 226 –*

The Suez canal became a 'dangerous zone' as The Eugenia, carrying iron and steel, sailed towards it on the way to India from Odessa (but starting in Genoa). The charterers,

13 Peter Cassidy Seed Co Ltd v. Osuustukkukauppa[1957] 2 Lloyd's Report 25

in breach of a 'general war clause' in the contract saying dangerous zones should be avoided, sailed into Port Said, thinking they could make it through the canal in time. The alternative was to sail around the Cape of Good Hope, which would have taken a long time. The ship was impounded as the canal was closed. The charterers then abandoned the contract and claimed it was frustrated. The claimant owners of the iron and steel claimed it was breach of contract.

> Lord Denning MR held that there was no frustration of the contract. First, that the charterers could not rely on any self-induced frustration (sailing into the canal) as a ground for arguing the contract was frustrated. If they had not tried the Suez canal, they would have had to sail round the Cape, but this would not have rendered the contract radically different.
>
> > *"This means that, once again, we have had to consider the authorities on this vexed topic of frustration. But I think that the position is now reasonably clear. It is simply this: If it should happen, in the course of carrying out a contract, that a fundamentally different situation arises for which the parties made no provision – so much so that it would not be just in the new situation to hold them bound to its terms – then the contract is at an end... the theory of an implied term has now been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth. The parties would not have said: 'It is all over between us'. They would have differed about what was to happen.... So here, the parties foresaw that the canal might become impassable. It was the very thing that they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it."*
>
> He said if the contract says something, 'the contract must govern. There is no frustration.' But if the contract says nothing, onerous or more expensive is not enough, 'It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done, and it is the courts to do it as a matter of law: see Tsakiroglou.' He said that the material factors were that the difference in time was 108 days from Genoa via the Suez and 138 days via the Cape. The goods would not be adversely affected. The only trouble was it took longer. He firmly rejected, however, that frustration can only apply where the event is unforeseen or unexpected.

J. Lauritzen A.S. v. Wijsmuller B.V, (The Super Servant Two) [1990] 1 Lloyd's Rep 1 more commonly known as 'The Super Servant Two' –

> The claimants in the case, J. Lauritzen A/S, were the owners of an oil drilling rig that the defendants Wijsmuller had agreed to transport from Japan to Rotterdam. Under the terms of the contract the defendants were able to transport the oil rig

using one of either two ships known as The Super Servant One or the Super Servant Two. The defendants decided to use the second ship as the first ship was being used for other contracts. However, in July 1981 the Super Servant Two was sunk in Zaire (now the Democratic Republic of Congo) while transporting another rig. The defendants argued that the contract has been frustrated as they were incapable of transporting the drilling rig and the claimants argued that the impossibility of performing the contract had been self-induced and that therefore they should not be discharged of the need to perform the contract.

The Court of Appeal ruled that the defendants could not rely on the doctrine of frustration and that the defendants would have to bear the additional costs of transporting the rig.

Remedies for Breach of Contract

English law does not usually enforce the contract in the sense of compelling the parties to carry out their primary obligations. At common law the only case is where the guilty party's outstanding obligation to pay a fixed sum of money, in equity there exist the remedies of specific performance and injunction but these are only exceptionally granted. In practice, the injured parties remedy is most commonly an action for damages to compensate him for the breach of contract.

Damages

Damages for breach of contract are designed to give the claimant as nearly as possible what he would have received had the defendant performed his obligation. In other words, the purpose of damages in contract is to award the claimant the value of his defeated contractual expectation, thereby compensating him not only for the expenses caused by the breach but also for the gains prevented by it, i.e. the loss of his bargain.

Since the basis of an award of damages for breach of contract is loss to the claimant, it follows that if the claimant has suffered no loss, he is entitled to no more than nominal damages, even if the defendant has profited from the breach.

A claimant who wishes to recover from the defendant the gain which the defendant has made from the breach, he has two potential claims open to him. First, he can seek to recover any payment which he had made to the defendant, provided only if he can prove that the consideration of his payment has wholly failed, that is that he has received no part of the performance for which he bargained. Where he has received part of the performance for which he bargained, he cannot bring a restitutionary claim to recover his payment, and can only bring a contractual claim for damages for the loss suffered as a result of the breach.

There is also a possibility for a claimant to sue for the recovery of the entirety of the gain which the defendant has made from the breach. However, it is only in exceptional cases that the English law permits such a claim.

In *A-G v. Blake [2001] 1 AC 268, [2000] 4 All ER 38* the House Lords ordered that the defendant, a former member of the security services who had escaped from prison while serving a 42 year sentence for selling intelligence secrets and had published his autobiography should account for the royalties on his autobiography, and this despite the fact that the information had already ceased to be confidential. This decision was clearly influenced by the fact that the defendant was, in the words of Lord Nicholls, 'a self-confessed traitor'. This remedy is exceptional and should be given only where the defendant is or is in a position similar to, a fiduciary.

The requirement of loss presents two other difficulties. The first is where the contractual claim is vested in one party but the loss has been suffered by an associated party for whose benefit the contract was concluded. This has the potential of creating a black hole in relation to remedies; the third party is debarred from suing by the privity rule and the innocent party, having suffered no loss, is entitled to purely nominal damages, so that the guilty party escapes scot-free. It is now established that when entering into a contract the parties contemplate that in the event of a breach, loss would be caused not to the innocent party but to an identified or identifiable third party or subsequent assignee of the innocent party's right, then if so intended, the contracting parties may be treated as having entered into the contract for the benefit of the third party and the innocent party can recover on its behalf the amount of the third party's loss.

This is considered as an exception to the privity rule. However, the justification for this exception to the privity rule disappears in cases where the third party has a direct claim against the party who breaches the contract that is where there is a separate contract.

In the case of *Alfred McAlpine Construction Ltd v. Panatown Ltd [2001] 1 AC 518, [2000] 4 All ER 97* the House of Lords made the following observations:

> *McAlpine, a subsidiary of Unex Corporation, agreed to carry out construction works for Panatown on land owned by Unex Investment Properties Ltd (UIPL), a co-subsidiary of Panatown, for which purpose Panatown had been put in funds by Unex to place the contract. In a separate duty of care deed McAlpine acknowledged that it owed a duty of care to UIPL and that it would exercise all reasonable care and attention in performance of the construction contract. The construction works were so seriously defective that it became necessary to demolish them and start again. Panatown then initiated arbitration proceedings and obtained an award of damages. The High Court set it aside. The Court of Appeal restored the award and its decision was in turn reversed by the House of Lords (Lord Goff and Lord*

Millette dissenting) on the ground that UIPL had a direct claim under the duty of care deed so that there was no good reason to apply the exception to the normal rule that a claimant can recover only for its own loss.

The second difficulty created by the requirement of loss arises where the contract is for the provision of work and materials to be carried out in accordance with a precise specification – for example, the construction of a swimming pool of stated dimensions in a private house and what is provided is not in accordance with the specification but there is no diminution in value.

Should the contractor nevertheless be required to reconstruct the swimming pool even if this will involve great expense and add no value? Or should the building owner be required to pay the full price with an entitlement to no more than nominal damages, when he has not received the performance for which he bargained?

English law views with disfavour the award of a remedy which is economically wasteful. At the same time, there is a recognition that a claimant to whom a particular performance has subjective value over and above the utility associated with its market price should receive some compensation if he does not receive that value. This is called "consumer surplus notion".

Ruxley Electronics Ltd v. Forsyth [1996] AC 344 - A swimming pool was constructed with a diving area significantly shallower than that called for by the contract and there was diminution in value. The trial judge awarded compensation for loss amenity, but the Court of Appeal reversed the decision of the High Court and awarded costs of reinstatement. The House of Lords allowed the appeal and held that the owner was not entitled to costs of reinstatement but was entitled to recover damages for the loss of amenity which he suffered as a result of the pool being built to the wrong specifications. It was held to be unreasonable to award him the cost of reinstatement because the cost of carrying out the repair work was out of all proportion to the benefit which the owner would have obtained from the performance of such work.

Remoteness of Damage and Measure of Damages

The term remoteness refers to the legal test of causation which is used when determining the types of loss caused by a breach of contract or duty which may be compensated by awarding of damages. Legal causation is different from factual causation which raises the question whether the damage resulted from the breach of contract or duty. Once the factual causation is established, it is necessary to ask whether the law is prepared to attribute the damage to the particular breach, notwithstanding the factual connection. Damage which is too remote is not recoverable even if there is a factual link between the breach of contract or duty and the loss.

The extent to which a plaintiff is entitled to demand damages for breach of contract was considered in *Hadley v. Baxendale (1854) 9 Exch 341*. The principle laid down in that case has since been repeatedly affirmed.

Hadley (plaintiff) owned and operated a corn mill in Gloucester. The crank shaft that operated the mill broke and halted all mill operations. To obtain a new shaft, Hadley was required to ship the old crank shaft to Joyce & Co., an engineering company in Greenwich, to be used as a model for a new shaft. Hadley contacted Pickford & Co. (Pickford), a shipping company owned by Baxendale (defendant), and obtained shipping information for the crank shaft. Hadley was informed that if the crank shaft was delivered to Pickford before noon, it would be shipped and delivered to Greenwich the following day. The following day, Hadley delivered the crank shaft to Pickford before noon and paid the shipping price in full. However, Pickford negligently delayed shipping, and the crank shaft was not delivered until several days later. As a result, Hadley obtained the new crank shaft several days later than expected, during which time the mill remained closed. Hadley brought suit against Baxendale for damages, including lost profits from the delay. The jury awarded Hadley lost profits, and Baxendale appealed.

The court held that in order for a non-breaching party to recover damages arising out of any special circumstances, the special circumstances must be communicated to and known by all parties at the time of formation. Since Hadley failed to disclose his special circumstances to Baxendale, he was barred from the award of lost profits.

In the ultimate analysis a claim for damages raises two distinct questions. These emerge from the fundamental principle that the remoteness of the damage for which compensation is claimed must be distinguished from the monetary assessment of that compensation.

The first is: for what kind of damage is the plaintiff entitled to recover compensation? Damage of the most catastrophic and unusual nature may ensue from breach but on practical grounds the law takes the view that a line must be drawn somewhere and that certain kinds or types of loss, though admittedly caused as a direct result of the defendant's conduct, shall not qualify for compensation.

The second question, which must be kept quite distinct from the first, concerns the principles upon which damage must be evaluated or quantified in terms of money which is called measure of damages.

The principle adopted in many cases dating back to at least 1848 is that of restitutio in integrum. If the plaintiff has suffered a damage that is not too remote, he must, so far as, money can do it, be restored to the position he would have been in had the particular damage not occurred.

Surrey County Council v. Bredero Homes Ltd [1993] 3 All ER 705 –

> The plaintiffs were Surrey County Council and Mole Valley District Council who were the respective freehold owners of two parcels of land totalling 12.33 acres in an area which had originally been acquired for road purposes. By 1980 the land was no longer required for those purposes and the councils acting together decided to offer the entire site for development as a housing estate.The councils by a sale and purchase agreement dated 28 November 1980 agreed to sell a property to the defendant for £1.52 million, subject to the defendant obtaining planning permission and on 22 January 1981 the councils transferred the land to the defendant. Under clause 2 of each transfer the defendant covenanted with each council that it would carry out the development of the housing estate in accordance with the terms of planning permission and the approved scheme. Later, the defendant obtained a fresh planning permission permitting more houses to be built on the site than that specified in the approved scheme which was a clear breach of the defendant's contractual obligation to the two councils. However, although the council knew about the planning permission, they took no legal steps to restrain the revised development.
>
> If the plaintiffs acted promptly, they could have obtained an injunction to restrain such development but they simply waited until the development was complete and then argued that they were entitled to recover as damages for breach of contract the extra profits which the defendant had made by more intensive development of the site arising from their admitted breach of contract. The Court of Appeal held that the plaintiffs could only recover nominal damages.

The House of Lords held however, in *A-G v. Blake (supra)* that it was not always the case that a claimant was limited to his own loss.

Blake was for many years employed by British Secret Intelligence Service and had signed a contract of employment which contained a provision for lifelong confidentiality. Unknown to the SIS Blake was also employed by the KGB. In 1961 this was discovered and he was charged, convicted and sentenced to 42 years' imprisonment. In 1965 he escaped and has since been in Moscow. He made a contract with the publisher, Jonathan Cape Ltd, to publish his autobiography. Under the contract he was entitled to £150,000 and at the time of the case he had received £60,000. The government which had not known of the book contract until the book appeared, was anxious to stop him receiving the balance of the advance and event to obtain it foe itself.

Held: In a case where the usual remedies for breach of contract were insufficient, it was possible to make an order which would remove from the person in breach of contract, the benefits of the breach. In these circumstances, it was appropriate to award a sum equal to the amount of royalties he would receive from his publisher. The law now recognises

a restitutionary claim for profits made from a breach of contract in cases of 'skimped' performance, and cases where the defendant obtained his profit by doing 'the very thing' he contracted not to do, as here.

Another important qualification to the principle that a claimant can only recover damages to reflect his own loss occurs in cases where a claimant has recovered damages which have been suffered by a third party as a result of breach of contract.

Snelling v. John G Snelling Ltd [1973] 1 All ER 79 – The plaintiff and two brothers were the directors of the defendant company. The three brothers financed the company. As part of an arrangement to borrow money from a finance company the three brothers entered into an agreement not to demand for repayment of their loans during the currency of the loan from the finance company. The defendant company was not a party to this agreement. The agreement provided further that if any of the brothers should voluntarily resign from his directorship he should forfeit the money owing from the company. A few months later the plaintiff resigned from the company and sued the company for repayment of his investment.

The plaintiff argued that the company was not a party to the agreement with his brothers and that the agreement did not affect his rights against the company. The brothers applied to be joined as co-defendants to the action and Omrod J held that although the company was entitled directly on the agreement, the co-defendant brothers were entitled to a stay of proceedings and that since all the parties were before the court and the reality of the situation was that the plaintiff's claim had failed and the action should be dismissed.

It seems therefore that what cannot be obtained directly by the third party can, in appropriate circumstances, be obtained on his behalf by the promisee by specific performance, stay of proceedings or presumably injunction.

In the case of *Lloyd's v. Harper (1880) 16 ChD 290* Lush LJ said:

> *The next question which, no doubt, is a very important and substantial one, is, that Lloyds, having sustained no damage themselves could not recover for the losses sustained by third parties by reason of the default of Robert Henry Harper as an Underwriter. That, to my mind, is a startling and alarming doctrine, and a novelty, because I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself.'*

Jackson v. Horizon Holidays Ltd [1975] 2 All ER 92 is a case where the plaintiff made a contract with the defendant for a holiday for himself, his wife two children in Ceylon. The holiday was a disaster and the defendants accepted that they were in breach of contract.

The court of appeal held that the plaintiff could recover damages not only for the discomfort and disappointment he suffered himself but also for that experienced by

his wife and children. This could, perhaps, have been put on the (relatively) narrow ground that the plaintiff was recovering for his own disappointment that his family's holiday was spoilt but Lord Denning MR stated clearly that the words of Lush LJ were of general application. Clearly, if this is the law the doctrine of privity will be substantially neutralised in any case where the promise can be persuaded to sue.

Lord Denning's statement was said to be incorrect by the House of lords in *Woodar Investment Development Ltd v. Wimpy Construction (UK) LTD [1980] 1 All ER 571*.

The vendors agreed to sell 14 acres of land to the purchasers. The purchasers were to pay a price of £850,000 and on completion a further £150,000 to a third party, Transworld Trade Limited, having no legal connections with the vendors. The vendors alleged that the purchasers had repudiated the contract and brought an action for damages. The purchasers argued that if they were liable in damages, such damages should only be nominal so far as non-payment to the third party was concerned.

This argument was upheld by the House of Lords. Their Lordships was of the view that *Jackson v. Horizon Holidays Ltd (supra)* was probably correctly decided on its facts but that the reason given by Lord Denning MR were clearly wrong and that Lush LJ's statement only applied where 'A' stands in a fiduciary relationship to 'B'.

Beswick v. Beswick [1967] 2 All ER 1197 – Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales, and weights. He used to take the lorry to the yard of the National Coal Board, where he bagged coal and took it round to his customers in the neighbourhood. His nephew, John Joseph Beswick, helped him in his business. In March 1962, old Peter Beswick and his wife were both over 70. He had had his leg amputated and was not in good health. The nephew was anxious to get hold of the business before the old man died. So they went to a solicitor, Mr. Ashcroft, who drew up an agreement for them."

The agreement was that Peter assigns his business to his nephew in consideration of the nephew employing him for the rest of his life and then paying a weekly annuity to Mrs Beswick. Since the latter term was for the benefit of someone not party to the contract, the nephew did not believe it was enforceable and so did not perform it, making only one payment of the agreed weekly amount of 5 pounds.

The nephew argued that as Mrs Beswick was not a party to the contract, she was not able to enforce it due to the doctrine of privity of contract.

Lord Denning, in the Court of Appeal held that Mrs Beswick was entitled to claim in her capacity as a third party intended to benefit from the contract. He said;

"Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party or jointly with him or, if he refuses to join, by adding him as a defendant. In that sense and it is a very real sense, the third person has a right arising by way of contract."

The House of Lords disagreed with the reasoning of Lord Denning that the law allowed third parties to sue to enforce benefits under a contract. However, they held that Mrs Beswick in her capacity as Mr Beswick's administratrix (i.e. as the person representing someone's estate who dies without a will) could enforce the nephew's promise to pay Mrs Beswick an annuity. Furthermore, Mrs Beswick was entitled to specific performance of the contract.

Article 74 of the United Nations Convention on Contracts for the International Sale of Goods which deals with a party's right to claim damages provides:

> *Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.*

Under this provision, the party can claim all losses suffered as a result of the breach, including loss of profits. Recoverability is limited by the requirement of foreseeability at the time the contract was concluded. Article 78 provides that if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it.

Article 78(i) of the Convention provides that if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

Specific Performance

A decree of specific performance is a decree issued by the court compelling a party to do what he has promised to do. It is a form of relief that is purely equitable in origin and is one of the earliest examples of the maxim that equity acts in personam.

It originated in the realisation that there are many cases in which the remedy available at common law is not adequate. The normal remedy for breach of contract is the recovery of damages at common law. In most cases this affords adequate reparation, as, for example, where the contract is for sale of goods easily procurable elsewhere, or for the delivery of stocks or shares for which there is a free market; but in many instances and especially where a vendor refuses to convey the land sold, a mere award of damages would defeat the just and reasonable expectations of the plaintiff. The fundamental rule, therefore is that specific performance will not be decreed if there is adequate remedy at law. The purpose of such a decree is to ensure that justice is done. In *Wilson v. Northampton and Banbury Junction Rly Co (1874) 9 Ch App 279 at 284* Lord Selborne said:

> *'The court gives specific performance, only when it can by that means do more perfect and complete justice."*

In the case of *Flint v. Brandon (1803) 8 Ves (Vesey Junior's Chancery Reports) 159* the Master of Rolls explained the position as follows;

> *This court does not profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective that it becomes necessary for courts of equity to interfere… In the present case complete justice can be done at law. The matter in controversy is nothing more than the sum it will cost to put the ground in the condition in which by the covenant it ought to be.*

The contrary conclusion was reached in *Beswick v. Beswick (supra)* the facts of which I have already discussed above. In that case the plaintiff was not only the administratrix of her late husband's estate but also the person to whom the annuity had been made payable by the contract between the husband and the defendant. Being a stranger to that contract, her only course was to claim payment of annuity by suing in her representative, not in her personal, capacity. The defendant argued The defendant agrees that as the administratrix her only right to recover compensation for such loss as the estate as the estate had in fact suffered and that since non-payment of the annuity after the husband's death caused no loss to his estate, the only remedy available either to the plaintiff or to the estate was the recovery of nominal damages.

> The House of Lords rejected this argument. It was held that to accept this argument would be repugnant to the concept of justice. A decree of specific performance would clearly have been available to the husband had the agreement made the annuity payable in his lifetime, and it followed that this remedy is equally available to his personal representatives under the instant contract.

The exercise of equitable jurisdiction to grant specific performance is not a matter of right in the person seeking relief, but of discretion in the court. This does not mean that the decision is left to the uncontrolled caprice of the individual judge, but that a decree which would normally be justified by the principles governing the subject may be withheld, if to grant it in the particular circumstances of the case will defeat the ends of justice. Lord Parker in *Stickney v. Keeble [1915] AC 386 at 419* said:

> *Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable to do so.*

In *Co-op Insurance Society Ltd v. Argyll Stores (holdings) Ltd [1997] 3 All ER 297* the plaintiffs were the developers of a shopping centre and they had secured the defendants, a leading supermarket chain, as tenants of one of the major stores in the centre. In such development presence of such a tenant is very important to the other tenants who look to the supermarket as a magnet for shoppers. The defendants had not only taken thirty-five-year lease but had expressly covenanted that they would operate the leased land as a

supermarket. After fifteen years they decided that the supermarket was no longer viable and left without notice.

This was clearly a breach of contract and in principle the plaintiffs were entitled to damages which reflected the impact on the whole development of the defendant's departure but the calculation of damages would necessarily be a difficult exercise involving peering into an uncertain future. The plaintiffs chose instead to sue for specific performance and were successful before the Court of Appeal.

The House of Lords unanimously reversed the decision of the Court of Appeal. The House of Lords considered in particular that it would be wrong to order specific performance where the effect would be to compel the defendant to carry on business at a loss.

Under the United Nations Convention on Contracts for International Sale of Goods both the buyer and the seller have the right to demand specific performance.

Article 46 of the Convention deals with the right to specific performance of the buyer which provides:

(1) The buyer may require performance by the seller of his obligation unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

The seller's corresponding right is found in Article 62 of the Convention. Article 62 provides that the seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

A SOCIOLOGICAL PERSPECTIVE ON THE BUDDHIST FIVE PRECEPTS FOR THE CONCEPTUALIZATION OF HUMAN RIGHTS, LAW, CRIME AND CRIMINAL JUSTICE

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Abstract

This sociological and anthropological analysis of the Buddhist five precepts develops a social theory of origin of social life in response to the survival issues of natural life. The social life is created by five great social values integrated in a meaningful structural order as presented in the set of the five precepts. These five values function as constitutional elements of the social life. Fundamental human rights, basic human needs, law, crime, criminal justice administration and correction of offenders can be conceptualized from the social perspective developed in this analysis. It is for the first time such a social theory of the Buddhist five precepts is developed referring to the formation and evolution of social life of people including the legal aspects.

Introduction

This study is concerned with identifying a new perspective on the Buddhist five precepts for developing a fundamental conceptual and theoretical base of civil and criminal justice administration in the contemporary social context. An anthropological and sociological analysis of the Buddhist five precepts is capable of assisting in overcoming some issues of ambiguous conceptualization of the very meaning of social life characterized with a cultural orientation including human rights, law, justice and punishment or corrections of offenders. Such an analysis is required to solve the inevitable adverse impacts of existing legal systems and the administration of justice while enhancing the quality, quantity, social and humane aspects of them. Being totally immersed in the quagmire of controversial legal practices and embedded in legal systems alone one may find no way out of them and continue contributing to the institutionalization of such systems and their reproduction of adverse impacts under the pretext of law and justice. This orientation tends to result in stagnation in the legal systems making the law and the administration of justice another set of rituals performed with higher devotion and respect. What is indispensable in the modern social context

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is the progressive development of the knowledge base of law and justice through the exploration of new horizons of conceptual and theoretical knowledge. This analysis on the social value base of the Buddhist five precepts is an initial attempt to conceptualize human rights, law and justice and an introduction to a new line of oriental social thoughts of them.

Buddhist Five Precepts

Even though the Buddhist five precepts known as *Pancha Seela* fall into religious teachings and observances of Buddhism their social base goes beyond the religious purview with a universal significance for the origin of social life in response to the needs of sustaining cooperative behaviors while mitigating the adverse impacts of lethal conflicts that challenge the survival in the natural life of mankind. It is well evident from the social norms and social values underlying the Buddhist five precepts (*Anguttara Nikaya*. 2009: 556., Bodhi. 2012). Social life in any society is constructed by norms and values collectively adopted, prescribed and followed by people. The Buddhist five precepts observed in Sri Lanka are as presented in the Table 01 and the major norms and social values deriving from them are as mentioned in the Table 02 and Table 03 respectively (Keown.2005:9).

Table 01. Buddhist five precepts

I undertake the precept to refrain from killing
I undertake the precept to refrain from taking what has not been given
I undertake the precept to refrain from sexual misconduct
I undertake the precept to refrain from speaking falsely
I undertake the precept to refrain from taking intoxicants affecting the body and mind

Social norms and values

As defined by Hoefnagels "*Norms are conceptions and expectations of people as to desirable behavior. They are often concretely formulated*" (Hoefnagels.1969:75). These characteristics are well apparent from the five norms of the five precepts. They function as specific guidelines of behavior. A social value is defined as "*collective conception of what is considered good, desirable and proper in a culture*" (Schaefer and Lamn.1976:78). They are general guidelines of behavior. These definitions clearly show the fact that the specific norms are deriving from the general social values collectively agreed upon by people. As general social values are having a very broad purview, they have the capacity of producing any number of norms for controlling behavior of people.

Table. 02. Social norms of the five precepts

1	Abstention from killing
2	Abstention from stealing
3	Abstention from sexual misconduct
4	Abstention from lying
5	Abstention from taking intoxicants affecting body and vigilance of mind

Table. 03. Social values of the five precepts

1	Respect for life
2	Respect for the ownership of material resources for life
3	Respect for proper sensual pleasure and propagation of human race
4	Respect for trust and honesty
5	Respect for healthy body and mindfulness

Being comparable with the universal social values explored by the prominent anthropologists of the last century, Alfred Kroeber, and Clyde Kluckhohn (1952:349) these great social values corroborate the indispensability of them for the formation of social life in any community in the world. According to them "*There are at least some broad resemblances in content and specifically in value content. Considering the exuberant variation of cultures in most respects, the circumstance that in some particulars almost identical values prevail throughout mankind is most arresting. No culture tolerates indiscriminate lying, stealing, or violence within the in-group. The essential universality of the incest taboo is well-known. No culture places a value upon suffering as an end in itself; as a means to the ends of the society (punishment, discipline, etc.), yes; as a means to the ends of the individual (purification, mystical exaltation, etc.), yes; but of and for itself, never.*" (Kroeber and Kluckhohn. 1952:349).

Four out of the five values of the Buddhist five precepts are found among the universal values identified by Kroeber and Kluckhohn in their study of world cultures. Intolerance of indiscriminate lying, stealing, violence, suffering and incest clearly indicate the functional significance of underlying social values of respect for honesty, ownership, life, nonviolence and sexual restrain for the formation of a social life beneficial to all members of society. This anthropological research study provides the universal justification for the relevance of considering the social values underlying the Buddhist five precepts as constitutive elements of social life and culture instead of reducing them into a mere religious doctrine.

Origin of social life and benefits

The way they construct the social life is well evident from the broad meaning of each social value and the order of their organization in the set of the Buddhist five precepts. In this order the social value of respect for life stands first followed by the respect for possession of resources for living. Refraining from killing is stemming from the great social value of respecting and acceptance of existence of others. Lack of respect for the life was the order of the day in the natural world without civilization. Killing remained the major challenge of survival of all and enjoyment of the full life span granted by the nature. Adoption of the social value of respect for life is the initiation of real civilization, social and cultural system of living. Among all life is supreme and not subordinate to anything else, as the world remains meaningful to individuals as long as it lives in it. Accordingly, any value system of social life or civilization against the brutality of natural life originates and evolves pivoting on the great social value of respect for life.

The second great social value of respect for the possession of resources occupies this position in the order of the five precepts because of the indispensability of food, space, and other material resources for living in this world. Mere respect for life is not going to ensure the longevity for all people unless the material resources required for living are made available to all of them. It is the respect for the ownership of resources that prevent stealing and fraudulent appropriation of resources, and the legitimacy of ownership is stemming from the indispensability of possessing the necessary resources for living. Lack of respect for the possession of material resource for living in the natural world deprived some people of life in the lethal struggle for grabbing their portion of resources. The natural and brutal conflicts over the necessary resources for living came under control of society with the adoption of the great social value of respect for the possession of material resources for living.

These two values of respect for the life and ownership of resources for living ensure the survival of people as physical beings with the freedom of living and consumption of resources to the extent they are respected by them. The natural and brutal conflicts over sensual gratification including sexual desires have been controlled to a greater extent with the adoption of the third social value of respect for the proper sensual pleasure and reproduction of new members. It occupies the third position in the order of the five precepts as the assurance of survival as physical beings is immediately followed by the need of ensuring the survival as humane species. Survival as human beings is challenged by the lethal impacts of killing in the struggle for sexual and other sensual pleasure. If one is born after killing two or more in the struggle for sexual gratification in a particular community, at the end the human species cease to exist in that community of people. It is after the adoption of this great social value of respecting proper sensual pleasure the world population started increasing ensuring the survival as human beings.

The fourth social value of respect for trust and honesty underlying the fourth precept creates the social bond or the social contract required for ensuring the real practice of the first, second and third social values. Genuine commitment to behave in conformity to these great social values cannot be realized if people are lying after transgressing them in secret manner. Therefore, it is the social value of trust that create a social life among people and any social movement or organization remains 'really social' as long as the value of trust in membership is respected. The value of trust is playing a vital role in the assurance of freedom in all social transactions and allow people to enjoy social life without fear, suspicion, and consequent tension. This fourth great social value transforms the human beings into social beings and the survival as social beings is ensured by the reciprocal respect for the value of being trustworthy and honest.

The transition of people from natural life to a social life has been caused by these four great social values and their evolution into more and more social values and norms in the development of social life. One important and historical benefit of the adoption of social life is the unprecedented freedom of enjoying life and longevity. Certain practices of enjoying the freedom of social life such as harmful dependence on consumption of intoxicants posed a serious threat to the sustainability of social life based on the great social values. Addiction to intoxicants had adverse impacts on the physical and mental health of people and their peaceful social lives as such impacts could reverse the social life back to that of natural and brutal. It is this historical experience of enjoying social life that has given rise to the adoption of the fifth great social value of respect for healthy body and mindfulness. Accordingly, this social value ensures the sustainability of beneficial social life and freedom of living. It makes the social members healthy and vigilant beings.

Fundamental formular of social life

This anthropological and sociological analysis of social values of the five precepts helps us to develop a fundamental formula of social life as given in the Table 04.

Table. 04. Fundamental formular of social life

1. Life	2. Food	3. Sex	4. Trust	5. Health

In this fundamental formula of social life, the first component of life represents freedom of life without any harm on long life and quality of it, and the second element of food stands for the indispensable provision of resources for meeting physiological and other needs of people. It emphasizes the availability of sufficient means of living. The third element refers to the gratification of sensual desires including sex and the reproduction of the human species. The fourth element creates the social system based on mutual trust and honesty for ensuring the fulfillment of basic needs of all members of society. The health component provides the inevitable baseline for setting limits and boundaries on

enjoying the freedom of social life and expanding its horizons. It is a universal practice in the modern world to assess, ascertain, measure, and mitigate the impacts of almost all human activities from the health perspective before they are considered from other relevant perspectives. This world trend corroborates this need of taking health as a universal parameter for directing and controlling all human activities. Furthermore, this fundamental formular of life defines the institutional organization of society in terms of five important components pertaining to each element respectively: safety, existence, propagation, assurance, and sustainability.

Basic Human Needs

Five major human needs are evident from this sociological explanation of the great social values as mentioned in the Table 05. The needs of safety stand first as life must be protected before all other needs are addressed. Safety needs are followed by the physiological needs because of their necessity for survival as physical beings. Due social recognition is required to address the needs of sensual pleasure and reproduction of new members. This category of needs encompasses a range of sources of pleasure gained through the five senses. Social needs play a vital role in the creation of a social system that ensure a satisfactory level of meeting these human needs for all the members of society. Health needs ensure the sustainability of the social life through the maintenance of healthy body and vigilance of all members.

Table 05. Basic human needs deriving from the five great values

1	Safety needs
2	Physiological needs
3	Needs of Sensual pleasure and reproduction
4	Social needs
5	Health needs

Functional prerequisites of society

The social system constructed by the five great social values has five major functional prerequisites as outlined in the Table 06. They are equally important for the formation of society as well as its functional equilibrium and sustainability. All social institutions such as the political institution, economic institution, education, religion, family and marriage, law and justice, social security and welfare, science and technology, media and communication, recreation and entertainment, health and medicine are responsible for fulfilling these functional prerequisites. Vision and mission of each social institution is deriving from these functional prerequisites of the society and any deviation from them could be dysfunctional. In particular, the social institution of law and justice needs to be established on the base of fulfilling the functional prerequisites through the

introduction of required laws, their enforcement, administration of justice in case of violations and controversial issues, corrections of individuals and institutions deviating from the system, and their reintegration into the law-abiding society. Functional interdependency of each social institution on others should be well recognized for the cooperative meeting of those prerequisites without drastic failure that seriously affect the equilibrium of society.

Table 06. Functional prerequisites of society

1	Safety of life
2	Availability and management of resources
3	Regulation of sensual desires and reproduction
4	Socialization for being honest and trustworthy members of society
5	Healthy and vigilant population

Fundamental human rights

As the social life has been adopted to ensure the meeting of basic needs of survival as human beings in a long lasting response to the natural life which deprived some people of their natural rights to meet basic needs and survive, the society has an indispensable responsibility of looking after all members respecting and fulfilling the five fundamental human rights stemming from the same social values as mentioned in the Table 06.

Table 06. Fundamental human rights

1	Right to long life
2	Right to ownership of resources for living
3	Right to sensual pleasure and reproduction
4	Right to be treated in honest and trustworthy manner.
5	Right to health

Right to life

The right to life has a very broad meaning according to this social theory of the Buddhist five precepts. The social value of respect for life not only prevents violence against life but also all actions of individuals, organizations and institutions including the state that directly or indirectly put human lives in lethal dangers. Even the acts of environmental pollution, careless driving of vehicles, production and sale of goods and services that affect the well-being of people, deprivation of basic needs including access to health care and medical treatments and all sorts of industrial and technological abuses for inflicting harm on people fall into the purview of violating the right to life. Peoples' consciousness of the right to life should be the first consideration in all decisions.

Right to ownership

As none is born with necessary resources, there is a natural right to find resources for fulfilling the basic and other needs for living the full span of life after birth. This right needs to be well recognized by people and their institutions including the state to provide all citizens with a legitimate means of living in the society. It is the capacity of meeting all physiological and other needs of life. This right to means of living should be perceived in terms of different categories of person such as infants, young, adult, elderly, and all those depend on others for variety of reasons, and adopt appropriate means capable of looking after each of them. Not only employment, professional and vocational training but also care systems such as family, social welfare, social security etc. fall into the purview of this human right.

Right to sensual pleasure

Right to sensual pleasure encompasses all legitimate and harmless sources of pleasure in the social life of people. The freedom of life gained through the adoption five great social values motivates people to seek pleasure from all senses. Respect for this right creates a social responsibility to facilitate proper means of getting sensual pleasure. Social recognition of the right to sensual pleasure including sexual gratification and reproduction is necessary to adopt legitimate means of satisfying them. Different cultures have adopted various means for this purpose. One of the universal functions of the marriage and family is the provision of legitimate means for the sexual satisfaction and reproduction of new members. A myriad of issues pertaining to these social institutions as well as value conflicts and legal issues pertaining to sexual relations seem to have deprived some people of this human right in the modern society. Sexual crimes in the contemporary society need to be perceived with due attention to this right to sensual pleasure and related issues of respecting and protecting it. State interference in the right to sensual pleasure is well evident from civil and criminal laws and regulations adopted for different purposes with little respect for it. The more the legitimate means of sensual pleasure in a society the lesser the number of persons resorting to harmful and illegal means of pleasure.

Right to be treated in honesty and trust

This right is deriving from the great social value of trust that functions as the central element of social life. Right to be treated in honesty and trust need to be conceptualized with reference to the unprecedented dependency of modern society on social organizations for meeting the basic and other social needs of people. The transition of society from self-sufficient families, communities and nations to a society that highly depends on other families, communities, organizations, and nations on a global scale for the production, distribution and consumption of goods and services, has made it

a compulsory requirement for people to be treated in honest and trustworthy manner as the recipients have no other means for personally checking the hygienic and other qualities of goods and services than believing the brands and labels carrying some real or pseudo information on the contents of them. As people have no direct way of establishing trust in goods and services produced by companies, the state in the modern society bears the responsibility of ensuring it on behalf of them.

The purview of this right is not confined to the economic well-being alone but extends to all social affairs involving trust and honesty for motivating human behavior. Criminal breach of trust is found in all types of social transactions with a huge cost to the victims including the state. Even the democratic systems of governance are seriously affected by the fraudulent practices and corruptions in the contemporary society. Health and medical systems, transportation systems, educational systems, entertainment and recreational systems, mass media, social media, communication, and postal systems runs on public trust in them. People believe in them for obtaining their services. This unprecedent human dependency on trust in individuals, groups, organizations, governments, states, and international communities for meeting the needs of modern life emphasizes the indispensability of protecting the right to be treated in honest and trustworthiness.

Right to health

As it is evident from the social theory developed in this analysis this fundamental human right emerges in response to the adverse impacts of expanding social activities on the physiological and psychological health of persons, and consequent destruction of beneficial social system. It refers to the healthy body and mind. Modern society enjoys the positive impacts of the historical evolution the civilization and diffusion of it throughout the world. In particular, the development of health conditions, prevention of diseases, medical treatments and the increasing life expectancy and quality are astonishing outcomes of the progressive development. At the same time the modern development of civilization is vehemently criticized for its adverse impacts on the health and well-being of people. The increasing mortality and morbidity rates of persons suffering from communicable and non-communicable diseases are always cited as indicators corroborating the magnitude of the seriousness of health hazards caused by the same development processes. As individuals remain helpless in front of these health hazards this human right to health makes it a responsibility of society and the state to ensure the protection of the health. The purview of the right to health encompasses not only the protection from health hazards but also protection from all human activities that directly or indirectly affect the health and long life of people.

It is the freedom of people gained as a result of adopting the five great social values, which is activated by these fundamental human rights. And they delimit the power of

the state and other social organizations while establishing a public responsibility for protecting them. The state obligation of respecting, protecting, and fulfilling the human rights needs to be perceived from a comprehensive point of view for ensuring the fullest coverage of all aspects of them. These fundamental rights generate more and more human rights with the increasing complexity of the modern society. For example, the right to possession of resources for living generates the right to work and leisure, right to produce and consume, right to invest and earn, right to care, welfare, and social security etc. which ultimately make the resources available for living. The right to health extends to the right to preventive health provisions including the right to health education, right to vaccination, right to nutritious meal, right to healthy environment, right to medication, right to select medical systems and right to humane treatment etc. Almost all the types of human rights in the modern society seem to have grown from the expansion of the five great social values.

Conceptualization of Law, crime and criminal justice law

The social perspective of this analysis suggests a five layered framework for the rational conceptualization and organization of the law, crime, and justice. Accordingly, five types of law can be identified as life-law, resource-law, pleasure-law, trust-law, and health-law. Protection of people from all types of direct and indirect life threats is ensured by the life-law. The legitimacy of life law is derived from the social responsibility of protecting life. Being predominantly economic the resource-law ensures the economic well-being of people through the regulation of production, distribution and consumption of goods and services so that all citizens find means of living. It is the indispensability of resources for living that provides the legitimacy for the resource law.

Pleasure-law is required to ensure the facilitation and regulation of the pleasure-seeking behavior of people. It addresses all sources of sensual pleasure. Simply because these senses belong to an individual, he or she cannot be allowed to appease them causing harm on oneself or another. The historical experience of developing extreme ends of conflicts, addiction, and harmful dependence on certain sources of pleasure as well as adverse psychological and social impact of being deprived of pleasure makes it compulsory to protect the human right to pleasure and keep it within an order of peace and healthy limits by means of the pleasure-law.

Honest and legal functioning of the individuals, social organizations, institutions, and the governments in the modern competitive society cannot be ensured unless the trust-law is adopted. As modern society runs on trust for meeting almost all the needs of people this legal instrument should be strong enough to regulate it successfully. Accordingly, the indispensability of trust and honesty for all social transactions provides the legitimacy for all the trust-laws. The extraordinary expansion of social life in the modern world

and consequent adverse impacts on health of people ask for the health-law to ensure the physiological and psychological well-being of the people. The health-law gains fundamental legitimacy from the irreducible need of protecting the health of people. The interrelationships among these types of law are also important in understanding the functional significance of all laws.

Crime

Conceptualization of crime remains controversial due to different perspectives applied for the interpretation of human behavior as is well evident from criminological literature (Miller, (Ed.) 2009). The social theory developed in this analysis of the Buddhist five precepts reveals the origin of social life as well as the birth of the concept of crime. The social life is created by the five great social values, and it ensure the four types of survival of people as Physical beings, human beings, healthy beings, and social beings. Accordingly, the natural right to survive as physical beings, the natural right to survive as human beings, the natural right to survive as healthy beings and the social right to survive as social beings are found at the very bottom of the social life generated by these five great social values. It is the social system generated by the five great values that ensure the individual and collective respect for these rights, protection, and fulfillment of them. Accordingly, any definition of crime needs to address the intentional violation of these survival rights and reciprocal responsibilities of members of the society. Such an address reveals the significance of considering the natural, social, and moral or cultural components for the conceptualization and definition of crime.

Criminal Justice

Meaning of the concept of criminal justice and primary objectives of the administration of criminal justice can be conceptualized in terms of this analysis. As the central role of the criminal justice system is to bring down the abstract criminal laws to concrete actions as required for the administration of justice, it must function in terms of the conceptual and theoretical knowledge underlying the criminal law. There should remain no gap between the two levels of abstract law and the concrete action. Accordingly, the fundamental objectives of the five types of the law conceptualized in terms of the survival requirements of people should be realized by means of the criminal justice system. Being the elementary structure of civilization and humanity the formular of social life developed in this analysis, does not allow any reaction to crime to transgress its five great values and challenge the survival of offenders, victims, and other stake holders. Punishment of offenders needs to be conceptualized within the framework of this value system. Capital punishment, corporal punishments affecting the long life, deprivation of basic needs to the lethal extent, deprivation of sensual pleasure to the extent of losing psychological equilibrium of mind and, opportunity for propagation of a new generation, deprivation

of health and medical needs to the extent affecting the healthy body, mind, and long life, cannot be considered as punitive sanctions according to the social theory of this formula of social life. Administration of criminal justice with reference to the violation of any type of the laws needs to see whether the basic needs are fulfilled respecting the fundamental human rights of the people. Crimes resulting from the deprivation of basic human needs and negligence of human rights cannot be punished as perpetrators are compelled by the nature to survive by any means in case they are not properly accommodated by the civilization and society. Not only the punishment but also sentencing policies and minimum standards for the treatment of prisoners are required to be conceptualized in terms of this formula.

Summery

Conceptualization of human rights, law, crime, and criminal justice requires exploration of different value systems and underlying social thought in any society. This analysis of the Buddhist five precepts brings to light five great social values ordered in a systematic and rational way for adopting a social life that ensure the survival of people as physical, human, healthy and social beings in response to the challenge posed by the natural way of living without civilization. Origin of social life and its constitutive elements of life, resource, sex, trust, and health remains the primary concerns of any legal system. The formula of social life stemming from this analysis itself prescribes the law and justice required for sustaining the universal benefits of civilization based on the irreducible great social values of respect for life, ownership of resources for living, proper sensual pleasure, trustworthiness and healthy body and vigilance.

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THERE IS NOTHING NEW EXCEPT WHAT HAS BEEN FORGOTTEN

Compiled by
Manjula Tilakaratne
Judge of the High Court, Colombo

A lengthy Allocutus

After the foreman had signed the verdict in the Bandaranaike Assassination Case, the trial judge inquired from 1st, 2nd and 4th accused whether they had anything to say before sentence of death was passed on them.

H.P. Jayawardena, the 2nd accused made a lengthy statement and it took two days to conclude it. Beginning late in the afternoon of 10th May 1961, he concluded only in the afternoon of 12th May.

A deliberate fire to defraud an Insurance Company

Alexander Kennedy was accused of causing mischief by fire in respect of the building which contained his shop. The trial lasted 34 days before Justice Allan Drieberg. The accused was convicted on 20th October 1934.

This was the first case in Ceylon in which it was proved that a fire was deliberately caused to defraud an insurance company.

Advocacy is an art and the most difficult of all arts

"Mr. Quass came here as a stranger to this Bar, but is a stranger to us no more. We have had a few sharp exchanges across the bar table, but breezes in Court are inevitable in a trial of this nature.

I must also thank other counsel for what I learnt from them. From Mr. Weeramantry I have learnt that it is more interesting to travel hopefully than to arrive.

From Mr. Shinya I have learnt that, if one approaches a difficult task with a show of light-heartedness and good humour, one can create the illusion that the task is an easy one. Mr. Satyendra has demonstrated that youthful enthusiasm can go a long way with an almost frightening kind of competence.

There is nothing mysterious or strange about circumstantial evidence. When your dog stands on the verandah and pricks up his ears on hearing the horn of your car half a mile away, he is acting on circumstantial evidence. He has arrived at the conclusion that you

are coming." said Mr.George Chitty, Q.C. in his powerful and compelling address to the Jury in the Bandaranaike Assassination Case.

Art of judging

When Justice H.N.G.Fernando was sworn in as Chief Justice in 1966, he referred to what he had learnt from Justice Gratiaen about the art of judging :

"An attentive and receptive ear, a mind open to conviction, a readiness to acknowledge error and a will resolved to do justice regardless of personal motives or prejudices."

Trial Judges in some of the famous jury trials

Talahena Murder Case (1907) - Hon. Woodrenton
Talpe Poisoning Case (1928) - Hon.E.W.Jayawardena
Whitehouse Murder Case (1948) - Hon.Swan
Crocodile Murder Case (1949) - Hon.R.F.Dias
Kadugannawa Postal Bomb Case (1949) - Hon.R.F.Dias
Turf Club Case (1950) - Hon. Arthur Wijewardena
Sathasivam Case (1953) - Hon.E.F.N.Gratiaen
Ranjani Taxi Cab Case (1954) - Hon. N.Sinnetamby
Arthur Thenuwara Murder Case (1955) - Hon.H.N.G.Fernando
Wilpattu Murder Case (1960) - Hon.K.D.de Silva
Bandaranaike Assassination Case (1961) - Hon.T.S.Fernando
Uruthiripuram Murder Case (1964) - Hon. Tambiah
Kularatne Case (1968) - Hon.H.N.G.Fernando
Pauline De Croos Case (1968) - Hon.H.N.G.Fernando
Kalattawa Case (1969) - Hon.PandithaGunawardena
Tismada Case (1972) - Hon. D.Q.M.Sirimanne
Chandrasekara Dias Murder Case (1982) - Hon. Robert Silva

Wilpattu Murder Case

A special session of the Midland Circuit of the Supreme Court was held in Anuradhapura to hear the Wilpattu Murder Case, which commenced before an English speaking Jury on 4th April 1960.

The trial was concluded on 27th May after 34 days of hearing in the course of which 110 witnesses were called for the prosecution.

The Solicitor General addressed the jury for a day and the two Defence Counsel took three days for their addresses. Justice K.D. de Silva then commenced his charge, which took the greater part of one day and it was concluded at 5.25pm.

The Jury retired at 5.27 pm and returned with their verdict at 6.27 p.m. They acquitted both accused on the charge of conspiracy, convicted Anandagoda of murder by a majority verdict of 6 to 1 and acquitted Podisingho Perera by a verdict of 5 to 2.

Whitehouse Murder Case

The trial in the Whitehouse murder case commenced at the Colombo Assizes on 22nd November 1948 before Hon. St. Clair Swan, Commissioner of Assize (later Judge of the Supreme Court) and an English speaking jury.

Mr.A.C.Alles, Crown Counsel (later Judge of the Supreme Court) appeared for the prosecution.

Mr.J.F.A.Soza (later Judge of the Supreme Court and Director, Judges Institute) appeared for Halpe Martin and Koti Albert.

Dr. Colvin R. de Silva appeared for Lathara Baas, Apin Baas and Jayasundara Perera.

The Crier's announcement in the Assize Court

"The Supreme Court of Ceylon doth strictly charge and command all persons in this Court to keep silence on pain of imprisonment."

This is now said in Sinhalese in certain High Courts.

Judges come and go, but justice itself should endure

In terms of Article 163 of the Constitution, all Judges of the Supreme Court holding office on the day immediately before the commencement of the Constitution ceased to hold office on the commencement of the Constitution.

Justices Jaya Pathirana, T.W. Rajaratnam, C.V. Udalagama, T.A. de S. Wijesundera, Malcolm Perera, Noel Tittawela, S.W. Walpita and Wilmot Gunesekera of the former Supreme Court were not reappointed to the Bench of either appellate Court, some of them having declined the offer of seats on the Bench of the Court of Appeal.

Justice D.Wimalaratne of the former Supreme Court accepted appointment as the first President of the new Court of Appeal. Justices Barnes Ratwatte and Percy Colin Thome of the former Supreme Court accepted appointment as Judges of the Court of Appeal. All three of them were later appointed to the Bench of the Supreme Court.

Law in the language of the people

Justice A.R.H. Canekeratne died on 19th October 1960. Reference was made to his death on 21st October 1960. Chief Justice Hema Basnayake, Q.C. opened the proceedings in Sinhala and Acting Attorney General A. W. H. Abeyesundere, Q.C. replied in Sinhala. It was the first occasion on which the Sinhala language was used in the Supreme Court.

L.B.T.Premaratne, Q.C. was the first to address a Jury in Sinhala.

The order of precedence and seniority of President's Counsel

The order of precedence and seniority of President's Counsel will be according to of the date of the letters patent issued to each such Counsel.

If two or more letters patent have been issued on the same date then the order of precedence and seniority will be according to the date on which the appointee took his oaths on his first admission to the Bar.

Tismada Case

The trial in the Tismada case commenced on 28th November 1972 at the historic Audience Hall (Magul Maduwa) at Kandy before Hon. D.Q.M. Sirimanne, Commissioner of Assize and an English speaking jury.

Mr. Cecil Gunawardena, Crown Counsel appeared for the prosecution while the three accused were defended by Mr. A.C.de Zoysa and Mr. Wijaya Wickramaratne, Advocates.

The jury after deliberating for 65 minutes brought an unanimous verdict against all three accused finding them guilty of murder.

Members of the Jury in the Bandaranaike Assassination Case

1. D.W.L. Lieversz (Foreman)
2. J.A. Bocks
3. D.J.C. Fernando
4. G.B.I. Jayaratne
5. S. Ratnam
6. T.E. Jansz
7. L.D.G. de Silva

D.W.L. Lieversz was a government electrical engineer who at one time had figured prominently in Ceylon Cricket.

Assize Courts

Western Circuit, four times at least in each year at Colombo.

Midland Circuit, three times at least at Kandy.
Northern Circuit, twice at least at Jaffna.
Southern Circuit, twice at least at Galle.
Eastern Circuit, twice at least at Batticaloa.

The first group of High Court Judges appointed under the Administration of Justice Law (1st January 1974)

Ratnapura	-	Justin Abeywardena
Kalutara	-	I.G.N. de Jacolyn Seneviratne
Badulla	-	Parinda Ranasinghe
Jaffna	-	T.J.Rajaratnam
Galle	-	C.N. de S.J.Goonewardena
Matara	-	J.R.M. Perera
Kurunegala	-	M.M.Abdul Cader
Kandy	-	E.F. de Zilva
Avissawella	-	J.F.A.Soza
Colombo	-	P.Colin Thome
Gampaha	-	H.A.G. de Silva
Batticaloa	-	L.H. de Alwis
Negombo	-	O.S.M.Seneviratne
Anuradhapura	-	N.Devendra
Kegalle	-	D.E. Dharmasekara
Chilaw	-	A.A. de Silva

The first native Judge, Advocate and Proctor of the Supreme Court

Justice Harry Dias was appointed Acting Puisne Justice in 1876. He became the first Sinhalese Judge of the Supreme Court. He was also the first "pure native" of Ceylon to be admitted as a Barrister in England. He was called to the Bar by the Middle Temple in 1848.

In 1849, H. F. Muttu Kistna had become the first native Advocate of the Supreme Court.

J.C. Dias became the first native Proctor of the Supreme Court in 1842/3.

The first Proctor to be elevated to the Bench of the Supreme Court

Justice D.Q.M.Sirimanne was appointed as a Judge of the Supreme Court on 5th January 1973 and became the first Proctor to be elevated to the Bench of the Supreme Court.

The first Silk from the Provincial Bar

Vernon Jonklaas was appointed a Queen's Counsel in 1965. He was called to the Bar in 1941 and continued practising in Kandy until 1958. Although he practised in the District Court of Colombo and in the Appellate Courts from 1958, having regard to

his long career at the Kandy Bar, it might be correctly said that he was the first Silk from the Provincial Bar.

The first lawyer from the Provincial Bar to be elevated to the Bench of the Supreme Court

Justice Jaya Pathirana was appointed a Judge of the Supreme Court on 24th February 1972 and became the first lawyer from the Provincial Bar to be elevated to the Bench of the Supreme Court.

Attorneys - General who became Chief Justice of Ceylon / Sri Lanka

1. Hon. Charles Peter Layard, CJ
2. Hon. Alfred George Lascelles, CJ
3. Hon. Anton Bertram, CJ
4. Hon. Allan Rose, CJ
5. Hon. Hema Basnayake, CJ
6. Hon. Victor Tennekoon, CJ
7. Hon. Sarath Silva, CJ
8. Hon. Mohan Peris, CJ
9. Hon. Jayantha Jayasuriya, CJ

The first career judge appointed to the Supreme Court

Justice R.F. Dias may be regarded as the first career judge appointed to the Supreme Court. He was appointed a Judge of the Supreme Court in 1946.

King's Counsel and Queen's Counsel in Ceylon

The first silks of our Bar, Sir Ponnambalam Ramanathan, Sir Thomas de Sampayo, Sir A.G. Lascelles and F. Donhorst were appointed King's Counsel in 1903.

82 King's Counsel and Queen's Counsel were appointed between 1903 and 1968, the last of them, in 1968.

Vernon Wijetunga, M.I. Mohamed, Neville Samarakoon and L.B.T. Premaratne were appointed Queen's Counsel in 1968.

The first meeting of the Judicial Service Commission

According to the records available at the Judicial Service Commission Secretariat, the first meeting of the Judicial Service Commission was held on 25th November 1947.

Chief Justice Sir John Howard, K.C., (Chairman), Justice Arthur Wijeyewardene, K.C., Justice C. Nagalingam, K.C. and E.M. Joseph (Secretary) were present at the meeting.

Brothers on the Bench of the Supreme Court

1. Justice A. St. V. Jayawardena, King's Counsel and Justice E.W. Jayawardena, King's Counsel
2. Justice A.L.S. Sirimanne and Justice D.Q.M. Sirimanne

Father and Son as Judges of the Supreme Court

1. Justice V.M. Fernando and Justice H.N.G. Fernando
2. Justice O.L. de Kretser (Snr.) and Justice O.L. de Kretser (Jnr.)
3. Justice H.A. de Silva and Justice H.A.G. de Silva
4. Justice H.N.G. Fernando and Justice Mark Fernando

Senior Attorneys - at – Law

The President has appointed the following Attorneys - at - Law as Senior Attorneys - at - Law in 1981.

Shiva Pasupathi, A. C. de Zoysa, Visty Gunatilaka, Eric Amerasinghe, Eardley Perera, J. W. Subasinghe, G. F. Sethukavalar, H. L. de Silva, Nimal Senanayake, Daya Perera and K.N. Choksy.

The following Senior Attorneys - at - Law have been appointed in 1983.

C.R. Gunaratne, T.B. Dissanayake, I.M.R. Wijetunga, A. Mahendraraja, E. Stanley Martin, George Candappa, Maureen Seneviratne, K.M.M.B. Kulatunga and E.R.S.R. Coomaraswamy.

The longest serving Attorney General and Solicitor General

Shiva Pasupathi, P.C. functioned as Attorney General from 1975 to 1988. Sir Ponnambalam Ramanathan, K.C. was Solicitor General from 1892 to 1906.

BAIL PENDING APPEAL

Mahie Wijeweera
Judge of the High Court (Civil Appeal), Galle

Bail pending appeal or post-conviction bail, in essence, is an application to release a convicted prisoner on bail, pending determination of his appeal. Evidently, pendency of valid appeal is *sine qua non* to constitute a bail pending appeal. This begs the question when right of appeal is not available whether a High Court Judge is justified in rejecting application for bail due to this fact alone, *in limine*. Effects of ICCPR Act should be taken into consideration in determining this issue. Legal provisions relating to bail pending appeal in Sri Lanka can be traced to statutory law as well as case laws.

Interestingly, it is not mentioned anywhere in the statutory law that only a convicted prisoner is able to present a bail pending appeal application. Then again, a convicted accused who is not imposed with a custodial sentence would have no purpose of moving a bail pending petition. Arguably, an accused who serve default sentence, for not paying a fine, too may also qualify to present a bail pending appeal.

Statutory Law relevant to Bail pending Appeal: prior to the Bail Act 1997

Conviction by Magistrate's Court

Section 323(1) of Criminal Procedure Code dealing with appeals from Magistrate's Courts provides that "When an appeal has been preferred the court from which the appeal is preferred shall order the appellant if in custody to be released on his entering into a recognizance in such sum and with or without a surety or sureties as such, court may direct conditions to abide the judgment of the Court of Appeal and to pay such costs as may be awarded."

Provided always that the appellant may if the court from which the appeal is preferred thinks fit instead of entering into a recognizance give such other security by deposit of money with such court or otherwise as that court may deem sufficient.

323 (2) provides that "Upon the appellant's entering into such recognizance or giving such other security as aforesaid he shall be released from custody".

Evidently, the law dictated the appellant to be enlarged on bail, and the Magistrate's discretion was limited to the conditions of bail.

Conviction by High Court

The applicable provision, before the passage of Bail Act of 1997, was section 333(3) of the Criminal Procedure Code. It reads as thus,

> *"When an appeal against a conviction is lodged, the High Court may subject to subsection (4) admit the appellant to bail pending the determination of the appeal be treated in such manner as may be prescribed by rules made under the Prisons Ordinance."*

According to section 333(3) of the Criminal Procedure Code, a High Court Judge was empowered to grant bail to a convicted prisoner. The legislature, in its wisdom, has refrained from enunciating on how this power to be exercised. Sri Lankan Courts have, quite consistently, held before Criminal Procedure Code of 1979 was enacted that bail pending appeal would not granted unless there were exceptional circumstance are shown to exist, *vide King v. Mathuratta*[1], *King v. Keerala* [2], *Queen v. Coranelis Silva* [3]. This legal position remained to be the guiding principle in granting bail to convicted prisoners, despite the passage of section 333(3) of the Code of Criminal Procedure Code 1979.

Statutory Law relevant to Bail pending Appeal after the Bail Act 1997

Conviction by Magistrate's Court

Section 19(2) of Bail Act:

> *Appellant to be released on giving security*
>
> *When an appeal has been preferred from a conviction by a Magistrate's Court the court from which the appeal is preferred may having taken into consideration the gravity of the offence and the antecedents of the accused, refuse to release the appellant on bail.*

The Bail Act 1997 has introduced significant novel provision, *inter alia*, in respect of granting bail for a convicted prisoner, which is the legislative source of law in the country in this respect in force since 28 November, 1997. Undoubtedly, unconditional right of a convicted prisoner for bail pending appeal was curtailed by these provisions. Nevertheless, granting bail remains the rule, subject to two exceptions, i.e. the offense convicted is grave in nature or/and convicted prisoner has a bad record. Unfortunately, there is a lack of clear judicial guidance in the sense of judgment by a court of record on how the issue of antecedents is to be interpreted. This may include, probably, previous convictions, pending cases, record of threatening witnesses, tampering with evidence, etc. in *Liyana Arachchige Munoj Bimsara Dissanayake v. the Attorney General*[4] pendency of another action against the accused was considered as a proper ground for refusal of bail pending appeal. Although this is a revision against refusal of bail pending appeal by a high court, the ratio is equally applicable to bail pending application before a Magistrate

1 (54 NLR 493)
2 (48 NLR 202)
3 (74 NLR 11)
4 (CA (PHC) APN 6112018, CA Minutes 18.10.2018)

as section 19(2) has special reference to antecedents. This ratio is helpful in determining the permissible boundaries of antecedents.

> *"The Learned SSC has submitted that there is another pending trial against the petitioner in Colombo High Court under case No. HC 5828/2011 where the petittoner was charged with another accused for cheating and misappropriating a sum of six million rupees from the same complainant of case No. HC 5793/2011. The Learned High Court Judge had correctly considered this fact in refusing the bail application."*

The case above mentioned, *Liyana Arachchige Munoj Bimsara Dissanayake v. the Attorney General* (supra) is a revision application emanating from a high court order in a Bail Pending Appeal, refusing bail. The Accused was sentenced for three years imprisonment. The counsel argued that his client should also be released on bail considering the short period of incarceration, as in another revision application before Homagama High Court, in a quite famous case, where a different Accused was sentenced by the Homagama Magistrate for six months, Hon. Attorney General has submitted that he has no objection for granting bail as the period of imprisonment was a short one. In the judgment, Hon. K. K. Wickremasinghe J. has held thus,

> *"Accordingly, the Learned Counsel contended that the Learned SSC for the respondent has submitted before this Court that 03 year period of sentencing was no way an exceptional ground grant bail and thereafter the same Senior State Counsel had gone to Case No. 11309 in the Magistrate's Court of Homagama and had taken an opposite view. Answering the said contention of the Learned Counsel for petitioner, the Learned SSC for the respondent has submitted that circumstances of the two cases are different. The accused in the Magistrates Court of Homagama was sentenced to a term of six months whereas the petitioner of instant case was sentenced to a term of 3 years.*
>
> *Accordingly, we are of the view that it is quite difficult to conclude an appeal within a period of 6 months no matter how expeditious the current appeal process is. Therefore, the time factor should be considered comparative to the term of imprisonment."*

The Accused in the above case was not granted bail pending appeal, mainly based on the distinction made by the Court of Appeal due to length of sentences. Be that as it may, vice versa, it is safe to conclude based on above reasoning that an Accused sentenced for a short period, such as six months, may preferably be released on bail, considering the time taken in preparation of appeal brief. However, as per statutory requirement, gravity of the offense and antecedents of the accused should also be taken into consideration.

Conviction by High Court

The relevant provisions of the Bail Act are section 20(2) and 20(3), which are reproduced below.

> *20 (2) When an appeal against a conviction by a High Court is preferred, the High Court may subject to subjection (3) release the appellant on bail pending the determination of his appeal. An appellant who is not released on bail shall, pending the determination of the appeal be treated in such manner as may be prescribed by rules made under the Prisons Ordinance*
>
> *(3) Where the accused is sentenced to death, execution shall be stayed and he shall be kept on remand in prison pending the determination of the appeal.*

Requirement of Exceptional Circumstances in Bail Pending Appeals from High Court Convictions

Though it appears legislature has vested court with unfettered discretion in granting bail to a convicted prisoner, in *Ramu Thamadarampillai*[5] it was held that, "Even if our discretion to grant bail is unfettered it must still be judiciously exercised."

At pages 292 and 293 it was emphasized,

> *"But it is not to be thought that the grant of bail should be the rule and the refusal of bail should be the exception where serious non-bailable offences of this sort are concerned.* ***Where a statute vests discretion in a court it is of course unwise to confine its exercise within narrow limits by rigid and inflexible rules from which a court is never at liberty to depart. Nor indeed can there be found any absolutes or formula which would invariably give an answer to different problems which may be posed in different cases on different facts. The decision must in each case depend on its own peculiar facts and circumstances.*** *But in order that like cases may be decided alike and that there will be ensured some uniformity of decisions it is necessary that some guidance should be laid down for the exercise of that discretion."*

Justice Gunasekara followed this position in the case of *Jayanthi Silva and two others v. Attorney General* [6] in which it was held that,

> *"In Ramu Thamotheram Pillai v. Attorney-General (Supra) bail was refused to the Appellant who was convicted of attempted murder and sentenced to seven years rigorous imprisonment pending his appeal on the ground that no exceptional circumstances have been made out. From a consideration of the decisions referred to above and the legal provisions as a general principle there is no doubt that*

5 (2004, 3 Sri L.R. 180)

6 [1997] 3 Sri L.R. 117

> *exceptional circumstances must be established by an appellant if the discretion vested in a High Court to grant him bail pending the determination of his appeal is to be exercised in his favor. But this by no means should be taken to be the invariable and inflexible rule for Justice Vaithiyalingam, J himself recognized it in the case of Thamotheram Pillai v. Attorney-General (Supra) when he observed thus "But the requirement of exceptional circumstances should not be mechanically insisted upon merely because the case is from the High Court. Even in the case of a High Court it is possible for an appellant to have been convicted of a trivial offence and to have been given a very light sentence."*

It is advisable not to be misled by the chronological order of the references given to above two cases by the Editors of the Sri Lankan Law Reports. *Ramu Thamadarampillai,* which is reported at page 180 of 3 SLR 2004 is actually a case decided on 03 April 1975 by a Three Judge Bench of the Supreme Court. *Jayanthi Silva and two others v. Attorney General*, recorded at page 117 of 3 SLR 1997 is in fact a case decided on 07 August 1997 by the Court of Appeal. For some reason, benchmark judgment *Ramu Thamadarampillai* has been overlooked by the legal recorders and it has been finally rectified, after more than three decades. Most importantly, both these cases were decided before the passage of Bail Act 1997.

In the case of *Dachchini v. Attorney General* [7], *Sriskandrajah J.* held that,

> *"By the enactment of the bail Act there is a major change in the legislative policy and the Courts are bound to give effect to this policy. Accordingly, the High Court Judge in the impugned Order has erred in not taking into consideration the policy; change that has been brought in by the enactment and mechanically applied the principle that the accused have failed to show exceptional* circumstnces *when this requirement is no more a principle governing bail pending appeal."*

However, said judgment the Court of Appeal was overruled by the Supreme Court in the case of *Attorney General v. Letchchemi & another* [8], where it was held that,

> *"The presumption of innocence that insures in favor of those suspected or accused or connected with the commission of an offence, ceases to operate after conviction by a court of competent jurisdiction."*

It was further held that,

> *"Bail after conviction in the High Court referred to in section 333(3) of the Code of Criminal Procedure Act No. 15 of 1979 has been incorporated in verbatim in Section 20(2) of the Bail Act No.30 of 1997. The settled law on this is that where a section has been incorporated in verbatim, governing principles applicable are those*

7 (2005) 2 S. L.R. 152

8 [S.C. Appeal 13/2006] (2006 B.L.R. 16)

> *contained in the principal enactment. The interpretation of the principal enactment has always held that there must be exceptional circumstances. As section 20 of the Bail Act No. 30 of 1997 is identical to that contained in the Code of Criminal Procedure, in its implementation the earlier restricted view of the convicted person having to disclose exceptional circumstances for grant of bail must prevail."*

In the case of *Attorney General v. Ediriweera* [9] it was held that,

> *"**Delay is always a relative term and the question to be considered is not whether there was mere explicable delay as when there is a backlog of cases, but whether there has been excessive or oppressive delay and this always depends on the facts and circumstances of the case."***

In *Sulaiman Lebbe Mohamad Uvais v. Director General*, **The Commission to Investigate Bribery**[10] **Hon. Sisira de Abrew J** held,

> *"Before Counsel argued that in an application to release an accused person on bail pending appeal **should not pre-empt the hearing of the appeal**. This view is supported by the judgment of the Supreme Court in Attorney General v. Ediriweera[11] [2006] BLR page 12 wherein Justice Thilakawardene remarked thus: "In any event our Courts have held consistently, that in an application for bail after conviction, the appellate Court should not pre-empt the hearing of the substantive appeal."*

His Lordship further held,

> *"Learned PC next contended that since the appeal has, so far, not been listed for hearing and that the accused has been sentenced to a term of six years RI the accused should be released on bail. **In my view the delay in hearing the appeal cannot be considered as an exceptional ground to release an accused on bail**. This view is supported by the judgment of the Supreme Court in Attorney General v. Ediriweera (supra) wherein Justice Thilakawardene observed: "In any event delay in listing of cases is not an exceptional circumstance as it is common to all cases."*

Evidently, the sum of above *ratios* is, while exceptional circumstances are *sine qua non*, existence of exceptional circumstances would depend on the facts and circumstances of each case. The vital issue that arises next is how to define exceptional circumstance. In a much. Earlier reported case, *Rex v. Cooray* [12], bail was granted on the ground of ill-health, that the accused-appellant was not likely to abscond.

9 [S.C. Appeal No. 100/2005] (2006 B.L.R. 12)
10 (CA (PHC)APN 86/2010, CA Minutes 03.02.2011)
11 [2006] BLR
12 (51 NLR362)

In *Sunil Sumanawansha Amarathunga v. Attorney General*[13] the appellant's main contention was that according to prison regulations the 2 years imprisonment, which had been imposed on him, would lapse in less than 18 months and his appeal would be rendered nugatory even if it is decided in his favour, as at least the appeal brief was not prepared by then.

Hon. Wicramasinghe J., with concurrence of Hon. Samayawardena J., advanced this *ratio* in *Attorney General v. Ediriweera* [supra], "**delay is always a relative term"**, by deciding,

> *"These decisions demonstrate that even though a petitioner is required to demonstrate exceptional circumstances in an application for bail pending appeal, such exceptional circumstances will certainly differ depending on the circumstances of each case."*
>
> *"This Court has earlier observed that in the present system of criminal justice **we do not see prolonged delays in preparing appeal briefs as it used to be**. However, we are of the view that the **time period of preparing the brief should be always considered compared to the term of imprisonment**. Therefore, we think that it is to quite difficult to conclude hearing an appeal within 18 months, given that the appeal brief of the instant case is not yet ready. Considering above, we are of the view that the Learned High Court Judge erred in refusing to release the petitioner on bail pending appeal."*

It was further held that,

> *"The main consideration of the Learned High Court Judge in refusing the bail application was that the petitioner whilst giving evidence has been laughing and ridiculing Court. The Learned Counsel for the petitioner submitted that neither the Learned High Court Judge nor the State Counsel who made that observation had been present in Court at the time the petitioner testified and the Learned High Court Judge who observed the petitioner, nevertheless we are of the view that such facts dealing with the conviction should not be considered in granting bail, pending appeal."*

Law in India on Bail pending Appeal

Indian cases, as usual, proved to have profound influence on Sri Lankan law in this area too. In the Indian case of *Harbhagan Singh v. State of Punjab*[14] it was held that the factors which the Appellate Court is to consider in an application for bail pending appeal were

(a) Whether a *prima facie* ground exists for (substantial grounds) for believing that the convicts committed the offences in question, or

13 (C.A. Revision Application No: CA (PHC) APN 115/2018, CA Minutes 26.02.2019)
14 (1977) Cr LR 1424)

(b) Whether the circumstances are such as likely to delay the decision of the appeal for an unreasonable time.

Sri Lankan courts too of the view these factors cannot be ignored and should be one of the considerations in consideration of granting bail. In *Liyana Arachchige Munoj Bimsara Dissanayake v. the Attorney General*[15], it was held, citing the *ratio* of foregoing case, thus,

> *"The factors which the Appellate Court is to consider in an application for bail pending appeal were ... (b) Whether circumstances are such as likely to delay the decision of the appeal for' an unreasonable time. It would afford scant satisfaction to the accused after serving their full or substantial portion of their sentence, their appeal succeeds and they are merely acquitted of the charge. This cannot be ignored and should be one of the considerations for granting bail."*

However, it must be noted Indian provisions for bail pending appeal are substantially different from Sri Lanka. Governing provision of law is embodied in section 389 of Indian Criminal Procedure Code.

389. Suspension of sentence pending the appeal; release of appellant on bail.

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall, -

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

Evidently, above provision is quite different from ours. In India, if the accused is on bail and convicted for term not exceeding three years, he shall be released on bail, on submission of appeal. If the prison term is more than three years, then convicted person

15 (CA (PHC) APN 6112018, CA Minutes 18.10.2018)

shall be released on bail, unless there are special reasons for refusing bail. Then again, Appellate Court would review such release, based on 389(1). In other words, subordinate court is vested with discretion to consider the question of post-conviction bail, when the offense such person has been convicted is a bailable one, and he is on bail, and sentence is one exceeding three years imprisonment. In all other matters, it is the Appellate Court which is vested with the decision of bail pending appeal. Nevertheless, it appears same principles governing bail pending appeal in Sri Lanka are applied in our neighbor, as evident from following decisions.

In one of the most recent landmark Judgments, *The State (Government of Delhi) v. Lokesh Chadha*[16], Apex Court of India has held thus,

> *"At this stage, we will refer to the decision of a two-Judge Bench of this Court in Preet Pal Singh v. State of Uttar Pradesh[17] where* ***Justice Indira Banerjee****, speaking for the Court, observed as follows:*
>
> > *"35. There is a difference between grant of bail under Section 439 of the CrPC in case of pre-trial arrest and suspension of sentence under Section 389 of the CrPC and grant of bail, post-conviction. In the earlier case there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception. (Emphasis added by me)*
>
> *However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in section 389(1) of the Cr.P.C."*

Another point to emphasize is, quite contrast to the ratios of Sri Lankan jurisprudence, in India, the prima facie merits of the appeal, of course coupled with other factors, is the most important point to consider when deciding the question of bail pending appeal. This was not totally alien to our law, however, was discouraged by later decisions such as *Sulaiman Lebbe Mohamad Uvais v. Director General, the Commission to Investigate Bribery* (supra) wherein it was held Appellate Court should not pre-empt the hearing of the appeal, for good reasons. Also, in *Liyana Arachchige Munoj Bimsara Dissanayake*

16 (Supreme Court of India Criminal Appeal No 257 of 2021, SC Minutes 2 March, 2021)

17 (Criminal Appeal 520 of 2020, 14 August, 2020)

v. the Attorney General (supra), it was held, "however, we are not bound to consider the merits of the main appeal under a revision application seeker for bail."

Grounds for Bail Accused usually rely on Bail pending Appeal Application

(a) accused is of a clean record and has no prior convictions.

(b) Regular attendance in all court hearings throughout pendency of the case.

(c) The Accused has not tampered with evidence nor has threatened any of the witnesses.

(d) The Accused is of ill health.

(e) The Accused's family member is seriously ill or affected by incarceration.

(f) Prevailing Covid-19 affects prison community more than the ordinary people in the society.

(g) Time taken to hear and determine appeal.

It is to be noted that first three grounds usually urged by the Accused can hardly be taken as exceptional circumstances. That is normally what is expected from any law-abiding citizen of this country, needless to say Accused are presumed innocent and they are expected to behave as normal law abiding citizen. Moreover, the second and third grounds are expected behavior from any suspect/accused in a criminal case. Violation of these norms would no doubt result in cancellation of bail during pendency of the trial, let alone pending the appeal.

Fourth ground is related to Accused's health and there are plethora of cases dealing with this aspect. Similarly, fifth ground is related to Accused's family. The fact the Accused in remand, in the normal sense, affect their well-being. However, whether court can consider such possibility as constituting exceptional circumstances is another matter. Ratios on pre-conviction bail can be applied for this issue as well. However, absence of presumption of innocence should be in the back of the judicial mind when the matter of bail is ultimately decided.

Covid-19 Pandemic, when at its peak, is behind the next ground frequently urged by the Accused. It is convenient to quote from *Herath Pathiranalage Sunil Wickrema Abeysinghe v. The Director General, the Commission to Investigate Allegations of Bribery or Corruption* [18],

> *"Additionally, at the inquiry of this application before the High Court and this Court, the President's Counsel for the petitioner brought to the attention of the court that the petitioner is a diabetes patient and the possibility of him getting infected with the Covid-19 is very high, therefore his life is in danger compared*

18 (CA PHC/ APN 67/20, CA Minutes of 13 06/07/2021)

> *to the other inmates in the prison. Senior State Counsel appeared for 1st and 2nd respondents while denying the point raised by the President's Counsel for the petitioner conceded the fact that petitioner is being in the remand hospital for a long period. Senior State Counsel further reiterated that the petitioner is being treated well and looked after in the proper manner by the prison authorities.* ***If this Court considers the request of the petitioner and enlarged him on bail, it will set a precedent which will be like an opening of flood gates where all the inmates in remand custody or otherwise will plead the same concession****."*

It was further held,

> *"Coronavirus disease (COVID-19) is not just an illness and it is an infectious disease (pandemic) caused by a newly discovered coronavirus widespread over the whole country and the entire world. I have no doubt that COVID -19 has had a significant effect, globally and nationally, on both individuals and institutions. One of these is the operation of the criminal justice system of our country. It is a well-known fact that the COVID-19, like other infectious diseases, poses a higher risk to populations that live in close proximity to each other. And it affects older people and individuals with non-communicable illnesses such as cardiovascular disease, diabetes, chronic respiratory disease, and hypertension.* ***While the effect of COVID-19 should be considered as a unique factor, since its impact is applicable to all the persons held in custody, it should be carefully considered whether the situation of the petitioner is, in fact, different from the others who experience similar circumstances while in prison.****"*
>
> *"Further, it was revealed at the inquiry that this appeal was listed for argument last month (May-2021) but could not be proceeding due to the prevailing situation of the country. Therefore, it is evident that whatever the delay that may have occurred in the proceedings has been unavoidable and it was not an 'excessive' or 'oppressive' delay."*

Conclusion

It is clear from the rationale of the above order, Covid-19 risk would not amount to exceptional circumstances, unless the Accused can be categorized as a **high risk person** due to Covid-19, i.e. suffering from non-communicable illnesses such as cardiovascular disease, diabetes, chronic respiratory disease, and hypertension and he was not afforded an opportunity to spend his days in prison in the Prison Hospital, where his risks would be brought to minimal standards. Most importantly, it shall not be forgotten the Hon. Court of Appeal has paid their special attention to the fact the Accused in the foregoing

case was fortunate enough to be availed an opportunity to be in the Prison Hospital for whole of his occupation in remand. Needless to say, he would not be in a better position even if he is outside the prison.

I took liberty to look at the Court of Appeal website, and, as it turned out, judgments in criminal appeals are delivered at present in the appeals lodged in 2019. In the past, however, there was a backlog of appeals in the Court of Appeal amounting for nearly 5-6 years. As it was aptly described by Hon. Wicramasinghe J., with concurrence of Hon. Samayawardena J., in *Sunil Sumanawansha Amarathunga v. Attorney General*[19], which I would wish to quote,

> *"This Court has earlier observed that in the present system of criminal justice* ***we do not see prolonged delays in preparing appeal briefs as it used to be****."*

Evidently, excessive, and oppressive delays we used to experience is a thing in the past, thanks to dedication of the judges in the appellate courts. This may also be viewed as one of the positive outcomes of expansion of the number of judges in the superior courts. Lack of oppressive delays is one of the factors to appreciate when question of bail pending appeal is considered.

19 (C.A. Revision Application No: CA (PH C) APN 115/2018, CA Minutes 26.02.2019)

THE CURRENT STATUS AND THE FUTURE OF ROMAN-DUTCH LAW IN SRI LANKA

Dr. Chamila S. Talagala*

1. Introduction

The Roman-Dutch Law was first introduced to Sri Lanka (then Ceylon) during the Dutch presence in the country and its colonial rule from 1638 to 1796. Having entered into the legal landscape of Sri Lanka as an alien system of law, within a couple of centuries it was ingrained into the country's legal system to the extent that by the first half of the 20th century, the Roman-Dutch Law came to be referred to as the 'general law of the Island' as well as 'common law of the land'.[1] As Professor LJM Cooray has observed, the most important sources of Roman-Dutch Law in modern Sri Lanka are the treatises of the jurists and the cases decided by the Sri Lankan courts 'interpreting and sometimes modifying the Roman-Dutch principles'.[2] While the Sri Lankan courts have indeed modified the Roman-Dutch Law in certain instances, whether they had or have the legitimate authority to do so has always remained a contentious issue in this country. Almost 22 years ago, it was thought that this issue was finally settled when a three-judge bench of the Supreme Court emphatically pronounced in the famous case of *Prof. Priyani Soyza v. Rienzie Arsecularatne*,[3] that the courts were not entitled 'to change the material of the Roman-Dutch Law' and what they were only permitted to do was 'to iron out its creases, whenever the necessity arises'.[4] In arriving at this conclusion, the Court was inclined to adopt the view of HNG Fernando CJ in the case of *De Costa v. Bank of Ceylon*,[5] over the decision of the Privy Council in the case of *Kodeeswaran v. The Attorney-General*,[6]

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1 Sultan v. Peiris 35 NLR 57, 81. In particular, Garvin SPJ observed that the Kandyan Law, Tesawalamai Law and Muslim Law 'are very limited in their scope and from the earliest times it became necessary to supply their deficiencies by the application of the principles of the only complete system of jurisprudence then in force in the Island, viz., the Roman-Dutch law. It has thus become the inveterate practice in Ceylon to resort to the Roman-Dutch law in all matters outside the area covered by the other systems of law where it can be applied without conflict and with any of its provisions, rules or principles. The Roman-Dutch law thus became the general law of the Island applicable to all inhabitants in all matters upon which their personal laws are silent and in this sense Common law of the land.'

2 LJM Cooray, An Introduction to the Legal System of Sri Lanka (2nd ed, Stamford Lake, 2003) 59.

3 [2001] 2 Sri LR 293.

4 [2001] 2 Sri LR 293, 306.

5 72 NLR 457.

6 72 NLR 337.

where a different view was taken by Lord Diplock. However, the recent decision of the Supreme Court in the case of *Karunanayake and others v. Mannapperuma*,[7] questioned the accuracy of the view of HNG Fernando CJ mentioned above, and held that the view of Lord Diplock in *Kodeeswaran*,[8] reflects the correct position of the law. The Court further declared that, because of the structure and hierarchy of courts of that era and the doctrine of *stare decisis*, the Supreme Court in *De Costa*,[9] was bound at that time to follow the *ratio decidendi* in *Kodeeswaran*.[10] Thus, in terms of the decision in *Karunanayake and others*,[11] 'it is well within the judicial power of [the Sri Lankan courts] to interpret, adapt where necessary and apply the Roman-Dutch law to suit contemporary requirements of modern human society and societal expectations'.[12] Against this backdrop, this article aims to briefly examine the current status and the future of Roman-Dutch Law in Sri Lanka, particularly concerning the power of the courts to develop the law and its principles.

2. What is Roman-Dutch Law?

The term "Roman-Dutch law" was invented by Simon van Leeuwen, which he employed in a work published in 1652.[13] This term underscores the fact that this system of law is a mixture of Roman and Dutch law.[14] As Professor Tambiah has noted, while Roman-Dutch Law 'obtained in Holland from the middle of the fifteenth century to the early years of the nineteenth century' is no more there, it was the Dutch East India Company and the Dutch West India Company that carried the Roman-Dutch Law to their settlements which included the maritime provinces of Sri Lanka (then Ceylon).[15] When the Dutch settlement in Sri Lanka was passed to the hands of the British at the end of the 18th century, the British continued to administer the Roman-Dutch Law which was later extended to the whole country upon the entirety of Sri Lanka becoming a Crown Colony of the British Empire in 1815.[16]

7 SC Appeal No.130/15, decided on 21-02-2022 (Unreported).

8 72 NLR 337.

9 72 NLR 457.

10 72 NLR 337.

11 SC Appeal No.130/15, decided on 21-02-2022 (Unreported).

12 SC Appeal No.130/15, decided on 21-02-2022 (Unreported) 61.

13 HW Tambiah, *Principles of Ceylon Law* (HW Cave, 1972) 117.

14 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 47.

15 HW Tambiah, *Principles of Ceylon Law* (HW Cave, 1972) 117-118. Sir Ivor Jennings and Professor Tambiah have noted that how the Roman-Dutch Law was extended to Sri Lanka (Ceylon) or exactly what parts of the Roman-Dutch Law became part of the Dutch settlements is not clear by any means. However, they observe that customary law of the Province of Holland became the 'common law' of the Dutch settlements subject to local custom. Sir Ivor Jennings and HW Tambiah, *The Dominion of Ceylon: The Development of its Laws and Constitution* (Stevens, 1952) 195.

16 See JCW Perera, *The Laws of Ceylon* (2nd ed, Government Printer, 1913) 2-3; Sir Ivor Jennings and HW Tambiah, *The Dominion of Ceylon: The Development of its Laws and Constitution* (Stevens, 1952) 6-14: MHJ van den Horst, *The Roman Dutch Law in Sri Lanka* (Free University Press, 1985) 87, 119-120: LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 5, 67-68.

3. The Roman-Dutch Law under the Dutch Colonial Rule

While Roman-Dutch Law was first introduced and applied in Sri Lanka by the Dutch during their presence and rule, 'not the whole of the Roman Dutch Law as set out by the Roman Dutch jurists was received in [the country]'.[17] The Roman-Dutch Law during the Dutch period applied only to the maritime provinces of Sri Lanka which were in their possession. Since the Dutch never ruled the Kandyan provinces, the Roman-Dutch Law hardly had any influence on the laws that were administered by the Sinhala King in those areas at that time. Although the 'early colonial policy of the Dutch was to apply their laws to both European and local inhabitants alike', this had to be changed given the opposition that came from the local inhabitants so that the Roman-Dutch law was applied to criminal cases while giving effect to the local customs in civil cases.[18] Accordingly, the Dutch applied the Roman-Dutch Law to their people in the maritime provinces of Sri Lanka while extending it to the Tamils, Muslims and Mukkuvars in those areas when their local laws and customs 'were silent or were not in accordance with their own conceptions of morality and public policy'.[19] Yet, to what extent the Dutch applied the Roman-Dutch Law to the Sinhalese in the maritime provinces remains a moot point. This has been exacerbated by the fact that during British colonial rule, the British started to apply Roman-Dutch Law to these Sinhalese on the controversial assumption that it was the primary law applied to them during the Dutch period.[20] However, as Professor LJM Cooray has surmised, the Dutch administration probably applied Roman-Dutch Law to the Sinhalese who embraced Christianity and to those who lived within the Dutch forts.[21] As regards other Sinhalese in the maritime provinces, the Roman-Dutch Law was applied only where their laws were silent or considered unsuitable.[22] Thus, it would be logical to assume that the application of

17 MHJ van den Horst, *The Roman Dutch Law in Sri Lanka* (Free University Press, 1985) 80. See also, JCW Perera, *The Laws of Ceylon* (2nd ed, Government Printer, 1913) 12-13 where it is stated: 'The whole of the Dutch Law as it prevailed in Holland more than a century ago was never bodily imported into this country. We have only adopted and acted upon so much of it as suited our circumstances, such as the Law of Inheritance in the Maritime Provinces, Community of Property, Law of Mortgage, and so forth.'

18 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 62.

19 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 62-63. Van den Horst has observed that the Roman-Dutch Law had to be applied when 'the Statutes of Batavia did not contain any provisions, when Ceylonese customary law was equivocal or did not exist and when there was no local legislation'. MHJ van den Horst, *The Roman Dutch Law in Sri Lanka* (Free University Press, 1985) 80.

20 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 63.

21 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 67.Walter Perera has noted that'[t]he possession of the Island by the Dutch was as a mere military tenure, and it is possible that the [Roman-Dutch] Law applied only to the Dutch and a very limited portion of the Sinhalese population – to the Sinhalese who were part of the urban population in the centres of the Dutch possessions - and the bulk of the Sinhalese had their own special customs and customary law. JCW Perera, *The Laws of Ceylon* (2nd ed, Government Printer, 1913) 4.

22 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 67.

the Roman-Dutch Law to all local inhabitants in the maritime provinces of Sri Lanka (i.e. Sinhalese, Tamils, Muslims and Mukkuvars) during the Dutch period was in the form of a "residuary law" or "subsidiary common law".[23]

4. The Roman-Dutch Law under the British Colonial Rule

The maritime provinces of Sri Lanka that were under the possession of the Dutch (Dutch settlement) were surrendered to the British by the Dutch in 1796. The same provinces were ceded by the Dutch to the British Government in 1802.[24] Although this territory was conquered by the British in 1796 and ceded by the Dutch in 1802, the general belief is that Britain acquired Sri Lanka as a ceded colony. In any event, this did not make any difference as regards the application of the law consequent to the commencement of power in the Dutch settlement in Sri Lanka since conquered and ceded colonies are subject to the same rules.[25] Accordingly, in a conquered or ceded colony, the law that was already in force, before the cession or conquest, continues in force until changed.[26] This principle which was followed by the courts was also given statutory force in terms of the *Proclamation of 23 September 1799* (*Proclamation of 1799*).[27]

The British adopted a dual approach towards the application of the Roman-Dutch Law during their rule. On one hand, they restricted the application of Roman-Dutch Law in the fields of procedure, evidence, criminal law, constitutional law and mercantile law, while extending it in respect of the persons to whom the law applied on the other.[28] Professor LJM Cooray has identified, legislation, and the actions and attitude of the judiciary as the most noteworthy factors that restricted the application of the subject matter of Roman-Dutch Law during the British period.[29]As the statute law always superseded the non-statute law, the statutes enacted covering a certain subject matter of Roman-Dutch Law inevitably abrogated that part of the Roman-Dutch Law.[30] Since the administration of

23 See T Nadaraja, *The Legal System of Ceylon in its Historical Setting* (EJ Brill, 1972) 247; MHJ van den Horst, *The Roman Dutch Law in Sri Lanka* (Free University Press, 1985) 136. See also, *Sultan v. Peiris* 35 NLR 57, 81.

24 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 5.

25 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 5.

26 *Campbell v. Hall* (1774) 1 Cowper 204; *Fabrigas v, Mostyn* (1775) 20 St. Tr. 162; LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 5; Sir Ivor Jennings and HW Tambiah, *The Dominion of Ceylon: The Development of its Laws and Constitution* (Stevens, 1952) 48-50; T Nadaraja, *The Legal System of Ceylon in its Historical Setting* (EJ Brill, 1972) 181; HW Tambiah, *Principles of Ceylon Law* (HW Cave, 1972) 225; JCW Perera, *The Laws of Ceylon* (2nd ed, Government Printer, 1913) 1-2.

27 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 7.

28 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 66-67.

29 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 66. See also, HW Tambiah, *Principles of Ceylon Law* (HW Cave, 1972) 128-130; Sir Ivor Jennings and HW Tambiah, *The Dominion of Ceylon: The Development of its Laws and Constitution* (Stevens, 1952) 197-198.

30 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 67; Sir Ivor Jennings and HW Tambiah, *The Dominion of Ceylon: The Development of its Laws and Constitution* (Stevens, 1952) 198; HW Tambiah, *Principles of Ceylon Law* (HW Cave, 1972) 138-142.

Roman-Dutch Law during British rule was under English judges, the usual and constant reference made to English law principles and solutions limited the application of Roman-Dutch Law.[31]

As mentioned before, the principle that the laws of the colony continue in force, subject to certain qualifications, until changed by the deliberate act of the new sovereign was followed by the British concerning Sri Lanka.[32] This was confirmed by the provisions in the *Proclamation of 1799* and *Ordinance No.5 of 1835* (*Ordinance of 1835*). These enactments, perhaps on an erroneous assumption, enabled the British administration to extend the Roman-Dutch Law to persons to whom it was never applied before. As Professor LJM Cooray has observed, the courts 'in the British period applied Roman-Dutch law in all cases to the Sinhalese of the maritime provinces, under the apparent impression that they had been subject to Roman-Dutch law in Dutch times and in the belief that they were giving effect in terms of the Proclamation of 1799, to the existing systems of law.'[33] Furthermore, in the Kandyan provinces where Roman-Dutch Law had hardly any influence, the British administration applied the Roman-Dutch Law by the operation of *Ordinance No.5 of 1852* 'in the event of *casus omissus*, a procedure which had never been followed in Dutch times.'[34]

5. Roman-Dutch Law as the General Law

Over time, the Roman-Dutch Law became the general law of Sri Lanka applicable to all its inhabitants in all matters when their local laws, such as the Kandyan Law (previously Sinhala Law), Tesawalamai Law and the Muslim Law were silent. As observed by Garvin SPJ in *Sultan v. Peiris*,[35] '[i]t has thus become the inveterate practice in Ceylon to resort to the Roman-Dutch law in all matters outside the area covered by the other systems of law where it can be applied without conflict with any of its provisions, rules or principles.'[36]

31 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 67; Sir Ivor Jennings and HW Tambiah, *The Dominion of Ceylon: The Development of its Laws and Constitution* (Stevens, 1952) 197-198; HW Tambiah, *Principles of Ceylon Law* (HW Cave, 1972) 138.

32 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 7.

33 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 68.

34 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 68. Section 5 of *Ordinance No.5 of 1852* provided: 'Where there is no Kandyan law or custom having the force of law applicable to the decision of any matter or question arising for adjudication within the Kandyan provinces, for the decision of which other provision is not herein specifically made, the court shall in any such case have recourse to the law as to the like matter or question in force within the Maritime provinces, which is hereby declared to be the law for the determination of such matter or question.' This led the Supreme Court in *Kiry Menika v. Kiry Menika* (1855) Ramanathan (1843-1855) 62 to hold that '[a]s the Kandyan Law is silent on such right of possession, the Maritime law (namely the Roman Dutch Law) should now be the law for the determination of such matter on question in the Kandyan provinces under the 5th Clause of Ordinance No.5 of 1852': cited in *Mohamed Nilaudeen and Another v. Mohammed Sameen Mohammed Rasleem*, CA No.866/2000(F) decided on 04-09-2018, 6. See also, MHJ van den Horst, *The Roman Dutch Law in Sri Lanka* (Free University Press, 1985) 119-120; JCW Perera, *The Laws of Ceylon* (2nd ed, Government Printer, 1913) 13-14.

35 35 NLR 57.

36 35 NLR 57, 81.

In that sense, His Lordship was of the view that the Roman-Dutch Law is the common law of Sri Lanka. However, this did not mean that the term could be used in the sense it is used in England since'[t]here is no body of legal principles and usage common to all parts of the Island and all its inhabitants'.[37]

Be that as it may, as Professor Nadaraja has pointed out, administrators, courts and scholars have used the terms 'general law', 'residuary law' and 'common law' to refer to Roman-Dutch Law in Sri Lanka.[38] However, he has noted that while 'it would be incorrect to state, as often done, that the Roman-Dutch Law is the common law of Ceylon', it 'can at best be regarded as merely a "subsidiary common law where our own law and practice are silent"'.[39]

6. Power of the Courts to Develop Roman-Dutch Law

Whether or not the courts in Sri Lanka are empowered to develop or alter the Roman-Dutch Law has remained a central issue for many years. Before proceeding to examine the relevant judicial pronouncements on this matter, it is pertinent to note that this issue has arisen primarily because of the provisions in the *Proclamation of 1799* and the *Ordinance of 1835*. In essence, the *Proclamation of 1799* provided that justice should be administered by courts in former Dutch possessions in the maritime provinces of Sri Lanka 'according to the Laws and Institutions that subsisted under the ancient Government of the United Provinces' subject to such changes as might be made by certain authorities (such as the Court of Directors of the United Company of Merchants of England trading to the East Indies, the Secret Committee thereof, and the Governor General in Council of Fort William in Bengal).[40] The *Ordinance of 1835* while repealing a major portion of the *Proclamation of 1799* provided that, the administration of justice within the maritime provinces should be exercised by courts 'according to the laws and institutions that subsisted under the ancient Government of the United Provinces' subject to such changes that may be made by 'lawful authority ordained'.[41] While the laws that subsisted under the ancient Government of the United Provinces unquestionably included the Roman-Dutch Law, the core dispute here was over the issue of whether the authorities mentioned in the *Proclamation of 1799* and/or the 'lawful authority' mentioned in the *Ordinance of 1835* that were declared to have the power of making changes to the laws that

37 35 NLR 57, 81.

38 T Nadaraja, *The Legal System of Ceylon in its Historical Setting* (EJ Brill, 1972) 190.

39 T Nadaraja, *The Legal System of Ceylon in its Historical Setting* (EJ Brill, 1972) 247. As Van den Horst has submitted, 'the Roman Dutch law can be described as a system of law which on the one hand acts as an independent system of law on certain areas of the civil law, while on the other hand it exercises a subsidiary function within the legal framework of Sri Lanka as a whole'. MHJ van den Horst, *The Roman Dutch Law in Sri Lanka* (Free University Press, 1985) 136.

40 See paragraphs 1-2, *Proclamation of 23 September 1799*. See also, T Nadaraja, *The Legal System of Ceylon in its Historical Setting* (EJ Brill, 1972) 181.

41 *Ordinance No.5 of 1835*.

subsisted under the ancient Government of the United Provinces (Roman-Dutch Law in particular) encapsulated the courts in Sri Lanka.

One of the earliest instances where a three-judge bench of the Supreme Court of Sri Lanka (then Ceylon) pronounced on the competence of the courts to modify the Roman-Dutch Law was in the case of *Samed v. Segutamby*.[42] There, Jayawardene AJ pointed out that since the *Proclamation of 1799* established the Roman-Dutch Law as it subsisted under the ancient Government of the United Provinces as the common law of Sri Lanka, 'the presumption is that [this law], if not repealed by the local Legislature, is still in force'.[43] However, Bertram CJ observed that the fundamental principles of the common law 'may no doubt, in course of time, become modified in their local application by judicial decisions'.[44] According to His Lordship, such a development could take place 'only by a series of unbroken and express decisions'.[45] Thus, Bertram CJ inferred that the courts in Sri Lanka were entitled to develop the Roman-Dutch Law as long as it was done through a series of unbroken and express decisions.

Although the Supreme Court did not expressly refer to the provisions in the *Proclamation of 1799* nor the *Ordinance of 1835* in the case of *Chisell v. Chapman*,[46] Gratiaen J (with whom HNG Fernando AJ agreed) pronounced that the courts 'are powerless to alter the basic principles [of Roman-Dutch Law] themselves, or to introduce by "judicial legislation" fundamental changes in the established elements of an existing cause of action.'[47] His Lordship also observed that the courts which 'administer the Roman-Dutch law cannot disregard its basic principles although (on grounds of public policy or expediency) [they] may cautiously attempt to adapt them to fresh situations arising from the complex conditions of modern society.'[48]

The Privy Council had to consider the authority of the Sri Lankan courts to develop or alter the Roman-Dutch Law in the case of *Kodeeswaran v. The Attorney General*.[49] There, Lord Diplock who delivered the decision of the Court declared that 'although the Roman-Dutch law as applied in Ceylon under the Government of the United Provinces is the starting point of the "common law" of Ceylon, it is not the finishing point.'[50] While attempting to equate the common law of Sri Lanka with the common law of England, His Lordship went on to state that '[l]ike the common law of England the common law of

42 25 NLR 481.
43 25 NLR 481, 496.
44 25 NLR 481, 487.
45 25 NLR 481, 487.
46 56 NLR 121.
47 56 NLR 121, 127.
48 56 NLR 121, 127.
49 72 NLR 337.
50 72 NLR 337, 342.

Ceylon has not remained static since 1799.'[51] Citing the decision in *Samed v. Segutamby*,[52] His Lordship further stated that, '[i]n course of time [the Roman-Dutch Law] has been the subject of progressive development by a *cursus curiae* … as the Courts of Ceylon have applied its basic principles to the solution of legal problems posed by the changing conditions of society in Ceylon.'[53]

Since the Privy Council was the highest judicial authority of Sri Lanka at that time, one would assume its pronouncement that the courts in Sri Lanka are empowered to develop the Roman-Dutch Law would have finally settled the controversy and set a binding judicial precedent for the future. Yet, within a time gap of just eight days from the date of the decision in *Kodeeswaran*,[54] two judges of the Supreme Court in the famous case of *De Costa v. Bank of Ceylon*,[55] resolutely expressed a contrary view to that of the Privy Council. Having deliberated deeply on the accurate versions of the *Proclamation of 1799* and the *Ordinance of 1835*, HNG Fernando CJ emphatically stated in *De Costa*'s case that the 'Proclamation did not authorize any such deviations or alterations to be made by the Courts of Law.'[56] Expressing views on the *Ordinance of 1835*, His Lordship observed:

> *[T]he Legislature of Ceylon declared in 1835 that the Roman-Dutch Law shall continue to apply in Ceylon by virtue of the Proclamation of 1799, and after the enactment of the Ordinance of 1835, deviations and alterations from or of the Roman-Dutch Law were not permitted to any of the authorities specified in the Preamble to the Proclamation, and were permitted only if they were ordained by lawful authority.*[57]

As such, while 'the Proclamation of 1799 and the Ordinance of 1835 did not authorize *the Courts* to alter or deviate from the Roman-Dutch Law', '[f] rom 1835 at least, such deviations or alterations could be effected only by Ordinance.'[58] Referring to Chapter 12 of the Revised Edition of the Legislative Enactments of 1956, HNG Fernando CJ commented that 'the examination of the relevant Documents and of the Ordinance of 1835 has shown that [the said chapter] is not an accurate reproduction of the provisions of law relating to the application in Ceylon of the Roman-Dutch Law'.[59] In short, according to His Lordship, 'Section 2 of Chapter 12 [was] incorrect in purporting to permit any deviations or alterations other than those ordained by lawful authority.'[60]

51 72 NLR 337, 342.
52 25 NLR 481.
53 25 NLR 481.
54 72 NLR 337. This case was decided on 11-12-1969.
55 72 NLR 457. This case was decided on 18-12-1969.
56 72 NLR 457, 461.
57 72 NLR 457, 462.
58 72 NLR 457, 462.
59 72 NLR 457, 462.
60 72 NLR 457, 462.

Weeramantry J, who wrote a separate judgement in *De Costa*,[61] fully agreed with HNG Fernando CJ on the point that the *Proclamation of 1799* in its original form did not authorize courts of law to alter or deviate from the Roman-Dutch Law.[62] His Lordship added that 'the established Courts were at the time of Proclamation by no means the appropriate authorities to decide upon the deviations and alterations which the Proclamation envisaged' and under the *Ordinance of 1835*, '[t]he Roman-Dutch Law was … firmly enthroned as the common law of this country subject to such deviations as might be legislatively ordained.'[63] As such, 'there was no express legislative authority conferred on the courts to vary the Roman-Dutch law'.[64]

Despite the Privy Council decision in *Kodeeswaran v. The Attorney General*,[65] a three-judge bench of the Supreme Court in *Priyani Soyza v. Rienzie Arsecularatne*,[66] preferred to follow the view of HNG Fernando CJ expressed in *De Costa v. Bank of Ceylon*,[67] regarding the competency of the courts to alter the Roman-Dutch Law. There, Dheeraratne J (with whom Bandaranayake J and Ismail J agreed), firmly stated that the specific authorities that could determine the deviations and alterations mentioned in 'the Proclamation issued by the British Governor on 23rd September 1799, making the Common Law of the Island the Roman-Dutch Law, … did not include the Courts'.[68] Having examined the *dicta* of Lord Diplock in *Kodeeswaran*,[69] and the view of HNG Fernando CJ in *De Costa*,[70] His Lordship went on to state:

> *Unfortunately, the text of the 1799 Proclamation referred to by Lord Diplock in Kodeeswaran's case (at page 339), was that which was reproduced as the Adoption of Roman Dutch Law Ordinance (Chapter 12) of the 1956 Revision of the Legislative Enactments and not the text of the original 1799 Proclamation which judges in De Costa's Case (at page 461) referred to, having obtained it from Dr. G.C. Mendis work on the Colebrooke-Cameron Papers. In the 1956 version of the 1799 Proclamation referred to by Lord Diplock, in the Preamble cum the first Clause, the crucial words "subject to such [deviations] alterations, and improvements, as shall be directed or approved by the Court of Directors of the United Company of Merchants of England trading to the East Indies, or the Secret Committee thereof, or by the Governor-General in Council of Fort William in Bengal" were missing.*[71]

61 72 NLR 457.
62 72 NLR 457, 511.
63 72 NLR 457, 513.
64 72 NLR 457, 514.
65 72 NLR 337.
66 [2001] 2 Sri LR 293.
67 72 NLR 457.
68 [2001] 2 Sri LR 293, 304.
69 72 NLR 337.
70 72 NLR 457.
71 [2001] 2 Sri LR 293, 305.

For the reasons mentioned above, Dheeraratne J stated that His Lordship was inclined to 'adopt the views expressed by Fernando CJ in *De Costa*'s case … which have been reached after a careful analysis of the *complete* provisions of the 1799 Proclamation'.[72] Thus, His Lordship declared:

> *I think we are not entitled, as judges, to change the material of the Roman Dutch Law, but are only permitted to iron out its creases, whenever the necessity arises. Effecting structural alterations to the Common Law should be the exclusive preserve of the Legislature and such alterations have been done by the Legislature from time to time as the occasion arose, in several fields … I entirely agree with [the] learned President's Counsel for the plaintiff that in the socio-religious backdrop of Sri Lanka, loss of care and companionship should attract compensation. The legislature should take such a policy decision and lay down guidelines on which courts should calculate and assess the quantum of compensation.Those guidelines should indicate, for example, in the case of a death of a child attributable to a tortious act, whether compensation should vary according to the age of the child; whether brother or sister could claim compensation; whether the father or mother is entitled to claim more than the brother or sister; or should loss of the only child attract more compensation; and the like* [73]

This view of Dheeraratne J in *Priyani Soyza v. Rienzie Arsecularatne*,[74] appears to have been acknowledged by the Parliament of Sri Lanka and generally followed by the courts up until the recent decision in *Karunanayake and others v. Mannapperuma*.[75] Particularly in response to the decision in *Priyani Soyza*,[76] the Parliament enacted the *Recovery of Damages for the Death of a Person Act No.2 of 2019* which provided for the recovery of damages for the death of a person caused by a wrongful act, omission, negligence or default.[77] This Act confers a right of action on the spouse, parents, children, siblings, grandparents or guardians as the case may be, where the death of a person is caused by a wrongful act, omission, negligence or default of another.[78]Also, it enables the applicant in such an action to recover damages for: (a) the loss of that person's love and affection and care and companionship; and, (b)the mental pain and suffering.[79]

In *WVR Somaratne and another v. Nimal Archchige Nimal*,[80] and *Ceylon Tobacco Company Limited v. PL Padmini Fernando*,[81] the Supreme Court did not dispute the line of thinking

72 [2001] 2 Sri LR 293, 305-306.
73 [2001] 2 Sri LR 293, 306.
74 [2001] 2 Sri LR 293.
75 SC Appeal No.130/15, decided on 21-02-2022 (Unreported).
76 [2001] 2 Sri LR 293.
77 Preamble, *Recovery of Damages for the Death of a Person Act No.2 of 2019*.
78 Section 2, *Recovery of Damages for the Death of a Person Act No.2 of 2019*.
79 Section 3, *Recovery of Damages for the Death of a Person Act No.2 of 2019*.
80 SC Appeal No.49/2011 and SC Appeal No.50/2011, decided on 15-11-2016.
81 SC Appeal 102/2009, decided on 14-06-2018.

of Dheeraratne J in the case of *Priyani Soyza*.[82] Also, in *Jayakody v. Jayasuriya*,[83] the Court of Appeal acknowledged the decision in *Priyani Soyza* citing it with approval.[84] Moreover, in *Gamagedara Jayarathna v. Gamagedara Karunawathie and others*,[85] although the Court of Appeal did not expressly cite or refer to the decision in *Priyani Soyza*, it did observe that in terms of the provisions in the *Proclamation of 1799* and the *Ordinance 1835*, 'the Roman-Dutch Law was firmly enthroned as the common law of this country subject to such deviations as might be legislatively ordained'.[86] Further, the Civil Appellate High Court of the North Western Province in *WMSSB Waththegedara v. TLA Bawa and Another*,[87] observed that *Priyani Soyza*'s case 'is [a] well considered judgement by his Lordship Justice Ranjith Dheeraratne' although '[s]ome critiques say this case was decided on [a] strict interpretation of the law as opposed to establishing justice'.[88]

When the Supreme Court in *Karunanayake and others v. Mannapperuma*,[89] found that the view of HNG Fernando CJ in *De Costa*,[90] regarding the competency of the courts to develop the Roman-Dutch Law was flawed and misconceived, it not only revived Lord Diplock's *dicta* in *Kodeeswaran*,[91] but also challenged (at least indirectly) the view of Dheeraratne J in *Priyani Soyza*.[92] The three-judge bench that decided *Karunanayake and others*,[93] clearly favoured following *Kodeeswaran* over *Priyani Soyza*. In particular, Kodagoda J (with whom Dehideniya J and Surasena J agreed) firmly stated:

> *In view of the structure and hierarchy of courts of that era and the doctrine of Stare Decisis, the Supreme Court of Ceylon was bound at that time to follow the ratio decidendi of judgements of the Privy Council. In the circumstances, with due respect to the views contained in the judgement of former Chief Justice H.N.G. Fernando and to the high authority of the views of His Lordship, I must respectfully express my inclination to hold the opinion that (a) the views of Lord Diplock as regards the status of the Roman-Dutch law in the common law of this country reflect the correct position of the law, and (b) the proposition that deviations and alterations to the Roman-Dutch common law may be introduced through non-legislative means, such as by judgements of superior Courts, is lawful and hence correct.*[94]

82 [2001] 2 Sri LR 293.
83 [2005] 1 Sri LR 216.
84 [2005] 1 Sri LR 216, 220.
85 CA Case No.671/1997 (F) decided on 19-06-2018.
86 CA Case No.671/1997 (F) decided on 19-06-2018, 7.
87 NWP/HCCA/KUR/Appeal/131/2011(F), decided on 12-10-2017.
88 NWP/HCCA/KUR/Appeal/131/2011(F), decided on 12-10-2017, 10.
89 SC Appeal No.130/15, decided on 21-02-2022 (Unreported).
90 72 NLR 457.
91 72 NLR 337.
92 [2001] 2 Sri LR 293.
93 SC Appeal No.130/15, decided on 21-02-2022 (Unreported).
94 SC Appeal No.130/15, decided on 21-02-2022 (Unreported) 55.

Referring to the contention that the text of the *Proclamation of 1799* in Chapter 12 of the Revised Edition of the Legislative Enactments 1956 referred to by Lord Diplock in *Kodeeswaran*'s case omitted certain crucial words that were contained in the original Proclamation,[95] Kodagoda J observed:

> *[I]n view of what is evidently an amalgamated, amended and revised version of the 1799 Proclamation and the 1835 Ordinance being published under the title 'Adoption of Roman-Dutch Law' in the 1956 revised version of the Legislative Enactments, and in view of section 12(3) of the Revised Edition of the Legislative Enactments Act [No.2 of 1956], the need to question the authenticity of the texts of the Proclamation of 1799 and the Ordinance of 1835 does not any longer arise.*[96]

While Kodagoda J believed that 'there is no substantial error in the re-production of the combined effect of the original Proclamation of 1799 and the Ordinance of 1835 in the 1956 Legislative Enactments', His Lordship held that the 'Courts are obliged to take cognizance of and apply provisions of the statute contained in the revised Legislative Enactments (1956)' since presently what has the force of law are the contents thereof.[97]

Commenting on the aptness of legislative intervention to develop the common law as endorsed by the Court in *Priyani Soyza*,[98] Kodagoda J stated that '[i]t would be undesirable to leave [a] lacuna in the common law, in expectation of Parliament remedying it' partly because the 'Parliament has other legislative priorities.'[99] Also, 'the vitality of the common law should be retained by the judiciary by providing necessary interpretations and adaptations to it', without causing 'violence to the fundamental features of the existing common law'.[100] Moreover, according to His Lordship, the reason for the Parliament to refrain from codifying the residual common law of Sri Lanka 'has been due to its appreciation that the judiciary is ideally suited to interpret and adapt the ancient Roman-Dutch law to suit contemporary and evolving requirements of society, and thereby ensure the delivery of justice to litigants.'[101]

Regarding the role of common law judges, Kodagoda J was of the view that while the 'common law is vibrant, flexible and accommodates the ever-changing demands of contemporary human civilization, evolving human conduct and norms and collective values of society', the 'growth of the common law depends upon judicial activism' which is reflected in progressive judgements that (a) do not impinge on written law, (b) do not cause erosion of the core legal principles found in the common law, (c) do not violate

95 Per Dheeraratne J in *Priyani Soyza v. Rienzie Arsecularatne* [2001] 2 Sri LR 293, 305.
96 SC Appeal No.130/15, decided on 21-02-2022 (Unreported) 48.
97 SC Appeal No.130/15, decided on 21-02-2022 (Unreported) 49.
98 [2001] 2 Sri LR 293.
99 SC Appeal No.130/15, decided on 21-02-2022 (Unreported) 51.
100 SC Appeal No.130/15, decided on 21-02-2022 (Unreported) 51.
101 SC Appeal No.130/15, decided on 21-02-2022 (Unreported) 61.

the legislation and obstruct legislative intent, (d) are in the public interest, and (e) are orchestrated towards the delivery of justice.[102] In consideration of all these factors, Kodagoda J held:

> *[T] the interpretation and adaptation of the common law and cautious application of such interpreted and adapted principles of the unwritten law (in this instance the Roman-Dutch common law) to suit contemporary complex requirements of modern society, are within the ambit of the legitimate exercise of judicial power by Courts as contemplated in Article 4(c) of the Constitution. Nevertheless, any such adaptations of common law including the Roman-Dutch law should not be inconsistent with (a) fundamental and core principles and features of the applicable common law, (b) provisions of written law enacted by Parliament, (c) should be in [the] public interest, and (d) should ensure proper administration and the delivery of justice.*[103]

7. The Conflict

As the case law in the country stands today, it is not clear whether the courts in Sri Lanka are empowered or entitled to develop the Roman-Dutch Law. This is particularly because of the two conflicting decisions of the Supreme Court under the *Constitution of the Democratic Socialist Republic of Sri Lanka 1978* (*Constitution 1978*) in *Priyani Soyza v. Rienzie Arsecularatne*,[104] and *Karunanayake and others v. Mannapperuma*,[105] standing side by side.

The Supreme Court under the *Constitution 1978*, is the 'highest and final superior Court of record in the Republic' of Sri Lanka.[106] It is also the 'final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution'.[107] The judgements and the orders of the Supreme Court in all cases are final and conclusive.[108] Thus, the Supreme Court under the *Constitution 1978* occupies a position equal to that occupied by the Privy Council in the judicial hierarchy of Sri Lanka before 1971.[109] This enables the present Supreme Court to review decisions of the pre-1971 Supreme Court (irrespective of whether they are Full Bench or Divisional Bench decisions) because at that time they were reviewable by the Privy Council.[110] As such, there is no doubt about the power and competency of

102 SC Appeal No.130/15, decided on 21-02-2022 (Unreported) 60.
103 SC Appeal No.130/15, decided on 21-02-2022 (Unreported) 62.
104 [2001] 2 Sri LR 293.
105 SC Appeal No.130/15, decided on 21-02-2022 (Unreported).
106 Article 118, *Constitution of the Democratic Socialist Republic of Sri Lanka 1978.*
107 Article 127(1), *Constitution of the Democratic Socialist Republic of Sri Lanka 1978.*
108 Article 127(1), *Constitution of the Democratic Socialist Republic of Sri Lanka 1978.*
109 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 181.
110 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 181.

the present Supreme Court in *Karunanayake and others*[111] to review the decision in *De Costa v. Bank of Ceylon*,[112] particularly the view of HNG Fernando CJ on the aptitude of the courts to develop the Roman-Dutch Law. Also, there is no doubt that the judges in *De Costa*,[113] were bound by the Privy Council decision in *Kodeeswaran v. The Attorney General*,[114] because Privy Council was the highest court for Sri Lanka at that time.

Be that as it may, there appears to be no clear-cut answer as yet to the question of whether the Supreme Court under the *Constitution 1978* has the competence to review Privy Council decisions pronounced before 1971. Although on the general principles set out by the majority in *Walker Sons & Co Ltd v. Gunatilleke*,[115] it may be assumed that these decisions of the Privy Council could be overridden by the Supreme Court under the *Constitution 1978*,[116] whether a Divisional Bench of the Supreme Court could do so remains highly questionable.[117] However, it is pertinent to note here that it was a Divisional Bench (despite that it was a five-judge bench) in *Natalie Abeysundere v. Christopher Abeysundare and Another*,[118] that (purportedly) overruled the Privy Council decision in *The Attorney-General v. Reid*.[119]

Although the Supreme Court in *Karunanayake and others*,[120] held that the view of HNG Fernando CJ in *De Costa*,[121] regarding the competency of the courts to develop the Roman-Dutch Law was misconceived, it did not directly and expressly hold that the decision in *Priyani Soyza*,[122] was also misconceived. In any event, the Supreme Court in *Karunanayake and others*,[123] did not overrule the decision in *Priyani Soyza*,[124] and nor did the Divisional Bench which decided *Karunanayake and others*, have the competence to do so. The upshot of this is that both decisions in *Karunanayake and others*, and *Priyani Soyza* still remain valid in Sri Lanka in terms of the law. They do have equal authority and legal weight since both are decisions of Divisional Benches of the Supreme Court.

As Hutchinson CJ observed in *Perera v. Amarasooriya*,[125] '[w]hen a Court is confronted by two conflicting decisions of Courts of co-ordinate jurisdiction, it must decide

111 SC Appeal No.130/15, decided on 21-02-2022 (Unreported).
112 72 NLR 457.
113 72 NLR 457.
114 72 NLR 337.
115 SC 365/76 decided in 1980 (Unreported) cited in LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 180.
116 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 180.
117 Justice Saleem Marsoof, *The Quazi Court System in Sri Lanka and its Impact on Muslim Women* (MWRAF, 2011) 37.
118 (1998) 1 Sri LR 185.
119 67 NLR 25.
120 SC Appeal No.130/15, decided on 21-02-2022 (Unreported).
121 72 NLR 457.
122 [2001] 2 Sri LR 293.
123 SC Appeal No.130/15, decided on 21-02-2022 (Unreported).
124 [2001] 2 Sri LR 293.
125 12 NLR 87.

which of them it should follow'.[126] Citing this case as authority, Justice Saleem Marsoof (writing extra-judicially) has submitted that 'where there is a conflict between decisions of two courts which are equal in authority, a future court has the discretion to follow either of the two conflicting decisions'.[127] If this is so, it would be a matter of choice for the future courts to follow either *Karunanayake and others* or *Priyani Soyza* on the question of the competence of courts to alter the Roman-Dutch Law.

8. Concluding Observations

While it is not clear whether the conclusions of HNG Fernando CJ and Weeramantry J regarding the power of the courts to develop the Roman-Dutch Law in the case of *De Costa v. Bank of Ceylon*,[128] were *ratio decidendi*, as 'the judgements of two out of five judges cannot be regarded as laying down the *ratio* for the entire case',[129] nonetheless, it may be argued that these conclusions are *per incuriam* since they have been reached in ignorance of an authority binding on the Court - namely the Privy Council decision in *Kodeeswaran v. The Attorney General*.[130] It would also be pertinent here to note the observations of Professor LJM Cooray, where he has submitted that the *dicta* of HNG Fernando CJ and Weeramantry J regarding another matter in *De Costa* could be argued to be *per incuriam* because the Court did not cite or refer to the Privy Council decision in *Page v. Cowasjee Eduljee*.[131] Be that as it may, the Supreme Court in *Karunanayake and others v. Mannapperuma*,[132] has firmly rejected the view of HNG Fernando CJ in *De Costa* regarding the power of the courts to develop the Roman-Dutch Law. By logical implication, this would mean that the *dicta* of Dheeraratne J in *Priyani Soyza v. Rienzie Arsecularatne*,[133] would attract the same consequences in terms of the decision in *Karunanayake and others*, as Dheeraratne J in *Priyani Soyza* explicitly adopted the view expressed by HNG Fernando CJ in *De Costa's* case.[134]

Apart from that, it may be possible to argue that the *dicta* of Dheeraratne J in *Priyani Soyza v. Rienzie Arsecularatne*,[135] on the potential of the courts to develop the Roman-Dutch Law is *per incuriam* on the ground that it has been made 'in ignorance of some inconsistent statute'- namely the *Revised Edition of the Legislative Enactments Act No.2*

126 12 NLR 87, 88. See also, *Rabot v. De Silva* 10 NLR 140, 148; *Kanagaratna v Banda* 25 NLR 129, 136.

127 Justice Saleem Marsoof, *The Quazi Court System in Sri Lanka and its Impact on Muslim Women* (MWRAF, 2011) 38.

128 72 NLR 457.

129 LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 93.

130 72 NLR 337.

131 (1866) 14 LT 176, IR IPC 127 cited in LJM Cooray, *An Introduction to the Legal System of Sri Lanka* (2nd ed, Stamford Lake, 2003) 89.

132 SC Appeal No.130/15, decided on 21-02-2022 (Unreported).

133 [2001] 2 Sri LR 293.

134 See *Priyani Soyza v. Rienzie Arsecularatne* [2001] 2 Sri LR 293, 305-306.

135 [2001] 2 Sri LR 293.

of 1956.[136] As Dr Felix has pointed out '[o]nce the revised edition of the Legislative Enactments came into force it was binding and was, for all purposes, to be treated as an Act of Parliament.'[137] Since the Commissioner appointed in terms of the *Revised Edition of the Legislative Enactments Act No.2 of 1956* was specifically 'empowered to omit any preamble or legislation, where such an omission could be conveniently made, and to incorporate any legislative changes to the law', 'once the revised edition of the Legislative Enactments of 1956 was published, it was no longer necessary to look beyond the Adoption of Roman-Dutch Law Ordinance (Cap. 12) in order to ascertain the applicable text of the Proclamation of 1799 (as amended by Ordinance, No.5 of 1835)'.[138] Against this backdrop, it may be argued that the above mentioned *dicta* of Dheeraratne J in *Priyani Soyza* was made in ignorance of the provisions in the *Revised Edition of the Legislative Enactments Act No.2 of 1956*, but relying instead on a view (namely, the view of HNG Fernando CJ in *De Costa* which was rejected in *Karunanayake and others*) that might itself be argued to be *per incuriam*.

Be that as it may, as at present, the decisions in *Priyani Soyza v. Rienzie Arsecularatne*,[139] and *Karunanayake and others v. Mannapperuma*,[140] stand side by side in the legal system of Sri Lanka, conflicting with each other. While the former decision holds that courts in Sri Lanka are not entitled to develop the Roman-Dutch Law, the latter decision rejects that position. Resolving this conflict would be a matter for a Full Bench of the Supreme Court or the Parliament.

136 See *Jeyaraj Fernandopulle v. Premachandra De Silva and others* [1996] 1 Sri LR 70.

137 Shivaji Felix, 'A Decent burial for dead Concepts: Engaging *Causa*/Consideration under the Common Law of Sri Lanka' (2005) *Law College Law Review* 157, 166.

138 Shivaji Felix, 'A Decent burial for dead Concepts: Engaging *Causa*/Consideration under the Common Law of Sri Lanka' (2005) *Law College Law Review* 157, 166.

139 [2001] 2 Sri LR 293.

140 SC Appeal No.130/15, decided on 21-02-2022 (Unreported).

Part - II

JUSTICE NIMAL GAMINI AMARATHUNGA MEMORIAL AWARD

WINNING ARTICLE

INDIAN APPROACH OF PUBLIC INTEREST LITIGATION AGAINST CORRUPTION; A CRITICAL ANALYSIS

N.W.K.L. Prabuddhika Lankanganie*
Magistrate, Warakapola

1.1 Introduction

India is considered as of having one of the most renowned jurisdiction for having very active Public Interest Litigation[1] (PIL) tradition. "Even where Parliament enacts that a minister may make such order as he thinks fit for a certain purpose, the court may still invalidate the order if it infringes one of the many judge-made rules. The court will invalidate it, a fortiori, if it infringes the limits which Parliament itself has ordained."[2] Above mentioned statement of the very genius Wade and Forsyth explains that, even the legislature has a responsibility to not going against judge made law. When it comes to the practical scenario, Indian hemisphere makes the ideal environment to be inspired.

1.2 Application and Development of PIL in India

1.2.1. Constitutional Provisions as the backbone of PIL

According to the preamble of Constitution of Sovereign Socialist Secular Democratic Republic of India, it was established 'to secure to all its citizens: justice, social, economic and political liberty of thought, expression, belief, faith and worship, equality of status and opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation'[3] In its operation till today, together with the legislature and the executive, the judicial system of India has been living it up to its expectations.

With a very vast fundamental rights, unlike in Sri Lanka, they have identified the right to life expressly since it is the root of each and every right.[4] To strength the fundamental rights which are already secured through the supreme constitutional Articles, the Constitution of India provides another right through Article 32 of the very same Constitution, which is considered as the backbone to protect the rights of citizens, which is the right

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1 Herein after referred as PIL

2 H.W.R. Wade, C. F. Forsyth; Administrative Law; Oxford University Press; 9th Edition; page 5

3 The constitution of sovereign socialist secular democratic republic of India

4 Article 21, protection of life and personal liberty, no person shall be deprived of his life or personal liberty except according to procedure established by the law.

to Constitutional Remedies.[5] However when it comes to Sri Lankan context, it is yet to be advanced to match up with Indian Constitution.

Fundamental duties include several prominent articles which bind the ruler and the citizen individually and collectively. Some of duties warned of the executive and administrative bodies going corrupted way and on the other hand, when there is such an incident, they ensured that any bonafide individual or a group of people acts against it, since they have to abide by the Constitution and respect its ideals and institutions,[6] and when there is corruption it damages the sovereignty of the constitution, but there is a duty of the citizen to protect and to uphold and protect the sovereignty, unity and integrity of India.[7] Most of the time natural resources are endangered to be corrupted by influent executive and ministerial decisions for their own benefits and Indian draftsmen ensured to give a constitutional acknowledgement by including a duty to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.[8] And to prevent abuse of power and uphold public trust everyone has a duty to safeguard public property and to abjure violence.[9] Ultimately to make sure that good governance is preserved through balancing conflict between the legislature, executive and judiciary, these three pillars have a duty to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement.[10] Fundamental duties made a very good attempt of every part of the state to be inspired from the principles of state policy when they stipulating, executing and reviewing the law and when every Indian has a responsibility towards ensuring those fundamental duties being attained. Therefore in a larger way, the principles of state policy is no less than a right in India.

In the case of *Bandhua Mukti Morcha v Union of India*[11] it was stated that, "But if we want the fundamental rights to become a living reality and the Supreme Court to become a real sentinel on the qui vive, we must free ourselves from the shackles of outdated and out mode assumptions and bring to bear on the subject fresh outlook and original unconventional thinking." It was described in the landmark Indian decision of

5 Article 32 - Remedies for enforcement of rights conferred by this Part. - (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

6 Article 51A (a) of the Constitution of Sovereign Socialist Secular Democratic Republic of India

7 Article 51A (c) of the Constitution of Sovereign Socialist Secular Democratic Republic of India

8 Article 51A (g) of the Constitution of Sovereign Socialist Secular Democratic Republic of India

9 Article 51A (i) of the Constitution of Sovereign Socialist Secular Democratic Republic of India

10 Article 51A (j) of the Constitution of Sovereign Socialist Secular Democratic Republic of India

11 A.I.R. 1984 S.C. 802

S.P. Gupta v. Union of India and others[12] that 'if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with task of keeping every organ of the state within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the judicial review has been conferred upon the judiciary and it is by exercising the power which constitutes one of the most potent weapons in the armory of law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the state or its officers.'

This was discussed in the case of *Vineet Ruia v. The Principal Secretary, Ministry of Health & Family Welfare, Govt. of West Bengal & others*.[13] 'that the legislature has imposed duties on the local self- government institutions to maintain hygiene in the public domain and has empowered such institutions to take appropriate measures to combat the menace of an epidemic or deadly disease. However, these powers must be exercised by the donees of such powers responsibly and by ensuring that the rights of the citizen which are recognized by law, are not jeopardized or curtailed unnecessarily. We are of the firm view that the right of the family of a Covid 19 victim to perform the last rites before the cremation / burial of the deceased person is a right akin to Fundamental Right within the meaning of Article 21 of the Constitution of India.'

1.2.2. PIL Case law study in a nutshell; A critical analysis

In India they have a very creative judicial framework to strengthen good administration. As a country which has higher tendency of corruption and general public being the victim of the corrupt system, it is mandatory to have an active PIL tradition to act against corrupt activities and to remind the public servants, that the public properties shall have to be handled as a trust and they have to be a savior of them for the future generations. Because ultimately, individual and collective rights have to be secured through constitutional provisions. If not, by relaxing locus standi and interpreting law for the betterment of the people, the judiciary has to be the unofficial lawmaker through PIL. In the case of *Ashok Kumar Gupta and another v. State of U.P.*[14] it was held that "Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally."

In India, they have frequent examples of PIL actions as a method to prevent corruption and abuse of power. In the case of *A Registered Society v.Union of India (Petrol Pumps Matter)*[15] the Supreme Court found that the Minister of Petroleum Industries had

12 1982 AIR S.C. 149
13 WPA 5479 of 2020 with I.A. No. CAN/1/2020 (Old No. CAN 4144 of 2020)
14 (1997) 5 SCC 201
15 (1996) 6 SCC 175

allocated petrol pumps to his friends and political supporters, without going through the tendering process. this ensured to the minister's friends and political supporters an unfair advantage in obtaining the supply of petroleum products. The minister thereof found to have acted in bad faith and had breached the public trust. The Supreme Court ordered that the allocations so tainted be set aside and fresh allocations made in a fair and equitable manner. The instrumentalities of the court were left available for further action, so as to ensure that the Minister does make the fresh allocations equitably and fairly. The court, after receiving extensive evidence from outside resources, laid down guidelines which the Minister must strictly follow when making such allocations of petrol pumps in the future.[16]

As Indian context considered, the Constitution together with the judiciary gets along really well to keep the executive in its limits. They have expanded the locus standi to reach the betterment of the maximum. In the case of *S.P. Gupta v. Union of India*[17], the Indian Supreme Court had determined that any member of the public can maintain an application for an appropriate direction or order or writ and had stated that, "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right and such person or determinate class of persons is by reason of poverty, helplessness or disability or sociality or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction or order or writ in the High Court under Article 226 or in case of breach of any fundamental right to this Court under Article 32."[18]

In the case of *Vineet Narain v. UOI*[19], an accused terrorist was apprehended in Delhi. The Central Bureau of conducted searches after his questioning and confiscated two journals and two note books from the premises. They revealed the enormous sums paid to high-ranking politicians and officials. The petitioners requested that the above-mentioned offences be ordered to be investigated in line with the law based on the facts set out in the petition. It was directed to take the necessary steps to guarantee that investigative institutions such as the Central Vigilance Commissioner are not directly susceptible to political pressure while investigating instances of corruption. Additionally, this decision provided the CVC with expanded authority, including oversight of the CBI and the Enforcement Directorate. This would help minimize the uncertainty associated with corruption investigations and their impact on the rule of law.

16 Lakshman Mrasinghe; Public Interest Litigation and the Indian Experience; Its Relevance to Sri Lanka; Vol;15; Sri Lanka Journal of International Law (2003)

17 (A.I.R. 1982 S.C. 149),

18 Per Shirani A. Bandaranayake, J quoted in M. Azath S. Salley V. Colombo Municipal Council, et al S.C. (FR) Application No. 252/2007

19 (1998) 1 S.C.C. 226

In contrast, *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited et al*[20] the court has limited the standi on decision-making process by emphasizing if it is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. It has been cautioned that Constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. Mere disagreement with the decision-making process would not suffice.' Thus sometimes the judiciary is limiting its capacity on the policy decisions of the government and if it the action of the executive is not reasonable in any ground, then the court intervene to mend the way.

With the sudden outbreak of Covid 19 India has faced many issues due to lack of medical supplements which eventually led to be misused. Thus to protect rule of law Indian judiciary made some remarkable orders to secure that everyone must get equal opportunities when it comes to health care.[21] This case ordered the government regarding a uniform method otherwise which will cost on patients lives. It was emphasis that no hospital should be allowed to deny them entry solely based on this reason or any other issues with identity proofs since some patients were being refused service based on arbitrary factors. Some specific drugs are being sold at significantly inflated prices or in fake form. Thus the court ordered that if it considers necessary in the public interest, government can fix a ceiling price or retail price of the drug for a certain period.

Additionally, it denounced efforts to profit off people's suffering and helplessness. It was recommended that a special team be formed to investigate the sale of medical grade oxygen/COVID-19 medications at inflated costs and the manufacture of counterfeit substances, as well as the recovery of the aforementioned chemicals. Until the Government formulates such a policy, no patient in any State must be refused hospitalization or necessary medicines, even in the lack of identification evidence.

During proceedings on a PIL, the Gujarat High Court ruled that no patient should be denied treatment for arbitrary grounds. In this instance, Ahmedabad hospitals initially refused to admit patients who did not come through government-run ambulances. Thus, it is obvious that wherever there is corruption, the court always intervenes to ensure equality before the law. Thus, I believe that public involvement in the fight against corruption is significantly strengthened by legislative contributions that prevent plaintiffs from being targeted, and Sri Lanka is yet to be inspired by the same.

20 (2016) 16 SCC 818

21 SuoMotu Writ Petition (Civil) No.3 of 2021 IN RE: DISTRIBUTION OF ESSENTIAL SUPPLIES AND SERVICES DURING PANDEMIC "the Union Government, the State Governments /Union Territories and the parties, who appeared to have approached the High Courts to show cause why uniform orders be not passed by this Court in relation to Supply of oxygen; Supply of essential drugs; Method and manner of vaccination; and Declaration of lockdown"

In the case of *Shiv Shankar Sharma v. The State of Jharkhand*[22] it was prayed to issue pertaining to embezzlement of public money. Primary objections were raised on the ground of the maintainability of the action. They argued that the petitioner has rushed to the court by filing an instant writ without exhausting the alternative remedy available under the Code of Criminal Procedure. Eventually the court overruled the objections by stating that there is allegation of siphoning of huge public money jeopardizing the public interest and siphoning the national wealth cannot be ignored. Then decided to proceed to hear the matter on merit finding.

PIL is a creation of common law, thus even Writ petitions shall be accepted to be proceed even though it has failed to comply with technical requirements. In the case of *Chiranjit Lal v. Union of India*[23] the court was of the view that 'an application shouldn't be thrown out simply on the ground that the proper Writ or direction has not been prayed for.' According to their view only the integrity of the matter shall be considered, because, what matter ultimately is only justice. On the other hand when they have opened doors for anyone with a complaint to be proceeded with the case, then technical errors bound to be happened. Thus it is open to court to mould the relief and to grant the consequential on ancillary relief to restore the position to what it was before the impugned action was taken by the concerned authority.'[24]

1.3. Whistle Blower Protection Law as a method of protecting litigants against retaliation in India

Since India is regarded as having a vigorous anti-corruption PIL tradition, the responsibility of the legislature is to safeguard real anti-corruption organizations. Thus, in addition to admitting the aforementioned group to the court, the legislature enacted the Whistleblower Protection Act, 2014 to safeguard PIL petitioners and urge the public to take action against corruption.

If whistleblowers are safeguarded from executive intimidation, they have a specified level of protection, allowing them to speak up about corrupt activities. Currently, Sri Lanka's absence of a whistleblower protection legislation inhibits pressure groups fighting corruption from blowing the whistle, since they must be certain that they will be protected if they do, and that blowing the whistle would have no detrimental impact on their job or legal responsibility. This is essential not just to inspire confidence in workers, but also to foster mutual trust and an integrity-based culture. Additionally, given the nature of corrupt actions perpetrated by strong and well-connected people, anyone with knowledge about corrupt acts may fear retribution. Such A legal framework must exist to safeguard litigants and witnesses from physical and legal retribution.

22 W.P (PIL) NO 4290/2021

23 AIR 1951 SC 41

24 Consumer Education and Research Centre v. UOI 1995 S.C.C. 3

Not only stipulated law, but it is necessary to restore the faith on the judiciary that their efforts do not fade away by the neutral judiciary. Whistleblowers must believe that blowing the whistle will achieve some good and that appropriate action will be taken by the agency. This is a question to store of institutional credibility. The legitimacy of any anti-corruption institution is dependent upon the confidence it can generate from its stakeholders. The executive has to ensure that the judicial protection is not overshadowed by their intimidation. Only then Whistleblowers will blow the whistle if they know that their actions will result in appropriate action. This is dependent upon the reputation of the agency and factors like impartiality, objectivity, functional independence, operational efficiency and financial autonomy of the institution.

Whistleblowers must be aware that they have the ability to make disclosures and understand how to proceed, including who, how, and what information may be disclosed as part of their actions. This is acrucial factor for whistleblowing to be successful. Often, there is no clear advice on whether material is or is not private or when its publication is acceptable. Additionally, corrupted governments have the propensity to utilize secrecy and confidentiality as a tactic to guarantee that little information about how the government operates is accessible in the public realm. With the passage of the right to information legislation and the creation of the national and state information commissioners in India, this attitude has started to shift.[25]

Along with the above facts, Indian whistleblowers law has its own shortcomings which have to be amended to obtain the objectives of the Act. It doesn't allow anonymous complaints and it is accepted only upon the disclosure of the identity of the complainant. But when there are high pressure on the complainant or any other security issues arise then the complainant has to be protected from being spotlighted. To prevent the above issue it is paramount to accept anonymous complaints subject to penalty if it is a false information.

The above discussion demonstrates that, despite India's highly breached political culture, the legislature has taken care to safeguard the people's sovereignty by enacting much progressive legislation to protect the general public from corruption. Additionally, they have loosened their locus standi to the point that if a petitioner is unable to submit a petition owing to retaliation, they are permitted to bring the case using a pseudonym. Only the substance and authenticity will be taken into account. Encouraged by the freedoms granted in the fight against corruption, the Indian people do not fear coming to court.

25 See generally, Chris Wheeler, Drafting and Implementing Whistleblower Protection Laws, in CONTROLLING CORRUPTION IN ASIA AND THE PACIFIC 127, 127-45 (Asian Development Bank 2004), available at http://www.oecd.org/site/adboecdanti-corruptioninitiative/ regionalseminars/35137772.pdf

1.4. Why PIL has to be regulated to protect the rule of law and good governance.

As a remedy of common law, PIL has been doing a tremendous duty towards protecting the rights of people at large. Judge's creativity and the application of rules of interpretation protected general public from corrupted practices of the executive and administrative bodies. But that made judicial populism and eventually, sometimes this may cause heavily on elected legislature and executive to be tied up to the extreme limits, that they are being checked unnecessarily. Sometimes for the future of the state, the executive arm has to take some unpopular decisions by using their discretion. Generally, Policy amendments are not subject to the judicial review. But extreme active judiciary can interfere even on these decisions.

When it comes to sensitive topics like development and public security, the decisions may effect on individual rights, but collectively, if the outcome is much needed for the public benefit, the public interest shall have to prevail over individuality. But, if the country has an overly active PIL tradition, this may lead some over enthusiastic attention seekers go against that decision and challenge it for their own benefit. Especially, India has been experiencing the very same issue over the years. In the case of *Ajai Kumar Singh v. State of U.P.Thru Secreatry*,[26] the petitioner has comewith a case filed by a practising lawyer and incidentally he met some prospective bidders of the land in question who have filtered out certain information which reveals the deliberate activities of the respondents with an ulterior motive to fill up their wallets, resulting in heavy losses to the public exchequer. Authorities had been charged with corruption. However, it was proven that 'there is not even an iota of evidence to prove that respondents caused any loss to the public exchequer or they acted in a fashion to help bidders. Curiously enough no bidder has come forward to challenge the entire transaction and the petitioner, who is not aggrieved person has assailed the auction of the respondents without any locus on an economic matter which is not in violation of any rule'. This was held that, 'Thus this petition has not been filed with clean hands. The conduct of the petitioner dis- entitles him to maintain the petition.'

Thus it is necessary to regulate PIL petitioners and shall have to have enough space for the development and individual freedom. In the case of *M. I. Builders Pvt.Ltd v. Radhey Shyam Sahu and others*,[27] it was questioned a building construction site in a park which was not only of great historical significance but its maintenance was necessary from the environmental point of view. Since the decision was an arbitrary, it was ordered several blocks of the underground shopping complex shall be dismantled and demolished and on these places park shall be restored to its original shape. It was held that, 'the constitutional power conferred on the government cannot be exercised by arbitrarily or

26 Writ Petition No.1093 (M/B) of 2006 PIL

27 http://indiankanoon.org/doc/1937304/ decided on 26.07.1999

capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the government has a public element in it and it must, therefore, be informed with reason and guided by public interest…. 'every action taken by the government must be in public interest; the government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated.'

Thus the court has to interfere only, when there is an infringement of a right. Otherwise the trust that has been vested upon the court may shade away. This stand is described in the case of *Federation of Railway Officers Association and others v. Union of India*,[28] ''Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of the power, the Court will not interfere with such matters."

As elaborated previously, The frequent abuse of PIL in Indian jurisdiction has made the Supreme Court of India to issue several directions to protect the sanity and purity of the PIL which is a milestone of regulating PIL tradition. These are;

(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this Court immediately thereafter.

(3) The courts should prima facie verify the credentials of the petitioner before entertaining a PIL

(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The courts before entertaining the PIL should ensure that the PIL is aimed at redresses of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations.

28 AIR 2003 SC 1344

As a result of the above regulations the court has recently dismissed the case of *Pratyush Prasanna and others v. State of NCT of Delhi*.[29] In this case Delhi high court dismissed the petition which alleged that government of Delhi was misusing public money. The petitioner prayed for an investigation into the funds collected by the government of Delhi for Covid 19 relief but made no effort to find out the information using the right to information Act, 2005. He merely relied on a tweet posted by a random person. The court pulled up the petitioner for not doing homework before filing the petition and hence was asked to pay Rs. 50000/- for abusing PIL.

From the aforesaid, Sri Lankan judiciary can extract the serum of it to protect the sanity of PIL. Because 'Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redresses of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta.'[30]

1.5 Summary

In conclusion, it is clear that PIL can be used as a weapon against corruption. When there is commission of illegal or arbitrary act, a genuine bonafide person or a group of people can approach to the court for asking to redress the decision. But extreme interference of the court can destroy the sanity of the court and it may lead shake rule of law and separation of power. Not only that, but it may cause to distract the development procedure of the country which will lead the elected legislature and executive to be afraid of taking unpopular, yet progressive decisions. Thus PIL actions has to be taken into consideration of the court very vigilantly and when there is an application of a meddlesome busybody, to discourage them there has to be some kind of punitive method. By adopting above process, good governance, democracy, constitutionalism and ultimately, the sovereignty of people can be prevailed from getting abused.

'In the absence of efficient institutions and ineffective enforcement of laws, the societal attitude toward corruption is probably the most critical factor in fighting corruption. As already said, sincerity cannot be regulated. No amount of legal limitations would be effective as long as society is accepting and accommodating. Thus, the judiciary's approach of taking action against corrupt acts without regard for the wrongdoer's position, and loosening the locus standi via PILs, was a watershed moment in India.[31]

29 WP©5117/21 decided on 03.05.2021

30 Ajai Kumar Singh v. State of U.P. Thru Secretary; Writ Petition No1093 (M/B) OF 2006 (PIL)

31 Krishna K. Tummala; Combating Corruption: Lessons Out Of India International Public Management Review; Volume; 10 · Issue 1 · 2009 · © International Public Management Network electronic Journal at http://www.ipmr.net

THE LEGAL ODYSSEY: PRE INDEPENDENCE TO POST INDEPENDENCE

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Sri Lankan Legal System

Many different systems of law have affected the development of law of Sri Lanka, earlier known as Ceylon. Our legal system did not suddenly descend upon us, nor is it as sometimes supposed, the product of colonial rule. Many basic concepts continue to remain part of our legal system because they are an integral part of what we are in Sri Lanka and what we endeavor to safeguard as essential to our existence as an organized society and dispensing justice is one of them. From ancient times it has been the endeavor of Kings and governments to ensure fairness in balancing the interests of opposing citizens and of individuals against the state. The achievement of justice has always been a matter of high priority.

There exists a multiplicity of laws as a result of historical development and due to the place occupied by various systems. Thus, the legal system of Sri Lanka is described as a synthesis of different systems of law, procedures and administrative experiences owing to invasions by various foreign powers from time to time, prominent been from South India and followed by Europeans beginning in 1505. The legal system of Sri Lanka is therefore a mixture of Roman Dutch Law, English Common Law, Kandyan Law, Thesawalamai Law and Muslim Law. Thus, the criminal law is based on English Law while much of the common law is Roman Dutch Law, with certain aspects such as marriage, divorce and inheritance associated with Kandyan Law, Thesawalamai Law and Muslim Law based on the ethnicity and geographical location.

Monarchy

Sri Lanka has a rich and deep rooted history than can be traced back through the first entries in the *Mahavamsa* to 543 BCE.[1] The kingdoms that flourished 300 years thereafter, until occupation of the Maritime Provinces by the Portuguese, the Dutch and the entire island by the British, recognized the King as the fountain of justice. According to the *Mahavamsa,* the aboriginal inhabitants of Lanka were mainly *Yakka, Rakshasas* (commonly accepted as demon worshipers) and the *Naga* (commonly accepted as

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1 Before the Common Era

Serpent Worshipers) tribes.[2] However, the constant interactions with the Indian invaders brought in the culture, practices of the Indians to Lanka.[3] The arrival of *Arahath Mahinda* and Buddhism saw a second wave of Aryan influence on the Lankan society.[4] In the course of its growth for almost twenty three centuries the Sinhalese legal system gathered material from various quarters.[5] Hayley states "*It was essentially the custom of the realm, known to the people, administered by judges, free from all interference by the courts of the King and marred by no sophisticated interpretation*".[6] According to Knox the Sinhalese had an organized justice system stemming from the village level with appeals to higher officers of Court and finally to the King himself.

The King was personally responsible for the maintenance of law and order and the dispensation of justice. The King endeavored to rule justly, righteously and impartially in accordance with the ten-fold code[7] – *dasarajadharma*[8]. The ten virtues specified in the *Jataka* verse: giving alms (*dana*), leading a moral life (*sila)*, liberality (*pariccaga*), fair dealing (*ajjava*), gentleness (*maddava*), self-discipline (t*apa*), freedom from wrath (*akkodha*), mercy (*avihimsa*), patience (*khanti*), "peaceableness" (*avirodhana*)[9]. The ten meritorious works (*dasapunnakriya*) are a similar list of royal virtues, or they are identical with the *dasarajadharma*.[10] The King thus endeavored to follow the norms relating to *dharma, viniscaya-dharma, nyaya, manuniti, manupamaniti, vohara, raja vohara, vyavahara, caritta, pubbacaritta,* founded partly upon the customary laws and usages of the indigenous people, and those of immigrants invaders and visitors of the sub-continent.[11] There were also legislation, royal decrees, edicts and orders.[12] Records were kept of judicial precedents (*pubbacaritta*) to ensure justice by equality in the application of the laws.[13] There were law reports recording precedents from the time of Udaya I (797-801 AC).[14] Decisions being systematically recorded is also evidenced by the Badulla Pillar Inscription of the reign of King Udaya IV (946-954 AC)[15].

Since the monarch himself adjudicated upon certain matters, it was essential that the future ruler be trained in and acquire a specialized knowledge of the laws of the realm.[16]

2 Lakshman Marasinghe, Sharya Scharenguivel, 'Compilation of Selected Aspects of the Special Laws of Sri Lanka', 1.
3 Ibid.
4 Ibid.
5 Ibid.
6 Ibid.
7 Charity, morality, altruism, honesty, gentleness, self-control, non-anger, non-violence, patience and uprightness
8 https://www.en.wikipedia.org/wiki/Dasavidha-r%C4%81jadhamma accessed 26.07.2022
9 A.R.B. Amerasinghe, 'The Legal Heritage of Sri Lanka', 144.
10 Ibid.
11 A.R.B. Amerasinghe, above n 9, 7-32.
12 Ibid, 260.
13 Ibid.
14 Ibid.
15 Ibid.
16 A.R.B. Amerasinghe, above n 9, 188-191

In order to ensure there was adequate access to justice, the day to day resolution of disputes was delegated to others from very early times. Justice was administered through a hierarchy of courts, with the village tribunals (*gam sabhas*) at the lowest levels to settle small disputes. At the next level, villages were grouped together, ten at a time (*dasa gam*).[17] There was a communal court operating at this level composed of a headman and citizens who were selected for their knowledge of the law (*vohara*) and other relevant disciplines (*sastra*) and for their social standing.[18] The court was endowed with wide powers, including the power of inflicting capital punishment.[19] The citizens of these village clusters were collectively held responsible for the maintenance of law and order and the failure to produce a criminal resulted in the imposition of a collective fine on all the members of the relevant village.[20] These tribunals were supervised by the King's officers.

Appeals were permitted from each tribunal. A decision of the village magistrate (*gramabhojaka*) could be canvassed before a provincial judge (*janapadabhojaka*) and his decision could in turn be challenged before the minister of justice (*vinicchaya-mahamacca*); and the minister's verdict could be placed before the minister of national security (*senadhipathi*).[21] The highest court was earlier referred to as the *maha-vinici a*nd subsequently as the *maha-naduwa*.[22] This was the Supreme Court and it is referred to in the Situlpahuwa inscription of King Gajabahu (174-196 AC).[23] Eventually, a matter could go up to the King who could be depended upon to do the right thing.

A blot on the administration of justice during that time was the harnesses of punishment. Knox had recorded that barbarous punishments were inflicted depending on the whims and fancies of the King. Sometimes punishment was ruthlessly imposed on the families and even associates of the guilty. Punishments varied from banishments to cruel and degrading treatment. Mutilation by cutting off hands and feet and noses and toes; tearing of jaws for transgressing royal orders; pulling out flesh with pincers and branding with hot irons to extract confessions; being made to stand on red-hot sandals for effacing brand-marks; beating with clubs and torture are some of the things that were done to suspects and convicts.[24] Not even those in holy orders were spared.

17 Ibid, 269 - 346
18 Ibid.
19 Ibid,59.
20 *Epigraphia Zeylanica* 1.6.250
21 A.R.B. Amerasinghe, above n 9, 269-354.
22 Ibid.
23 Ibid.
24 A.R.B. Amerasinghe, above n 9, 54 – 80.

Colonial Period

The great history of Sri Lanka reveals that this island remained colonized for well over four decades beginning in the 16th Century with the arrival of the Portuguese.

Portuguese

The Portuguese were the first European power to exercise dominion over Ceylon. They conquered only a part of the island and occupied Ceylon from 1505 to 1656. The Portuguese did not introduce their own system of law into Ceylon and interfered little with administration of the areas under their control. However, from the period of Portuguese rule, a distinction was made between the laws and customs of the Kandyan[25] and low country[26] areas. The Portuguese did not occupy the Kandyan Provinces and thus in no way influenced the Sinhala law in the Kandyan province. However, the laws and customs in the Maritime Provinces came under the influence of Portuguese. It is said that at the Malwana Convention of 1597, the Portuguese agreed to maintain and administer the laws and usages of the Sinhalese in the Maritime Provinces which came under their sway. Further, the Sinhala laws and customs in the Maritime Provinces which came under the growing influence of Portuguese customs changed their character in course of time.

Dutch

The Dutch who expelled the Portuguese and ruled the coastal areas of Sri Lanka from 1656 to 1796, took an incomparably greater interest in judicial administration than the Portuguese. Commander Van Goen, in 1661, in his instructions to Governor Van Der Meyden of Sri Lanka, observed that "*Justice is the foundation of every good government and its administration must therefore be entrusted to the most honest and ablest persons that can be found.*" The Dutch introduced Roman-Dutch law moulded by Grotius, the father of international law, and Voet, the prince of commentators, to Sri Lanka which is today the common law of the country, as they carried the law of their homeland into their colonies. The original intention of the Dutch was to retain and apply the existing laws to the local inhabitants, and the Dutch laws only supplementing the existing laws, where necessary. In a memoir written in 1665 by A. Pavilioen, it is stated: "*Justice is administered to the Dutch and other Europeans according to the laws in force in the fatherland and the Statues of Batavia. The natives are governed according to the customs of the country, if these are clear and reasonable, otherwise, according to our laws.*" Although in criminal matters the Dutch applied their laws universally, in civil matters they endeavored to apply the local laws and customs where they were "clear and reasonable". A compilation of ancient customs and rules of the Tamils of Jaffna in Northern Province, (*who were said to have had an "obstinate attachment" to their "old custom and habits*"), known as the "*Tesavalamai Code" was codified in 1707.* A compilation was also made of the laws and customs of the

25 Consisted of the central area and the north central plain of the island

26 Coastal areas outside the Kandyan Kingdom

Tamils of the Mukkuvan caste and of the Muslims of Puttalam district. A short code relating to the law of inheritance and marriage of the Muslims was also complied. The Dutch also established a court system. However, as the Dutch never ruled the Kandyan Provinces, they did not in any way influence Sinhala law in those areas. Further, the Dutch towards the latter part of their rule also established the post of Advocate Fiscal.

British

There was a profound influence of English law in the development of the laws and legal system of Sri Lanka, due to the long tenure of the British rule. In 1796, the British conquered the island of Ceylon and the Maritime Provinces which remained under the control of the Dutch. Subsequently, the same territory was ceded by the Dutch to the British in 1802. The Kingdom of Kandy which managed to maintain its territorial integrity during the reign of the Portuguese and the Dutch was conquered by the British in 1815. As the British had acquired Sri Lanka as a ceded colony, the law that was already in force prior to the cession continued in force until changed. The principle that the laws of the colony continue in force, subject to certain qualification, until changed by the deliberate act of the new sovereign, was followed by the courts in Sri Lanka.[27] This principle was enunciated in Campbell vs Hall decided in 1774 A.D. Consequently, the Roman Dutch law and the customary laws of the Sinhalese, the Tamils and the Muslims continued in force.[28] Thus, the Kandyan law was administered in the Kandyan Province after 1815, while the Islamic law was applied as a strict personal law to Muslims in relation to matters of succession, rights of inheritance and matrimonial affairs and the Tesawalamai law, a personal law with a peculiar territorial limitation, governed disputes between Tamil inhabitants[29] of the Northern Province.

A large number of statutes incorporating English law principles were passed during the reign of the British, beginning with the Proclamations of 1799 and 1801 which established the original Courts of Civil jurisdiction and set out the provisions relating to the procedure to be followed in civil actions. Charter of Justice granting trial by Jury was promulgated in 1812. This was followed by the Charter of 1883 which established a District Court in each District. In 1889 the Courts Ordinance was enacted consolidating the administration of justice system in the country and provided for two types of courts: (a) those concerned with the "ordinary administration of justice, civil and criminal" and (b) other courts and tribunals. The court structure in order of hierarchy consisted of the Supreme Court comprising in 1889 of the Chief Justice and two Puisne Justices[30], exercised original criminal jurisdiction only in those cases in which no other court had competence, such as offences against the State, murder, culpable

27 L.J.M. Cooray, 'An Introduction to the Legal System of Sri Lanka', 7.

28 Ibid.

29 Was applicable to Malabar inhabitant of Northern Province.

30 The number of Puisne Justices was later increased from time to time.

homicide not amounting to murder, rape and grave types of extortion. The Supreme Court did not have jurisdiction to conduct civil trials, but its original civil jurisdiction was exercised in issuing writs of habeas corpus and quo warranto, in granting injunctions to prevent irremediable mischief before a matter was brought before an original court. In order of importance, the District Courts came immediately after the Supreme Court, followed by Courts of Requests, Magistrates' Courts and the Rural Courts. The Districts Courts were given limited Admiralty jurisdiction by the Ceylon Courts of Admiralty Ordinance No.02 of 1891, the Supreme Court being the Court of Admiralty for Ceylon, however, exercising Prize jurisdiction in terms of the Naval Prize Act of 1864[31] and the Prize Courts Act of 1894.[32] The Courts of Requests had power of making determinations referred to under the Police Ordinance, the Land Acquisition Act and the Town and Country Planning Ordinance. The Police Courts created by the Courts Ordinance of 1889 were in 1938 designated as Magistrate' Courts. Lowest in hierarchy of "the ordinary Courts of law" were, the Rural Courts, described as the "people's courts of small causes". These descendants of *gamsabhavas* which Judicial Commissioner Wright described as "courts of arbitration in small local matters", which later functioned as "village tribunals, committees and councils" under the Courts Ordinance of 1889, became more formal courts in 1945 in terms of the Village Tribunals Ordinance No.12 and 13 of 1945. Although they were courts of law, they were required "not merely to adjudicate, but invested with the duty by all lawful means of endeavouring to bring the parties to an amicable settlement and to remove, with their consent, the cause of the grievance between them". Further, legal representations were not permitted in the Rural Courts.

Enactment of Courts Ordinance 1889 was followed by the enactment of the Civil Procedure Code No.02 of 1889, which consolidated the laws relating to the procedure of the Civil Courts in island. This significant piece of legislature though amended from time to time remains in force to date. Similarly, the administration of criminal justice too was codified during the period of the British regime. Both the Penal Code and the Criminal Procedure Code were enacted in 1883 and the Evidence Ordinance in 1896. These were the key sources of the Law of the criminal Justice system in Sri Lanka. The Criminal Procedure Code enacted in 1883 was thereafter replaced by the Criminal Procedure Code No.15 of 1898, and remained in force for nearly eight decades until it was replaced by the Administration of Justice Law No.44 of 1973. Presently, the Code of Criminal Procedure Act No.15 of 1979 which replaced the Administration of Justice Law, along with the Judicature Act No.2 of 1978 remains the key laws governing the conduct of criminal trials. The Penal Code and the Evidence Ordinance too continues to be in force with their subsequent amendments.

31 https://www.legislation.gov.uk/ukpga/Vict/27-28/25/contents accessed 02.08.2022

32 https://www.legislation.gov.uk/ukpga/Vict/57-58/39#:~:text=(5)A%20court%20duly%20authorised,forfeitures%20incurred%20during%20the%20war accessed 02.08.2022

Independence

The British colonial rule was also characterized by successive Constitutions which saw a gradual evolutionary process culminating in 1948 with the granting of independence. The Constitution was contained in several documents, namely, The Ceylon Independence Act,[33] the Ceylon Independence Order in Council,[34] the Ceylon Independence (Commencement) Order in Council,[35] the Ceylon (Constitution) Order in Council,[36] and the Ceylon Constitution (Special Provisions) Act.[37] There was also a Defense Agreement and an External Affairs Agreement between the government of the United Kingdom and Ceylon to regulate relations between the two counties in respect of defense and external affairs. There was also a Public Officers Agreement transferring to the government of Ceylon the responsibilities of the government of United Kingdom in respect of officers in the public service appointed with the consent of the Secretary for State for Colonies. Section 52(1) of the Ceylon (Constitution) Order in Council provided for the appointment of a Chief Justice, Puisne Judges of the Supreme Court and Commissioners of Assize.

1972 Constitution

With a new government taking office in May 1970 pledging to effect radical changes, a Constituent Assembly appointed by the government in July 1971 adopted basic resolutions leading to the enactment of a new *Constitution of Sri Lanka* on 22 May 1972. Ceylon, as it was known during the British period became Sri Lanka, which was declared to be a "free, sovereign and independent republic". The Constitution, being "autochthonous", derived its authority from the People in whom sovereignty was declared to be vested. The 1972 Constitution not only provided that the National State Assembly as the supreme pillar exercising State power, legislative, executive and judicial, but also contained express provision prohibiting judicial review of the constitutionality of legislation which the Supreme Court obtained from the Independence Constitution. Article 49 provided that the Speaker of the Assembly should certify every Bill passed and that such certificate could not be called in question by anyone including any institution administering justice. Article 48(2) provided that "no person or institution, including an institution administering justice, shall have the power or the jurisdiction to inquire into, pronounce upon or in any manner call in question the validity of any law of the National State Assembly." However, the 1972 Constitution made provisions for a Constitutional Court to examine Bills and report thereon as to the manner in which a Bill should be passed so as to be in accordance with the Constitution. While a Fundamental Rights

33 https://www.legislation.gov.uk/ukpga/Geo6/11-12/7/enacted accessed 02.08.2022

34 https://www.lawnet.gov.lk/ceylon-independence-order-in-council/#:~:text=(1)%20The%20Governor%2DGeneral,pleased%20to%20assign%20to%20himaccessed 02.08.2022

35 https://www.lawnet.gov.lk/ceylon-independence-commencement-order-in-council-3/ accessed 02.08.2022

36 https://www.lawnet.gov.lk/ceylon-constitution-order-in-council-3/ accessed 02.08.2022

37 https://www.lawnet.gov.lk/ceylon-constitution-special-provisions/accessed 02.08.2022

chapter was enshrined in this constitution the enforcement of its jurisdiction was not given to the court. The Administration of Justice Law No.44 of 1973 repealed most of the previous legislation regarding the judiciary including the Courts Ordinance and Courts of Admiralty Ordinance. It removed the original criminal jurisdiction from the Supreme Court and curtailed the issuing of mandates in the nature of writs against a Criminal Justice Commission. The appellate authority which the Privy Council had had until 1971 was abolished as the Supreme Court became the last resort in both civil and criminal cases. The previously existing Judicial Service Commission was replaced by a Judicial Services Advisory Board and a Judicial Service Disciplinary Board. Then the Second Republican Constitution and the Judicature Act of 1978 solidified the framework of the Supreme Court which functions today.

1978 Constitution

The Present Constitution of Sri Lanka was promulgated on 17th August 1978 as the Supreme Law of the Democratic Socialist Republic of Sri Lanka. The Constitution lays down the basic framework of the system of government. It is confined to the main principles and rules relating to basic matters such as the Source of Sovereign Power, the Legislature, the Executive, the Judiciary, the Process of Constitutional Amendment and the definition, guarantee and enforcement of Fundamental Rights.

In Article 1 of the 1978 Constitution the State of Sri Lanka is described as "a Free, Sovereign, Independent and Democratic Socialist Republic." The Second Republican Constitution declares Sri Lanka a unitary state and vests sovereignty in its people. Sovereignty while being inalienable includes the powers of government.The roots of the doctrine of separation of powers are engraved in Articles 3 and 4 of the Constitution. Article 4 of the Constitution, describes the mode in which the powers of government are to be exercised. That is to say: (a) The legislative power of the people shall be exercised by Parliament, consisting of elected representatives of the people and by the people at a Referendum (b) The executive power of the people, including the defense of Sri Lanka, shall be exercised by the President of the Republic elected by the people (c) The judicial power of the people shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to parliamentary privileges, immunities and powers of Parliament and of its Members, wherein judicial power of the people may be exercised directly by Parliament according to law.

The Supreme Court consists of the Chief Justice and of not less than six and not more than sixteen other Judges[38], while the Court of Appeal consists of the President of the Court of Appeal and of not less than six andnot more than nineteen other Judges.[39] The

38 Constitution, Article 119 (1).

39 Constitution, Article 137.

Supreme Court has power to act notwithstanding any vacancy in its membership, and no act or proceeding of the Court shall be, or shall be deemed to be,invalid by reason only of any such vacancy or any defect in the appointment of a Judge.[40] The Supreme Court is the highest and final superior court of record and subject to the provisions of the Constitution exercises: jurisdiction in respect of constitutional matters; jurisdiction for the protection of fundamental rights; final appellate jurisdiction; consultative jurisdiction; jurisdiction in election petitions; jurisdiction in respect of any breach of the privileges of Parliament; and jurisdiction in respect of such other matters which Parliament may by law vest or ordain.[41] The present Constitution did not reintroduce judicial review of legislature but vested Supreme Court with the exclusive jurisdiction of pre-enactment judicial review to examine the consistency of Bills with the provisions found in the Constitution. Article 80 (3) of the Constitution lays down that where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed on it, no court or tribunal shall inquire into, pronounce upon or in any manner call in question the validity of such an Act on any ground whatsoever. However, by Article 120 the Supreme Court is conferred with jurisdiction to determine any question as to whether any Bill or any provision in such Bill is inconsistent with the Constitution.

Furthermore, the Supreme Court has sole and exclusive jurisdiction to hear and determine issues relating to the interpretation of the constitution.[42] The sole and exclusive powers of deciding cases relating to infringement or imminent infringement of fundamental and language rights stated in chapters three and four of the Constitution, by administrative or executive action is vested with the Supreme Court.[43] In this connection, it should be mentioned that although the Constitution of 1972 declared the fundamental rights of citizens, remedial action was difficult to come by. The 1978 Constitution significantly improved access to relief in that regard. The rights and freedoms are spelt out in greater detail, the restrictions more narrowly tailored and most important of all, an enforcement mechanism is set out in the Constitution. Several fundamental rights applications were filed before the Supreme Court and a body of case law developed in this area. The Supreme Court is also the final Court of civil and criminal appellate jurisdiction for errors in fact or law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgments and orders of the Supreme Court in all cases is final and conclusive.[44] In its consultative jurisdiction the court provides its opinion to issues regarding a question of law or fact that has arisen or is likely to arise and is of public importance, referred to it

40 Constitution, Article 119 (2).
41 Constitution, Article 118.
42 Constitution, Article 1250 (1)
43 Constitution, Article 126.
44 Constitution, Article 127 (1).

by the President.[45] The supreme Court also inquires into and reports its determination regarding allegations put forward by the Speaker on a resolution by a Member of Parliament under Article 38 (2) (a) alleging that the President is permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that the President has been guilty of intentional violation of the Constitution, treason, bribery, misconduct or corruption involving the abuse of the power of his office or any offence under any law, involving moral turpitude.[46] Such opinion, determination and report shall be expressed after consideration by at least five Judges of the Supreme Court, of whom, unless he otherwise directs, the Chief Justice shall be one.[47] The Supreme Court also has the power to determine any legal proceeding related to Presidential elections or validity of a referendum, as well as hear appeals from a judgment of the Court of Appeal in an election petition case.[48] In addition to this the Supreme Court has power to take cognizance of and punish any person for the breach of the privileges of Parliament.[49] The Chief Justice with previous consent of the President could appoint the President of the Court of Appeal or any other judge of the Court of Appeal as ad hoc judges when the required quorum of judges is not available in court.[50] It is vested with the powers of establishing regulations for the entire judicial system of the country. These rules include those of hearing appeals, granting bail, stay of proceedings, the admission, enrolment, suspension, removal and the etiquette rules of attorneys-at-law, attire of judges and attorneys-at-law and the manner in which the jury is prepared, summoned, empanelled and challenged.[51]The Chief Justice, President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal are appointed by the President by warrant under his hand and in making such appointments, the President shall seek the observations of a Parliamentary Council.[52] In terms of the Constitution Judges of the Supreme Court and Court of Appeal could hold office during good behaviour and can serve until the retirement age of 65 and 63 years respectively.[53] The Judges of the Supreme Court and Court of Appeal cannot be removed except by an order of the President made after an address to the Parliament and supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehavior or incapacity.[54] A resolution for the presentation of such an address can be entertained by the Speaker or be placed on the Order Paper of Parliament only if notice of the resolution is signed by not less than

45 Constitution, Article 129 (1).
46 Constitution, Article 129 (2).
47 Constitution, Article 129 (3).
48 Constitution, Article 130.
49 Constitution, Article 131.
50 Constitution, Article 133 (1).
51 Constitution, Article 136.
52 Constitution, Article 107.
53 Constitution, Article 107 (5).
54 Constitution, Article 107 (2).

one third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.[55] Parliament is required to provide for all matters relating to the presentation of such an address (including the procedure for the passing of the resolution, the investigation and proof of the alleged misbehaviour or incapacity, and the right of the judge to appear and to be heard in person or by representative), by law or by Standing Orders of Parliament.[56] A Judge of the Supreme Court is not permitted to perform or hold any other office, whether paid or not, or accept any place of profit or emolument, except as authorized by the Constitution or by written law or with the written consent of the President. [57] Further, any person who held the office as a permanent Judge of the Supreme Court is prohibited from appearing or practicing in any court, tribunal or institution as an Attorney-at-Law at any time without the written consent of the President.[58]

The Court of Appeal which is a superior Courts of Record, stands immediately below the Supreme Court[59] and has wide powers of appeal, revision and *restitutio in integrum* in respect of decisions made by High Courts in the exercise of its appellate or original jurisdiction or by any Court of First Instance and tribunals.[60] It has appellate jurisdiction over the decisions and orders of the High Courts of the Provinces.[61] The Court of Appeal may inspect the records of any court of first instance or tribunal or other institution and issue orders in the nature of *certiorari, prohibition, procedendo, mandamus and quo warranto* against any judge of a Court of First Instance or tribunal or other institution.[62] Having inspected the record of any Court of First Instance, the Court of Appeal in the exercise of its revisionary power may make any order as the interest of justice may require.[63] It may also issue writs of *habeas corpus*[64], or injunctions to prevent irremediable mischief which might ensue before a party making an application for such injunction could prevent by bringing an action in any Court of First Instance.[65] The Court of Appeal also has jurisdiction to try election petitions in respect of elections to Parliament.[66]

The High Court is declared by Article 111 of the Constitution of 1978 to be the "highest Court of First Instance exercising criminal jurisdiction. It was to exercise "such jurisdiction and powers as Parliament may vest or ordain." Section 4 of the Judicature Act No.2 of 1978 (as amended) provided that the High Court shall be a court of record which

55 Ibid.
56 Constitution, Article 107 (3).
57 Constitution, Article 110 (2).
58 Constitution, Article 110 (3).
59 Constitution, Article 105.
60 Constitution, Article 138 (1).
61 High Court of the Provinces (Special Provisions) Act No. 19 of 1990,Section 11
62 Constitution, Article 140.
63 Constitution,Article 145.
64 Constitution, Article 141.
65 Constitution, Article 143.
66 Constitution, Article 144.

consists of not less than ten and not more than one hundred and ten[67] judges of the High Court. The High Court Judges operate in the "judicial zones" determined by the Minister responsible for the subject of justice.[68] The judges of the High Court are appointed by the President on the recommendation of the Judicial Service Commission.[69] Judges of the High Court are subject to the disciplinary control of the President on recommendation of the Judicial Service Commission.[70] Other judges are appointed by and subject to the disciplinary control of the Judicial Service Commission comprising of the Chief Justice and the two most senior Judges of the Supreme Court appointed by the President.[71] In terms of Article 154P introduced by the Thirteenth Amendment to the Constitution there is to be a High Court for every province to which the Chief Justice may nominate such number of judges as may be necessary. The High Court of Provinces (Special Provisions) Act No 19 of 1990,[72] vested a High Court of a province with appellate and revisionary jurisdiction with regard to judgments and orders made by Magistrate's Courts or by Labour Tribunals within that Province and order under Section 5 and 9 of the Agrarian Service Act No.58 of 1979 in respect of any land situated within that province. The High Court is one of the Courts declared by section 2 of the Judicature Act to be a Court of First Instance for the administration of justice. It is notable that since 1978 till 2022, the 1978 Constitution has prevailed as the predominant legal document for governance in Sri Lanka for 44 long years.

Conclusion

The essential element of our legal system has been the same for as long as our ancient recorded history goes. According to chronicles there was an adequate system of justice in Sri Lanka for the administration justice in the pre-colonial era that had existed for well over two thousand years. As stated by British observers like D'Oyly and Davy, there was nothing radically wrong with the system of administration of justice. Though, it was by no means a perfect system. Changes had taken place from time to time, but further improvements were required. We have had a network of courts spread across the country facilitating physical and geographical access to justice. There has always been a variety of devices such as adjudication, arbitration, mediation and a combination of such means for resolution of disputes between people and between people and the State. Therefore, whether it is a King, colonial ruler or leaders of the people, whoever is entrusted with governing us, justice should always be of paramount consideration. However, social organization, economic endeavor, political climate, methods of governance and legal culture had over decades altered the ways justice is administered in Sri Lanka.

67 Judicature (Amendment) Act No. 26 of 2017

68 Judicature Act, Section 3

69 Constitution, Article 111 (2).

70 Ibid.

71 Constitution, Article 111 (D).

72 High Court of the Provinces (Special Provisions) Act, above n 61. Section 3.

FAULT, NEGLIGENCE AND FORESEEABILITY IN DELICTUAL LIABILITY; SOUTH AFRICAN PERSPECTIVE

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1. Introduction

Fault is considered as one of the five elements that establishes delictual liability. It generally refers to blameworthiness or culpability on the part of the wrongdoer. It consists of two forms, namely, intention (*Dolus)* and negligence *(Culpa)*. In an *Aquilian* action and action for pain and suffering in order to establish the element of fault, plaintiff must establish either negligence or intention of the defendant. However, in an action of *injuriarum* proof of intention is a mandatory requirement.

Therefore, in an *Aquilian* action negligence forms an integral part of establishing delictual liability over patrimonial loss. A person is said to have been acted negligently if a reasonable person in his position would have acted differently and if the unlawful causing of damage was reasonably foreseeable and preventable.

Different approaches applied in determining foreseeable harm. However, two main theories namely, *abstract theory* and *concrete theory* in assessing reasonable foreseeability stands out in various South African judgments. The judgment of the South African Supreme Court of Appeal namely, The Premier of the *Western Cape Province v. Loots NO*[1] is a clear example of comprehensive analysis on the subject under discussion.

This judgment has its origin in a delictual claim for damages arising from an unsuccessful sterilization operation. But the claim is not for child-raising expenses that ensued from unwanted conception as could be anticipated from precedent in matters of this kind. Instead, it resulted from the harm suffered by the mother during the subsequent birth process that went terribly wrong.

In appeal the Supreme Court of Appeal of South Africa was called upon to answer *inter alia* whether the damages flowing from the complications from the child birth fulfilled the foreseeability requirement as an element of negligence.

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1 The Premier of the Western Cape Province vs Loots NO, (214/2010) [2011] ZASCA 32 (25 March 2011).

1.2 Delictual Liability

McKerron in his celebrated work titled, The Law of Delict, defines delict as, 'a breach of duty imposed by law, independently of the will of the party bound, which will ground an action for damages at the suit of any person to whom the duty was owed and who has suffered harm in consequences of the breach'.[2]

J. Burchell, defines delict as, 'an unlawful, blameworthy (intentional or negligent) act or omission which causes another person damage to person or property or injury to personality and for which a civil remedy for recovery of damages is available'.[3]

However, the most comprehensive and simple definition was given by Neethling et al and defines delict as, 'an act of a person that in wrongful and culpable way causes harm to another'.[4]

> The first principle of the law is that damage rests where it falls, which means individual has to bear the loss or damage he suffers. However, where there are certain legally recognized principles and mechanisms to suggest otherwise above dicta does not operate as it is and the burden of the damage may shift from the person suffered, to the person who is responsible for his suffering. In order to establish the wrongdoer's breach of obligation towards the victim and compel him to compensate the victim as he is legally obliged, law of delict provides the mechanism and legal authority.
>
> In order to establish the delictual liability, law of delict recognizes the proof of certain general elements commonly referred to as general principles or requirements. Such elements that have to be satisfied before the conduct complained of treated as a delict are, 1) *act*, 2) *wrongfulness,* 3) *fault,*4) *causation*, and 5) *harm*. If a party fails to establish any one (or more) of these elements delictual liability would not be established.

2. Element of Fault

Fault is the subjective element of a delict because it involves judicial evaluation of the blameworthiness or culpability of the defendant[5]. Fault has been described as the element of delict which induces the law to impute someone's wrongful conduct to that person in holding him legally responsible. Accountability is a prerequisite for fault: The person at fault, to be at fault, must be *culpae capax*, having the ability to know the difference between right and wrong and to act accordingly. Unless one is in this sense accountable, one is not accountable for one's actions or omissions; one is, in other words, *culpa incapax*.

2 K. G. McKerron, The Law of Delict (7th Ed.), (Juta & Co. Ltd, Cape Town 1971) 5p.

3 J. Burchell, Principles of Delict, (Juta & Co., Cape Town,1993), 6p

4 Neethling, Potgieter, Visser, Law of Delict (7th Edition), (LexisNexis, Durban 2015) 4p.

5 Neethling, Potgieter, Visser Law of Delict (7th Edition), (LexisNexis, Durban 2015) 119p

2.1 Negligence

Negligence is the failure on the part of the defendant in a given circumstance to exercise that degree of care which the circumstance demand.[6] Negligence is a relative conception and not an absolute conception. It may consist either omitting to do something which a prudent and reasonable man would do in the circumstance or in doing something which a prudent and reasonable man would not do in the circumstance. According to 'Neethling' the defendant said to be negligent if a reasonable person in his position would have acted differently. According to Holmes JA in *Kruger v. Coetzee* the reasonable person would have acted differently if the unlawful causing of damage was reasonably foreseeable and preventable.[7]

It was held in *Kruger v. Coetzee*,[8] that in order to establish the liability under negligence (*culpa)* against the defendant that plaintiff has to prove;

a) a *diligence paterfamilias* (a reasonable person) in the position of the defendant,
   i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss: and,
   ii) would take reasonable steps to guard against such occurrence: and
b) the defendant failed to take such steps[9].

The question of negligence (i.e. the failure to comply with the standard conduct of a reasonable person) is the logical starting point to any inquiry in to the defendant's liability, for without proof of negligence the plaintiff cannot succeed in his action and considerations of wrongfulness and remoteness (legal causation) will not arise.[10]

In *Jones v. Santam BPK*[11] the negligence test for children is clearly formulated: after pointing out that the test for accountability and negligence should be clearly distinguished, the court decided that the test of *diligens paterfamilias* should not be reduced to a reasonable child test.

Further in *Van Wyk v. Lewis*[12] Court held that in the in the case of an expert, such as a surgeon, the standard is higher than that of the ordinary lay person, and the court must consider the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.[13]

6 K. G. McKerron, The Law of Delict (7th Ed.), (Juta & Co. Ltd, Cape Town 1971) 25p.
7 Neethling, Potgieter, Visser, Law of Delict (7th Edition), (LexisNexis, Durban 2015) 138p
8 Kruger vs Coetzee, 1966, (2), SA 428 (A).
9 Ibid-430p
10 Bennet MadalaMkhatswa vs Minister of Defence, 2000 (1) SA, 1104, (SCA).
11 Jones vs Santam BPK, 1965 (2) SA 542 (A)
12 Van Wyk vs Lewis, 1924, AD 438p
13 Ibid - 444p

2.1.1 The Test of Negligence

The test for negligence is one of the objective or reasonable person (*bonus paterfamilias*). The test requires *"an adequate and consistent level of care on the part of all legal subjects."* It *"does not represent a standard of exceptional skill, giftedness or care but does also not represent a standard of undeveloped skills, recklessness or thoughtlessness."* It is the standard of the ordinary individual who takes reasonable chances and reasonable precautions. What also needs to be emphasized is what is required to satisfy any test for negligence is foresight of the *reasonable* possibility of harm. Foresight of the mere possibility of harm will not suffice.[14]

Thus, test rests on two legs, namely, reasonable foreseeability and reasonable preventability of damages. Unless the plaintiff succeeds in proving both he would not find court holding in his favour against the defendant.

3. Reasonable Foreseeability

Reasonable foreseeability is an important element in deciding the issue of negligence. It means whether the defendant complied with the standard of the reasonable person and whether the harm is foreseeable. Jurists find two conflicting approaches in assessing the foreseeability.

1) Abstract (absolute) approach.
2) Concrete (relative) approach.

3.1 Abstract (absolute) approach

The question of whether someone acted negligently must be answered by determining whether the harmin general reasonably foreseeable; in other words, whether his conduct in general create an unreasonable risk of harm to others. Under this approach there is no need to prove the extent of the damage or any particular consequence actually occurred it should have been reasonably foreseeable.[15]

3.2 Concrete (relative) approach

This approach to the test of foreseeability is based on the premise that a person's conduct may only be described as negligent in respect of a specific consequence or consequences. Therefore, it is a prerequisite for negligence that the occurrence of a particular consequence must be reasonably foreseeable. In other words: a wrongdoer is negligent only to a specific consequence if that consequence, is reasonably foreseeable.[16]

14 Bennet Madala Mkhatswa vs Minister of Defence, 2000 (1) SA, 1104, (SCA).
15 Botes v. Van Deventure: 1966 3 SA 182 (A),191p
16 Neethling, Potgieter, Visser, Law of Delict (7th Edition), (LexisNexis, Durban 2015) 149p

According to 'Neethling' the concrete approach was more preferred by the courts in South Africa than the abstract approach. However, still in the case under discussion Supreme Court of Appeal of South Africa applied the abstract approach in determining foreseeable harm in negligence.

3.2.1 Application of Abstract Approach – The Premier of the Western Cape Province v. Loots No

The claim was brought by Johannes Hendrik Loots N.O. acting on behalf of Mrs. Johanna Cecelia Erasmus. Mrs. Erasmus suffered brain damage as a result of complications during her pregnancy resulting in her being unable to manage her own affairs.

It was alleged Mrs. Erasmus underwent a sterilization operation during 1999 performed by Dr. Du Plessis, the Second Appellant, who was a clinical assistant at that stage in the employment of the First Appellant. Mrs. Erasmus, however, fell pregnant soon afterwards. It later transpired that the Dr. Du Plessis had mistakenly occluded Mrs. Erasmus' round ligaments instead of her fallopian tubes. Thereafter, Mr. and Mrs. Erasmus were offered the option to terminate the pregnancy by the Tygerberg Hospital, which they declined for religious reasons.

During November 1999, when Mrs. Erasmus was admitted to the Tygerberg Hospital an emergency caesarean section was performed. Unfortunately, the baby was severely compromised and did not survive.

It was transpired during the cause of the trial that either shortly before, during or after the caesarean section Mrs. Erasmus had developed what is known as "**amniotic fluid embolism**" (AFE), which occurs when foetalantigens enter the maternal circulation. The AFE probably caused Mrs. Erasmus to suffer severe hemorrhaging and cardiac arrest, which in turn led to brain anoxia and eventually the irreversible brain damage.

During the initial hearing in the Western Cape High Court parties have sought a ruling of Court on the issues pertaining to appellants' liability, while the issues regarding the quantum of damages were left for subsequent determination, depending on the ruling of the Court on issues pertaining to liability. High Court held that the appellants are liable for the damages suffered by Mrs. Erasmus as the respondents may prove at the subsequent hearing of the matter. Appellants appealed to the Supreme Court of Appeal canvassing the validity of such ruling of the High Court.

At the end of the arguments, Brnad JA pronounced the judgment while four other judges were concurring and thereby the appeal stood dismissed.

Brnad JA, focused on two defences advanced by the appellants and rejected both. The first defence was that Dr. Du Plessis was not negligent with regard to the consequences of the failed sterilization for which Mrs. Erasmus sought to hold him liable. The Appellants

relied on the concrete approach to negligence as the basis for the said defence as the harm which Mrs. Erasmus actually suffered was not of a general kind reasonably foreseeable, as AFE is an unpredictable and unpreventable event which occurs in about 1 out of every 8000 to 30,000 deliveries. However, Court rejected this argument and Brand JA held in the judgment,

> *"I do not agree with this argument. As the appellants readily conceded, pregnancy was a generally foreseeable consequence of a failed sterilization. According to Dr Dalrymple's testimony – which remained unchallenged – pregnancy is a dangerous condition associated with a myriad of potential complications. One of these complications was AFE. Although the particular complication is rare, it must be included under the general rubric of complications which was reasonably foreseeable. It follows that, in my view, the second appellant (Dr. Du Plessis) was negligent with regard to the harm that Mrs. Erasmus had suffered."*[17]

As such, Court held that the AFE in general reasonably foreseeable as a complication of pregnancy and concluded that appellantswere therefore negligent with regard to the harm that Mrs. Erasmus had suffered.

The general harm consequent upon a failed sterilization was pregnancy and or general risks associated with that condition. Therefore, the appellants took up the position that the harm that actually occurred is a result of AFE and not reasonably foreseeable. Consequently, so the argument concluded, neither the harm suffered by the patient nor the manner in which it occurred, are included in the category of what can be regarded as generally foreseeable consequences. However, Brand JA refused the instant argument on the premise that AFE, although it is a rare complication, it must be included under the general reasonably foreseeable complication of pregnancy. Such thinking, no doubt would enhance the scope of the concept of reasonable foreseeability via abstract approach.

3.3 Abstract Approach vs Concrete Approach

Most academics prefer and supply convincing reasons why a concrete approach of negligence is preferable to an abstract one. They points out that it is difficult to conceive how the 'second leg' of the negligence test, namely whether the reasonable person would have taken measures to prevent the harm, can practically be answered without concrete reference to a particular kind of harm.

> *"on the other hand, are staunch advocates of concrete negligence, although they do not use the terminology. They state clearly that negligence can be established only in respect of a specific consequence. A specific harmful consequence must be reasonably foreseeable and preventable.*[18]

17 The Premier of the Western Cape Province vs Loots NO, (214/2010) [2011] ZASCA 32 (25 March 2011), 7p.

18 J.C. Knobel, "The Feasibility of the Co-existence of Concrete Negligence and Legal Causation", South African Law Journal, 124, 2007, 579p.

During the cause of the argument of the Loots NO case appellants relied heavily on the concrete approach in order to exclude their liability.

> *"For the factual basis of their argument the appellants relied on the proposition that the harm which the patient actually suffered was not of a general kind reasonably foreseeable"*[19]

According to the concrete approach a person's conduct may be described as negligent in respect of a specific consequence. Therefore, it is a pre requisite for negligence that the occurrence of a particular consequence must be reasonably foreseeable. Therefore unless the alleged wrongdoer foresees the specific consequence, he would not be held liable. Thus a wrongdoer should only be held liable for those consequences in respect of which he had intention, or in respect of which he was negligent.

The time honored authoritative test formulated by Holmes JA in *Kruger v. Coetzee* is said to have laid down the foundation for the test of negligence. However, the Supreme Court of Appeal in South Africa in *Mukhieber v. Raath*[20] followed a somewhat narrower test in determining foreseeability as proposed by Boberg in his work titled The Law of Delict.

> *"For the purposes of liability culpa arises if –*
>
> *(a) a reasonable person in the position of the defendant –*
>
> *(i) would have foreseen harm of the general kind that actually occurred,*
>
> *(ii) would have foreseen harm of the general kind of causal sequence by which that harm occurred,*
>
> *(iii) would have taken steps to guard against it, and*
>
> *(b) the defendant failed to take those steps".*[21]

According to Knobel[22] above words were clearly chosen to reflect the concrete approach to negligence. However, he stressed that in *Mukhieber v. Raath*, Court did not harshly reject the abstract approach, and emphasized that both approaches, if properly applied would bring about similar legal result in each of the cases.

In *Groenewald v. Groenewald*[23] defendant physically assaulted the plaintiff and threatened to kill her and locked her in a room. The plaintiff attempted to escape through a window but sustained injuries when she fell from the third floor of the building. She sued the defendant for damages.

19 The Premier of the Western Cape Province vs Loots NO, (214/2010) [2011] ZASCA 32 (25 March 2011), 6p.

20 Mukhieber vs Raath, 1999, (3) SA 1065, (SCA)

21 Mukhieber vs Raath, 1999, (3) SA 1065, (SCA), 16p

22 J.C. Knobel, "The Feasibility of the Co-existence of Concrete Negligence and Legal Causation", South African Law Journal, 124, 2007, 586p

23 Groenewald vs Groenewald, 1998, (2), SA 1106, (SCA)

During the appeal Streicher JA applied the following test in order to ascertain whether the conduct of the defendant is negligent or not.

> *"In delictual claims of the nature involved in the present case two separate questions arise:*
>
> 1. *Was the defendant at fault ?*
> 2. *For what consequences caused to the plaintiff in consequence of the defendant's conduct, is the defendant liable in damages to the plaintiff?"*[24]

While adopting the abstract approach in deciding the negligence through the above test Court made the following remark during the reasoning of the judgment.

> *"For the purposes of answering the first question ……He would also be held to be at fault if a reasonable person in the position of the defendant would have realized that harm to the plaintiff might be caused by such conduct, even if he would not have realized that the consequences of that conduct would be to cause the plaintiff the very harm he actually suffered or harm of that general nature*[25]

in *Sea Harvest Corporation (Pty) Ltd v. Duncan Dock Cold Storage (Pty) Ltd.*[26] In that case first defendant's cold store was set alight by a distress flare fired by an unknown traveler in celebration of the New Year. The city fire brigade was summoned but by the time the fire was eventually extinguished the cold store and its contents had been largely destroyed. The cold store was recently built and had been in operation for no more than a few months. It was the product of a joint venture between the second defendant and another company. The property of the plaintiffs was destroyed in the fire and they instituted action for damages against the defendants. Court found in favour of the defendants on the issue of liability, and on appeal a similar view was expressed by Streicher JA in the dissenting judgment

> *"I shall follow the approach followed in Groenewald. As will become apparent the same result is arrived at as would be reached if the relative view of negligence is applied."*[27]

There he too agreed with the majority judgment of the Court but for different reasons by adopting the abstract approach in deciding the issue of negligence, and reached the same conclusion as the majority of the Bench.

However, this would not always bring about similar conclusions. If the concrete approach was applied in the Groenewald case defendant would not be held liable for the injuries sustained by the plaintiff after falling from the ledge of the third floor building occupied by the defendant. Court held that the injuries sustained by the plaintiff pursuant to the assault by the defendant were inflicted intentionally. However, the injuries caused by the

24 Ibid 16p

25 Groenewald vs Groenewald, 1998, (2), SA 1106, (SCA), 16p.

26 Sea Harvest Corporation (Pty) Ltd vs Duncan Dock Cold Storage (Pty) Ltd, 2000, (1), SA, 827, (SCA)

27 Ibid 19p

fall were not intended by the defendant. However, the judges were of the view that the defendant could have generally foreseen the possibility of plaintiff injuring her self while attempting to escape. Court further held that;

> *"a reasonable person in the defendant's position would have foreseen that, if there was a way for the plaintiff to escape and possibly avoid being killed, she would try to escape. Escaping through the window and jumping from the third floor was a way of escaping with less serious consequences than death. Unless there was another way of avoiding being killed, which was so obvious and so certain to be successful as to make an escape through the window unreasonable, even for a person in the plaintiff's state of mind, areasonable person would have foreseen that she might do so."*[28]

This is clearly a very abstract determination of fault followed by the application of a flexible approach to legal causation to narrow down the limits of liability. If the concrete approach was applied by court the defendant would have succeeded in his defence since the harm suffered by the plaintiff when she fell from the ledge cannot be considered as generally foreseeable injuries by a *diligence paterfamilias*.

In *Bennet Madala Mkhatswa v. Minister of Defence*[29] the plaintiff was forcibly removed from his home by members of the then South African Defence Force who were off duty at the time. He was taken to a nearby road where he was severely assaulted. In the course of the assault, he was struck in the face with a rifle butt resulting in the loss of his right eye. He instituted action against the defendant; Minster of Defence as the employer to hold him liable for the conduct of the soldiers who carried out the assault. During the appeal Smalberger JA refused to apply the abstract approach.

> *"in my view the reasonable possibility of these events occurring and harm ensuing to the plaintiff would not have been foreseen by a reasonable person in the position of those in command. To have foreseen what happened would have required prophetic foresight, which is not an attribute of the reasonable person. Consequently, there can be no fault ontheir part for not taking steps to prevent what was not reasonably foreseeable"*[30]

At this juncture it is important to consider what would be the outcome of the Loots NO case if court applied the concrete approach in deciding the negligence.

According to the concrete approach to the reasonable foreseeability, it is a pre requisite for the existence of negligence, that a *specific consequence* must be reasonably foreseeable. There is no doubt that the pregnancy is a generally foreseeable consequence of a failed sterilization. However, the harm suffered by Mrs. Erasmus was not only the pregnancy but the condition known as AFE, which is in laymen's term cannot be

28 Groenewald vs Groenewald, 1998, (2), SA 1106, (SCA), 21p.

29 Bennet MadalaMkhatswa vs Minister of Defence, 2000 (1) SA, 1104, (SCA).

30 Bennet MadalaMkhatswa vs Minister of Defence, 2000 (1) SA, 1104, (SCA).

considered as a generally foreseeable consequence of a failed sterilization. However, the defendants in this case were not laymen, but medical professionals, and for them AFE is not an unknown condition associated with pregnancy. Therefore, it appears that the application of the abstract approach was a mandated by the facts and circumstances of the Loots NO case, and it would be erroneous to apply the concrete approach.

4. Conclusion

One of the major criticisms against the application of the abstract approach is that, it might create a situation where it is possible for the defendant's liability to extend wider than his or her fault, depending on the manner in which legal causation is applied. Knobel observes that such a criterion would be most undesirable in so far as the *Aquilian* liability. However, as per the majority judgment in Sea Harvest case where Scott JA remarked "it is probably so that there can be no universally applicable formula which will prove to be appropriate in every case".[31] Hence, courts are at liberty to use the most suited approach based on the facts and circumstances of each case.

31 Sea Harvest Corporation (Pty) Ltd vs Duncan Dock Cold Storage (Pty) Ltd, 2000, (1), SA, 827, (SCA)

HUMPTY DUMPTY COULD BE PUT TOGETHER AGAIN BY VIRTUE OF THE BEST INTEREST AND WELLBEING

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Once upon a time there was a child called "Humpty Dumpty" who lived with his parents happily. One night he heard a big noise and went to see what it was. To his surprise he saw his father was drunk and was using abusive words while beating his mother. He attempted to prevent the beating and the father beat him too. This became a habitual act.

One day after abusing his wife and Humpty Dumpty, the father had abandoned the family leaving them in a desperate situation both mentally and financially.

This traumatizing scenario and financial difficulties restrained Humpty Dumpty from attending school and he was helping in a garage. He was also begging to feed himself and his mother. Occasionally he robbed items from nearby shops.

Once happily lived Humpty Dumpty's world was shattering slowly.

The law enforcing authority produced Humpty Dumpty before the Court of Law, as he had hurt the owner of a shop while he was robbing.

Chapter - 2

Global Perspective for Humpty Dumpty's Issues

The devastating aftermath of the world wars and its impact on children, the United Nations had decided that the human rights of children required special attention and protection.

At the end of the Second World War, the United Nations General Assembly accepted the Declaration of the Rights of the Children. The said Declaration laid the foundation for the adoption of the Convention on the Rights of the Children which became the first international treaty to protect children's rights.

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The United Nations Convention on the Rights of the Child has identified the need for special care and protection on achieving rights of children including legal protection antenatal as well as postpartum. [1]

The UN General Assembly stimulates efforts to maintain children with their families, wherever possible. When it is not in the best interest of the child, the State is accountable for protecting the rights of the child and ensuring appropriate alternative care such as foster care, kinship care and other forms of family-based or family-like care or supervised independent living arrangements.[2]

The Convention elaborates on the administrative ambiance implicating juvenile offenders. No child shall be deprived of his/her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of the child shall be in conformity with the laws and shall be used only as a measure to its last resort and for the shortest period of time.[3]

There are number of International Rules and Guidelines which focus on the best interest, wellbeing, care and protection for the children coming into conflict with the law, such as;

- **The Hague Convention (1980)** on the Civil Aspects of International Child Abduction, assigned to the State Institutions with powers and functions depicted to protect children internationally from the harmful effects of their wrongful removal or retention and to provide procedures to ensure prompt return to the country of their habitual residence.[4]
- **The Beijing Rules (1985)** provides guidance to States on protecting children's rights and respecting their needs when developing distinct and specialized systems of juvenile justice. Children should have the right to be represented by a legal representative or to have free legal aid. Whenever possible, detention pending trial for juveniles shall be replaced by alternative measures, such as close supervision, placement with a family, an educational setting or in a home. Detention, pending trial shall be used only as a measure of last resort and for the shortest possible period of time. A juvenile/child or a young person shall be dealt differently, from an adult.[5]
- **The Riyadh Guidelines (1990)** represent a comprehensive and proactive approach for the prevention and social integration of child offenders. The rules encompass principles and outline specific circumstances where children can

1 (UN General Assembly, Convention on the Rights of the Child, UN. Treaty Series 1577 (1989), https://www.refworld.org/docid/3ae6b38f0.html)

2 https://data.unicef.org/topic/child-protection/children-alternative-care/

3 Article 37

4 https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction

5 https://juvenilejusticecentre.org/wp-content/uploads/2018/08/UNGA-Standard-Minimum-Rules-for-the-Administration-of-Juvenile-Justice.pdf

be deprived of their liberty, stressing on the notion that deprivation of liberty should be considered the last resort, and for the shortest period of time limited to exceptional occurrences.[6]

- **The Havana Rules (1990)** are applicable to juveniles that are confined to any institution or facility by order of any judicial, administrative or other public authority. These Rules are also called the "UN Rules for the Protection of Juveniles deprived of their liberty" [7]
- **The Tokyo Rules (1990)** for the United Nations are the Standard Minimum Rules for Non-Custodial accomplishments.[8]
- **The Vienna Guidelines (1997)** focus on ensuring that State parties should be able to implement their obligations under the CRC and measures to be taken on children in the Criminal Justice System.[9]
- **The Bangkok Rules (2010)** provide that the States and Human Rights Institutions should pay attention to the issues of women in prison including the children of women in prison.
- It also addresses the needs of physical, emotional, social and psychological impact on infants and children affected by parental detention and imprisonment.[10]
- The United Nations Basic Principles on the use of Restorative Justice Programs in Criminal Matters (2002).[11]

In addition to the provisions of the UNCRC, there are number of General Committees on the Rights of the Children in Juvenile Justice that administer with State parties. These General Committees include Children's Rights in, Juvenile Justice,[12] to be heard,[13] to be free from all forms of violence,[14] and to have child's best interests taken as a primary consideration.[15]

The United Nations General Assembly adapted expanded Rules for protection of the rights of prisoners deprived of liberty and is called as **"Nelson Mandela Rules".**

6 UN Guidelines for the Prevention of Juvenile Delinquency, adopted by the General Assembly Resolution 45/112 of December 1990

7 Adopted by the General Assembly Resolution 45/113 of December 1990

8 https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/tokyorules.pdf

9 https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1990-1999/1997/ECOSOC/Resolution_1997-30.pdf

10 https://www.unodc.org/documents/hiv-aids/publications/Prisons_and_other_closed_settings/P_BangkokRules_2010_EN.pdf

11 https://www.unodc.org/pdf/criminal_justice/Basic_Principles_on_the_use_of_Restorative_Justice_Programs_in_Criminal_Matters.pdf

12 (No. 10)

13 (No. 12)

14 (No. 13)

15 (No. 14)

At the South Asian Association for Regional Cooperation (SAARC) conference (2002), "Regional Arrangements for the Promotion of Child Welfare in South Asia Convention" was passed and it was agreed that the right of the child to enjoy all rights and freedoms guaranteed by the national laws and regionally and internationally are binding instruments.[16]

Chapter - 3

From a Global to Local Context

The Sri Lankan Government pursued a consistent social policy of free health and education services which contributed to family well-being and social stability. Declining rates of maternal and infant mortality as well as family planning and the compulsory education for children ensured a remarkable quality of life for the younger generation.

Sri Lanka ratified the **Convention on the Rights of Child** (hereinafter mentioned as CRC) on 12th July 1990. Sri Lanka's obligations under the CRC were subsequently adopted into State Policy by way of the **Children's Charter** in 1992.[17]

It expects the State parties to promote a distinctive system of juvenile justice with explicit goals and also to provides a list of elementary norms for the conviction of juvenile offenders, such as a minimum age of criminal responsibility, measures provided for children who may have infringed the penal law having no recourse to judicial proceedings and provisions for a variety of dispositions and institutional care.

CRC is not enforceable in any Court of Law, as there is no corresponding Act of Parliament that incorporates the Convention into national law. Notwithstanding this limitation, a number of existing laws have been amended to reflect Sri Lanka's obligations under the CRC.

South Asian Association for Regional Cooperation (SAARC) was established in 1985 and Sri Lanka formally adopted the charter. It recognizes family as the "fundamental unit" of the society and the best environment for a child to be nurtured. State should be given necessary protection and assistance and thereby fulfill responsibility for its children and community.[18]

The **Sri Lankan Constitution** guarantees equal protection of the law, and non-discrimination under the law.[19]

16 (https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/genericdocument/wcms_251025.pdf)

17 http://www.childwomenmin.gov.lk/institutes/dep-probationand-child-care-services/child-rights/crc

18 https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro- new_delhi/documents/genericdocument/wcms_251025.pdf

19 Article 12

It is also mentioned that nothing shall prevent subordinate legislation or executive action for the advancement of women, children or disabled persons.[20]

The Directive Principles of State Policy laid down in the Constitution, place an obligation on the State to promote the interests of children and youth and to ensure their full development. [21]

The Convention on the **Civil Aspects of International Child Abduction Act No.10 of 2001**, was signed at Hague, Netherlands on October 25, 1980 and Sri Lanka acceded to the aforesaid Convention.

Sri Lanka is a signatory to the memorandum of understanding of the **International Program on the Elimination of Child Labour (IPEC) in 1996.**[22]

In addition to existing domestic Laws, Sri Lanka signed ILO Forced Labour Convention 1930 (No.29), ILO Abolition of Forced Labour Convention 1957 (No.105), ILO Minimum Age for Employment Convention 1973 (No.138) and ILO Worst Forms of Child Labour Convention 1999 (No.182).

The recent legislations by way of amendments to the Penal Code, the Code of Criminal Procedure, the Evidence Ordinance and the Judicature Act as well as the establishment of State Institutions to protect children's rights were integrated with the principles laid down on these conventions.

Chapter - 4

Legal Framework on Children's Rights

The system of justice is structured to hear charges against children, if the alleged child is above the minimum age of responsibility. Children under the minimum age of responsibility cannot be accused of an offence or be subjected to any legal proceeding.

There is non-uniformity in the Sri Lankan Laws for the age of a person to be considered as a "Child."

The predominant Acts and Circulars for determining justice for children in Sri Lanka are;

(The referred contents are based on the date of submission of this Article)

+ **Children and Young Persons Ordinance No.48 of 1939,** makes provision for the establishment of "Juvenile Courts", the supervision of juvenile offenders, and care and

20 Article 12(4)

21 Article 27 (13)

22 https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/genericdocument/wcms_210580.pdf

protection of children/young persons and other connected matters. Ordinance defines a "Juvenile Court" as a court of summary jurisdiction sitting for the purpose of hearing any charge against a child/young person or for care and protection. [23]

The salient features of the Ordinance are;

- a specific obligation on law enforcement officers and the courts are cast to ensure the separation of children/young persons from adult offenders and a girl child shall be under the care of a woman during the pendency of the case.[24]
- that there is a duty on the court to require the attendance of the child's parent or guardian prior to his/her case being heard.[25]
- that the law enforcement officer is required to notify a relevant Probation Officer in the event a child/young person is to be brought before a Magistrate and upon receiving the notification, the Probation Officer is required to investigate the background of the child/young person and prepare a report to be submitted to court.[26]

The Inspector General of Police had issued Circular Nos.2359/2012 and 09/2012 dated 22/05/2012, to the attention of all the relevant Police Officers, the Section 17 of Children and Young Persons Ordinance.

- It mandates that every court dealing with a child/young person shall focus primarily on the best interest and welfare of the child and securing the child's education.[27]
- A child/young person shall not be committed to prison in default of the payment of a fine.[28]
- In the event a child/young person satisfies the threshold set out in section 34(1), the Juvenile Court could order that the said child/young person to be sent to an approved or certified school, placed under the supervision of a Probation Officer, or entrusted to the care of a "fit person". [29]
- A detention order for an approved or certified school lasts for a period of three years and at the expiration of such period, it could be extended till the child becomes 14 years.[30]
- A child/young person escaping from a certified or approved school could be apprehended without a warrant and brought before the Juvenile Court.[31]

23 Section 2
24 Section 13
25 Section 16
26 Section 17
27 Section 21
28 Section 23
29 Section 35(1)
30 Section 42
31 Section 55

- It is an offence for a person who has the custody of a child/young person to perpetrate an act of cruelty against such a child by assaulting, ill-treating, neglecting, abandoning or exposing him/her.[32]
- It is an offence to sell cigarettes to a person under the age of sixteen.[33]
- Ordinance defines a child to be a person under the age of 14 years. A young person to be an individual who has attained the age of 14 years and is under the age of 16 years[34]

+ **Youthful Offenders (Training Schools) Ordinance No.28 of 1939 (Amended by No. 42 of 1944),** is an ordinance which makes provision for the establishment of training schools for detention, training and reformation of youthful offenders intending to change the behavior through education and training. A "youthful person" means a person who has attained the age of sixteen years and who has not attained the age of 22 years.[35]

+ **Age of Majority (Amendment) Act No.17 of 1989** recognizes a person attaining the age of 18 years as having attained the legal age of majority.[36] An offender who has not attained the age of 18 years has the right to exercise their rights as a child within the respective detention, training and reformation centers.

+ Human rights, Access to Justice and Witness Protection have incorporated children's rights into their ambit, enacting the **International Covenant on Civil and Political Rights (ICCPR) Act No. 56 of 2007.** In all matters concerning children, whether undertaken by public or private institutions, the best interest of the child shall be of paramount importance.[37]

+ **Prevention of Domestic Violence Act No. 34 of 2005** permits a child in respect of whom an act of domestic violence has been or is likely to be committed, to apply to the Magistrate for a Protection Order.[38] This protection order shall not affect the rights of any person under the Maintenance Act No. 37 of 1999.[39]

The violence in question can consist of a single or a number of acts which form part of a pattern of behavior, even though some or all of these acts, when viewed in isolation, may appear to be minor or trivial.

+ **Assistance to and Protection of Victims of Crime and Witnesses Act No.4 of 2015** which the National Authority was established to protect, promote and enforce the rights of the Victims and Witnesses of Crime. The Duties and functions of the Authority are

32 Section 71
33 Section 76
34 Section 88
35 Section 16
36 Section 2
37 Section 5(2)
38 Section 2(1)
39 Section 12 (2)

mentioned in Section 13(1) of the said Act. It also ensures a mechanism for reparation and rehabilitation of survivors of crime.

+ As per **Probation of Offenders Ordinance No.42 of 1944,** the court while considering the nature of the offence along with the psychology, background and understanding of the juvenile offender, shall release on probation and supervision. The Probation Orders shall not be less than one year and not more than three years from the date on which the order was made.[40]

+ Evidence (Special Provisions) Act No. 32 of 1999 permits a child to give evidence as a witness via a pre-recorded video. This facility has replaced the need to lead the child's evidence-in-chief in open court.[41]

The above provision only applies to evidence-in-chief and does not extend to the cross-examination of the child. The facility to provide pre-recorded video evidence is not extended to children in cases of domestic violence under the Prevention of Domestic Violence Act.

It also provides for the Court to receive evidence of a child without causing an oath or an affirmation to be administered to such a child.[42]

+ Provisions relating to 'Child Abuse' have been included in the **Penal Code (Amendment) Act No. 22 of 1995,** in Sections 286, 288, 308, 350, 360, 363 and 365**.**

+ Under the **Employment of Women, Young Persons and Children Act No. 47 of 1956,** employment of a child under the age of 14 by a person is a punishable offence, subject to the provisions of Section 7(2). However, with the amendment to the said Act by **Act No.02 of 2021**, the minimum age of employment is increased to 16 years.[43]

+ **Adoption of Children Ordinance No.29 of 1941 (Act No.38 of 1979)** provides procedures for adoption of children and registration of persons who are not natural parents of a child but have the care, custody or control of the child.

+ **Maintenance Act No.37 of 1999** describes Maintenance of children who are unable to maintain themselves.

+ Maternity Benefits Ordinance (Chapter 140) was amended by the **Maternity Benefits (Amendment) Act No.15 of 2018**. Accordingly, the Shop and Office Employees (Regulation of Employment and Remuneration) Act (Chapter 129) was also amended. This amendment lifted the restrictions on maternity leave for women with two or more children and made women entitled to 84 days of maternity leave irrespective of the number of children they have, for the best interest and wellbeing of the newborn children.

40 Section 8
41 Section 4
42 Section 2(1)
43 Section 7

+ **Civil Aspects of International Child Abduction Act No.10 of 2001** deals with protection of children against negative effects of wrongful removal or retention internationally.[44]

+ **Citizenship (Amendment) Act No.16 of 2003** allows for obtaining nationality of children in Sri Lanka from both parents (not only from the father).[45]

+ **Corporal Punishment (Repeal) Act No.23 of 2005** had repealed Corporal Punishment Ordinance and also omitted sentence of whipping where it is included as part of a sentence to be imposed by courts in respect of any offence committed under any written law.[46]

This Act repeals corporal punishment in prisons under the Prisons Ordinance 1877 (amended in 1939).

Prior to the said Act, **the Circular No.2001/11 dated 30.03.2001 by the Secretary Ministry of Education** was issued, to avoid corporal punishment at schools.

+ Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act No.20 of 1998 considers eliminating ragging, violent and cruel inhuman treatment within or outside an educational institution and shall be guilty of an offence.[47]

+ **Orphanages Ordinance No.45 of 1946** is an ordinance to provide for the registration and control of orphanages and other institutions for the boarding, care and maintenance of orphans and deserted children. The Minister may establish a Children's Home for the reception of orphans and deserted children who are removed from orphanages.[48]

+ Marriage Registration (Amendment) Act No.18 of 1995 raises the minimum age of marrying to 18 years.[49]

+ **Mediation Boards (Amendment) Act No.4 of 2011** considers an offence under Sections 367 or 368B of the Penal Code, committed by a child under the age of 18, to be referred to mediation.

+ **Births and Deaths Registration Act No.17 of 1951 (amendment) Act No.12 (2005)** is the law relating to the registration of births, deaths and still-births.

Registrar General had issued Guidelines Reference Nos.ඒ.18/චකුලේඛ/02/94 dated 11/05/1994 and No.එම්/10/01/2001 dated 17/09/2008 in respect of issuance of Estimated Age Certificate for the children who are attached to the Child Development Centers/ Homes and without having a birth certificate or relevant documents.

44 Section 3
45 Section 7
46 Section 3
47 Section 2(1)
48 Section 14
49 Section 2

+ **Children and Young Persons (Harmful Publications) Act No.48 of 1956** protects children from harmful publications, selling and having in possession of obscene books, photographs and films.

+ As per **Administration of Justice (Amendment) Law No. 25 of 1975,** Court Procedures to actions by a minor, to actions against a minor, to take charge of a minor, to take charge of estate of a minor, custody of a minor and compulsory judicial settlement of accounts of a minor were incorporated.[50]

+ The national law on education contained in **Education Ordinance No 31 of 1939** and also **Compulsory Attendance of Children at School Regulation No.1 of 2015** (issued under the Section 37 of the Education Ordinance) provides for the compulsory education of children from 5 to 16 years of age.

Assisted Schools and Training Colleges (Special Provisions) Act of No.5 of 1960, the (Supplementary Provisions) Act No.8 of 1961, the Amending Act No.65 of 1981, the Examinations Act No.25 of 1968, the Pirivena Education Act No.64 of 1979, the National Institute of Education Act No.28 of 1985, the Colleges of Education Act No.30 of 1986 and the National Education Commission Act No.19 of 1991 are enacted for the betterment of education of children.

Children who are attached to the Child Development Centers/Homes, shall not be prevented from admitting to a school on the grounds of non-availability of basic documents and Children who need special care shall be admitted to schools with other children, according to the **Circular No.1998/16 dated 29.04.1998 and No.ළමා/15/69 dated 30/09/1979 issued by the Secretary, Ministry of Education and Higher Education** respectively.

+ Minimum age of a young person to be employed in a factory is the person who has attained the age of fourteen years and has not attained the age of eighteen years as per **Factories Ordinance No.45 of 1942**. The minimum age had been increased to 16 years by the **Amendment Act No.19 of 2002**.[51]

+ According to **Shop and Office Employees Act No.19 of 1954 (Amendment) Act No.44 of 1985,** minimum age for employment in a shop or office is not below the age of 14 years.[52]

+ **Registration of Domestic Servants Ordinance No.28 of 1871 (amended) Act No.18 of 1936** provides for registration of domestic servants.

+ Under the **National Dangerous Drugs Control Board Act No.11 of 1984,** National Dangerous Drugs Control Board was established. It is charged with formulation and

50 Section 3
51 Section 2
52 Section 10

review of a national policy relating to the prevention, control, treatment and rehabilitation of drug abusers.[53]

+ **Drug Dependent Persons (Treatment and Rehabilitation) Act No.54 of 2007** describes process, in case of drug or substance dependent incident. When a person is produced before a Magistrate upon the completion of the procedure set out in Section 10(1) and 10(2) of the said Act, such person shall be sent for compulsory treatment and rehabilitation.[54]

+ **Tsunami (Special Provisions) Act 2005** has special provisions for Tsunami orphaned children regarding their foster care and their protection. This Act was enacted to protect persons/children affected by the tsunami that occurred on December 26, 2004.

+ As per **Circular No.05/2011 issued by the Registrar General**, the place of birth shall not be mentioned as "Prison", for the children who were born from mothers on detention or imprisonment.

+ Mothers who have children below the age of 02 years are not permitted to leave the country for overseas employment and there should be a care and protection plan for the children who are above the age of 02 years as per the **Circular No.01/2022 dated 12/07/2022 issued by the Secretary, Ministry of Labour and foreign Employment.**

Chapter - 5

Judicial Protection for Child Rights

Apart from the State evolution policies and the Laws, Acts, and Conventions, the Sri Lankan Courts are safe guarding the best interest and wellbeing of the children. The courts make a decision to determine the custody, adoption, guardianship, safety, judicial interpretation of international standards and statutes of the country.

Whenever a court makes a decision, it always considers that the decision is in consistent to the best interest and wellbeing of the child. Several Judgements/Orders had been laid down principles to safeguard and conserve the best interest and wellbeing of a child, such as;

In *Krishanthi Perera v. M.R. Perera*[55]**,** Hon. Justice L.K. Wimalachandra explained the scope of the upper guardian as "It is in the child's interest the court plays a special role as the guardian of the child's welfare".

In *Talagune v. De Livera*[56] case it was decided that if the child's age has passed the stipulated age, the rights of the parties to be decided at the date of the institution of the case.

53 Section 2(1)
54 Section 10(3)
55 CALA 334/2004, dated 2006-08-30
56 (1997) 1 SLR 253

The court held in *S. Navaratnam v. Karunaratne*[57] case, that a Magistrate cannot act only on a report of a Probation Officer and it is the duty of the Magistrate to be personally satisfied that the child/young person is in need of care and protection.

Weragoda v. Weragoda [58] it was decided "The courts must decide on who should have custody depending on all the factors affecting the case, the presumptions and counter presumptions, but bearing in mind that the paramount consideration was the welfare of the child".

In *G. Pemawathie v. A. Kudalugoda*[59] Hon. Justice Weeramantry held that where the law governing the right to the custody of an illegitimate child is the Roman-Dutch law and as the natural guardian mother of the child is entitled to the custody of the child against a stranger. However, the interests of the child would be affected by an interference with its present custody, the claim of the stranger to custody would be preferred, to the claim of the mother.

In *Samarasinghe v. Saiman*[60] it was held "Where a parent has surrendered the custody of a child to another, the mere assertion of his natural right is not sufficient to entitle him to claim back the child. The court will not disturb the status quo unless there is a good ground for that it would be detrimental to the best interests of the child."

In ***P****adma Fernando v. T. S. Fernando*[61] the court decided that the father's fundamental right to the custody of a child during the subsistence of his marriage may be overridden on the grounds that if the custody of the father would lead to adverse effects on the life, health or moral of the child.

In *Visal Bashitha Kavirathne and others v. W.M.N.J. Pushpakumara and others*[62] it was held that although there is no specific provision dealing with the Right to Education in the Constitution as such in the Universal Declaration of Human Rights, the said right has been accepted by our courts through the provisions embodied in Article 12(1) of the Constitution.

Haputhantirige and others v. Attorney General [63] it was decided that "both from the perspective of the application of the equal protection of the law guaranteed by article 12(1) and from the perspective of national policy, the objective of any binding process of regulation applicable to admissions of students to schools should be that it assures to all students equal access to education".

57 62 NLR 82
58 (1961) 66 NLR 83
59 (1961) 66 NLR 83
60 75 NLR 398
61 (1956) 58 NLR 262
62 SC. FR 29/2012 decided on 25.06.2012
63 SC 1 (2007) Sri LR 101

In *Rajaluxumi v. Iyer* [64] case Sri Lankan courts have recognized the right of the non-custodial parent's reasonable access, based on the fact that natural ties cannot be denied unless it is harm for the child.

Dharma Sri Tissa Kumara Wijenaike v. Attorney General[65] held that the decision appears to be based on the reality that the court is the upper guardian of a child.

In *Hewa Maddumage Karunapala and two others v. Jayantha Prema Kumara Siriwardhana, Teacher, Puhulwella Central College*[66] court decided that Sri Lanka as a signatory to the UNCRC has understood the need to curb the widespread use and acceptance of corporal punishment.

In *Re John Mathew* [67] case the court held that a young person should not be ordered to be imprisoned for any offence or sent to prison in default of payment or fine unless the court is satisfied that he is of unruly character and cannot be detained in a remand home or certified school, or he is so deprived of character that he is not a fit person to be detained.

In *Landage Ishara Anjali (Minor) and Another v. Waruni Bogahawatte, Matara Police Station and three others,* [68] the Supreme Court has decided that the Law Enforcement Officials shall at all times ensure to obey and uphold the Law and abide by the Rules for the best interest of the children which were mentioned in the said Judgement.

The Commissioner of Probation and Child Care Services – Western Province, by his letter reference බප/පරීළඉස්/ඉස් 01 dated 24.08.2011 had informed the Supreme Court, that a contactable Special Probation Unit had been established from 01.09.2011, at Bellantara, Dehiwela as per the order/direction in *Amugoda Kankananmge Doti and two others v. Andradige Don Sunimal Priyankara and twelve others* [69] case. According to the proceedings of the said case, multiple directions have been given, including to the Commissioner of Probation and Child Care to furnish a list of Remand Homes with the sex, age and the capacity of such institutions to all the Magistrate Courts. The said information has been sent out on 01/09/2011.

In accordance with the proceedings of the said Landmark Case, the Supreme Court had given numerous directions and guidelines to the State Officials and Institutions who were dealing with children's matters.

64 (1972) 76 NLR 572
65 SC Appeal No.179/2012 minutes of 18/11/2013
66 SC FR 97/2017 decided on 12th February
67 (1986) 1 Sri L.R 243
68 SC (FR) Application No. 677/2012 decided on 12.06.2019
69 FR Application No.335/2010 minutes of 06.09.2011

Chapter - 6

Enforcement Institutions for Humpty Dumpty's Rights

Implementation of reforms shall be based upon local needs and international best practices, paving the way for a response to prevailing obstacles and gate keeping challenges, and exploring new models or ways to make a distinction in the lives of the children. To achieve this, the government had established several institutions to safeguard and protect the child rights.

Ministry of Women, Child Affairs and Social Empowerment[70] will stand against child abuse and for their protection.

Under the National Child Protection Act No.50 of 1998, the **National Child Protection Authority** for child protection was established. Its' objectives are to prevent child abuse, protect and treat abused children, and develop and coordinate regulations or policies and actions to prevent child abuse. To effectuate this objective, the National Child Protection Authority had drafted the National Policy on Child Protection**.** It also initiated to formulate much needed reforms of the laws.

The **Department of Probation and Child Care Services**[71] functioning under the Central Government, provides funds for the nine Provincial Departments of Probation and Child Care Services for the protection of orphaned, abandoned and destitute children and to bring a sound mental development of such children. In accordance with the **Probation Ordinance No. 22 of 1944,** Probation service in Sri Lanka had been established in 12th March 1945 under the Prison Department.

The Department of Social Services was established in 1948. With the introduction of the Provincial Council system after the 13th Amendment to the Constitution in 1987, the **Provincial Social Services Department** [72] was empowered to enforce the welfare activities such as, to provide care and shelter for intellectually impaired and vulnerable children who are without parents or guardians. Community based Rehabilitation Programs are conducted to rehabilitate persons with disabilities and integrate them into society providing relevant services. There are registered institutions for the children who are having a disorder or retardation in his/her growth or having any disability identified at birth or in childhood.

All the police stations have set up **Children and Women Bureau**[73] with a vision to have a society free of violence for children and women. Its mission is prevention of crime, abuse, exploitation and discrimination against children and women through referral

70 https://www.end-violence.org/sites/default/files/paragraphs/download/National%20plan%20of%20action%20for%20children%20in%20Sri%20Lanka%202016-2020.pdf

71 https://www.socialproba.cp.gov.lk/en/probation-and-child-care-services/services.html

72 https://www.socialservices.gov.lk/web/index.php?option=com_content&view=article&id=1&Itemid=103&lang=en

73 https://www.police.lk/index.php/item/816-child-women-bureau

to law enforcement, reintegration of offenders through rehabilitation and violence-free through community awareness**.**

National Authority for the Protection of Victims of Crime and Witnesses [74] is an institution to protect, promote, and uphold the rights of victims and witnesses and it includes the quasi-judicial as well as enforcement, operational and regulatory functions to protect victims of crime and witnesses.

The National Dangerous Drugs Control Board was established under the **National Dangerous Drugs and Control Board Act No.11 of 1984.** It synchronizes the activities of institutions engaged in the prevention and control of dangerous drugs as well as to promote treatment and rehabilitation for drug dependent persons and conduct drug abuse and preventive programs for the children and adults.

Children are entitled to receive legal aid in both civil and criminal cases if they qualify for financial assistance through the **Legal Aid Commission** which was institutionalized with passage of the Legal Aid Law No.27 of 1978.

Chapter - 7

The Fate of Humpty Dumpty

"Children are like buds in a garden and should be carefully and lovingly nurtured, as they are the future of the nation and the citizens of tomorrow."

- Jawaharlal Nehru - [75]

The foundational principle of the criminal justice system for adults revolves around the concept of retribution or punishment. This concept is not only disturbing the juvenile offenders but also there is a possibility of blighting their futures. Therefore, restorative justice is mostly what is imposed on juvenile offenders. The key doctrine of restorative justice is repairing the harm done and restoring the society, restitution of the victim, making the offender understand and take responsibility for his/her actions, and helping to transform to a law-abiding citizen and progress the behavior of the offender.

Justice systems for children have an obligation to ensure that they are embedded to address the root causes of offending behavior or the facts for a child to need care and protection, to facilitate the reintegration of children into society.

Judicial priority for children's rights, an emphasis on family preservation and restorative justice, recognition of the difficulties associated with family disintegration and the need to inspire the support of children by a much wider spectrum of potential caregivers shall be the prime consideration.

74 https://napvcw.gov.lk/about-us

75 https://www.hindustantimes.com/lifestyle/festivals/happy-children-s-day-2021-quotes-by-jawaharlal-nehru-wishes-images-messages-to-share-on-bal-diwas-101636794330868.html

The security and stability of a child is ensured by his/her physical and mental health. On the physical side, one must develop a healthy body with the necessary strength to resist not only disease and ill health, but also stress, strain and trauma. On the mental side, the capacity to think clearly, think analytically as well as holistically and to arrive at viable conclusions are key factors. To accomplish this object, it's prudent to solicit medical advice from mental health professionals.

As children are the future custodians of the country, it is important that they are set on the correct direction by turning them into an accountable citizen, rather than imposing punishment without making them comprehend the nature and the consequences of their actions, while all endeavors are made towards making the best interest and wellbeing of the child. The punishment should be proportionate to the crime committed.

Courts can certainly play a catalytic and supportive role in efforts to set up a greater humane order and in prodding society to give the child the best it has to offer.

When Humpty Dumpty was before the Court of Law, it was clear that the best interest and the wellbeing of the child is the paramount consideration. Humpty Dumpty had been referred to Doctors for counseling, a Probation Officer was allocated for supervision and under the guidance and advice of the Divisional Secretary a Child Right Promotion Officer provided the financial assistance for education and other needs and thereby he was integrated to the society as a law-abiding responsible person. His father had been sent for rehabilitation and had overcome his addiction to alcohol.

Humpty Dumpty was able to put together again with the Judicial and Administrative holistic intervention for his best interest and wellbeing. Humpty Dumpty's family was reunited and lived happily thereafter.

The saga to be continued

for the New Trends of Future Generations.....

AN OVERVIEW OF THE LAW RELATING TO INHERENT POWERS OF THE COURT UNDER THE SECTION 839 OF THE CIVIL PROCEDURE CODE

Nuwan Tharaka Heenatigala*
Additional District Judge, Negombo

Inherent powers of the Court can be simply described as the powers those are not explicitly stated in a statue or code that allows the court to take actions, which are needed to efficiently ensure justice to litigants. In Civil Procedure Code [hereinafter mentioned as "CPC"] of Sri Lanka it states that nothing in the Civil Procedure Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.[1]

These inherent powers are not unlimited but the court can use these powers in a broad manner to ensure justice to the litigants. Decided cases by our superior courts will be useful to understand the broadness of this concept as well as limitations to this concept.

In an early case of *Carolis Appuhamay v. Singho Appu*[2] it was held that a District Judge is empowered to open or rescind any order made *exparte* on being satisfied that it was prejudicial to a party. However, if there is no any allegation of fraud in obtaining the decree, it could not be set aside merely on the ground of irregularity under the provisions of section 839. This was decided in *Fernando v. Fernando.*[3]

Whether the provisions in section 839 of CPC can be used to lay by a case on the request of a party to that case?

This issue was discussed in *Selvadurai v. Rajah*[4] whereas the parties filed one case in District Court of Jaffna and same parties filed another case on same property in District of Kandy. The plaintiff in the action in District Court of Jaffna filed a petition and an affidavit and moved in the District Court of Jaffna that the present action be laid over pending the final decision of the Kandy case. The defendants opposed the application and the District Judge made order dismissing the application of the plaintiff as he thought he had no power under the Civil Procedure Code to grant the application of the plaintiff except with the consent of the defendants.

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1 Section 839 of the Civil Procedure Code

2 5 NLR 75

3 9 NLR 237

4 41 NLR 423

The question of law that arises on the appeal is whether a Court has no powers in matters of procedure other than those expressly provided for by the Code. In the appeal it was held that a Court has inherent power to lay by a case pending the decision of an action in another Court between the same parties in which the maters in dispute are identical.

When a judgment entered against a person under wrong name, can the Court use its inherent powers to correct it?

Section 189 of the CPC provides that a court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which-is necessary to bring a decree into conformity with the judgment. Apart from that provision in *Parsons v. Abdul Cader*[5] it was held that where judgment is entered in a case against a person under a wrong name, the Court has inherent power to substitute the right name in the caption of a plaint even after the decree.

Whether the District Court can vacate its own orders under section 839 of CPC?

Generally section 86 of CPC provides the procedure to vacate *exparte* orders made against any defendant in a civil case on the default of such party. However, in certain instances parties made applications under section 839 to vacate such judgments/ decrees given *exparte*. General rule is that once an order or decree is entered, the Court becomes *functus officio* and cannot set aside or alter the order or decree except in the limited circumstances specified in section 189 of the Civil Procedure Code. Where the defendant argues that he was not served summons and without serving summons the exparte judgment/decree had been entered the issue will arise that whether the section 839 of CPC will be an exception to the above general rule. This issue was discussed in *Ittepana v. Hemawathie*[6] whereas the defendant argued that the court cannot act upon persons who are not legally before it; and a defendant who has never been notified of the proceedings. The Supreme Court held that the failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or is otherwise notified of the proceedings against him, judgment entered against him in those circumstances is a nullity, and when the Court is made aware of this defect in its jurisdiction, the question of rescinding or otherwise altering the judgment by the Court does not arise since the judgment concerned is a nullity. Where there is no act, there can be no question of the power to revoke or rescind. One cannot after that which does not exist. The exercise of power to declare such proceedings or judgment a nullity is in fact

5 42 NLR 383

6 1981 [1] SLR 476

an original exercise of the power of the Court and not an exercise of the power of revocation or alteration. The proceedings being void, the person affected by them can apply to have them set aside *ex debito justitiae*[7] in the exercise of the inherent jurisdiction of the Court. Further the Court held that the proceedings being void, the person affected by them can apply to have them set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court which is saved by section 839 of the Civil Procedure Code.

Later in *Abeysinghe v. Abeysekera*[8] case also the Court of Appeal held that when there is no 'live' Defendant before Court it has no jurisdiction to hear and determine the action, the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted for they are *coram non judice*[9]. Hence the proceedings being void, the person affected can apply to have same set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court.

In *Ariyananda v. Premachandra*[10] where a District Court finds that summons/decree have not been served on the Defendant and yet an *ex-parte* judgment had been illegally made and thereafter writ issued and executed. The court held that it was the duty of the Court *ex mere motu* to have restored possession to the Defendant even if such a relief had not been asked for and when an application is under section 839 of the Civil Procedure Code, invoking the inherent powers of Court to make order as may be necessary to meet the ends of justice or to prevent abuse of process of Court.

In *Pieris v. Wijeratne and others*[11] an application to recall the Probate filed by the Intervenient Petitioner was dismissed on the ground that, the Application was not maintainable on the ground that section 536 of the Civil Procedure Code provides for a recall of Probate only where an order absolute had been issued in the first instance, and in the instant case an Order Nisi had been issued in the first instance. The court held that this is an appropriate case where the Court should use its inherent power under section 839 of the Civil Procedure Code in the interest of justice and although according to section 536 of the Civil Procedure Code an application to recall Probate could be made only when an order absolute in the first instance has been made, in an appropriate case, depending on the circumstances, a Court has jurisdiction to act under section 839 of the CPC.

Circumstances and Limitations to be considered in using Inherent Powers

Although as a general rule, no court or judge has power to rehear, review, alter or vary any judgment or order after it has been entered, either in an application made in the

7 reason of an obligation of justice : as a matter of right

8 1995 [2] SLR 104

9 Latin for "not before a judge", is a legal term typically used to indicate a legal proceeding that is outside the presence of a judge, with improper venue, or without jurisdiction

10 2000[2] SLR 218

11 2000 [2] SLR 145

original action or matter or in afresh action brought to review the judgment or order, yet the rule is subject to certain exceptions and all Courts have inherent jurisdiction to vary their orders in certain circumstances. In *Mohamed v. Annamalai Chettiah*[12] it was held that when a person invokes to exercise its inherent powers, the Court must ask itself two questions, they are:-

(a) Is it a case which comes within the scope of the inherent powers of this Court; and

(b) Is it one in which those powers should be exercised?

In *Jeyaraj Fernandopulle v. Premachandra De Silva And others*[13] Justice Amerasinghe pointed out that certain factors to be considered when a court deciding to use its inherent powers. They are:-

(i) An order which has not attained finality according to the law or practice obtaining in a Court can be revoked or recalled by the Judge or Judges who made the order, acting with discretion exercised judicially and not capriciously.

(ii) A clerical mistake in a judgment or order or some error arising in a judgment or order from an accidental slip or omission may be corrected.

(iii) A Court has power to vary its own orders in such a way-as to carry out its own meaning and where the language is doubtful, to make it plain or to amend it where a party has been wrongly named or described but not if it would change the substance of the judgment.

(iv) A judgment against a dead party or non-existent Company or in certain circumstances a judgment entered in default or of consent will be set aside.

(v) The attainment of justice is a guiding factor.

(vi) Order made on wrong facts given to the prejudice of a party will be set aside by way of remedying the injustice caused.

(vii) Public or general importance of a matter and/or dissent by a minority of the Judges constituting the Bench does not give the Chief Justice the authority to constitute an appellate division of the Supreme Court to review and revise its own decisions.

Inherent powers can be used to rectify order made *per incuriam*[14]. The Court of Appeal in *Kariawasam v. Priyadarshani*[15] considering the definition of *per incuriam* and decided that the Court can exercise its inherent powers to rectify the mistake made in

12 (1932) 12 CL Rec. 228

13 1996 [1] SLR 70

14 Judicial decisions which were given in ignorance or forgetfulness of inconsistent statutory provision or of some authority binding on the court concerned.

15 2004 [1] SLR 189

the judgment to prevent injustice to be caused to the plaintiff-appellant. The rationale behind this decision is the legal principle that no man shall be put in jeopardy by a mistake made by a Court.

When considering above precedents a question may arise as to whether the inherent powers of court can be invoked to disregard express statutory provisions or to override express statutory provisions. This issue was discussed in *Abeygunasekera v. Wijesekera*[16] and it was held that inherent power of Court could be invoked only where provisions have not been made, but where provision has been made and are provided in section 754 (2) of the CPC inherent power of the Court cannot be invoked and therefore the inherent powers cannot be invoked to disregard express statutory provisions. In *Jeyaraj Fernandopulle Case*[17] also the court further held that the inherent powers of a court are adjuncts to existing jurisdiction to remedy injustice and that cannot be made the source of new jurisdictions to revise a judgment rendered by court.

The Supreme Court of India in *M/s Tecnimont Pvt. Ltd. v. State of Punjab & others*[18] held that the inherent power of the Court cannot be exercised for doing that which is specifically prohibited by law and the inherent power is to be read with the limitation that exercise of such power cannot be undertaken for doing that which is specifically prohibited. Same limitation must be read into the scope and width of implied power of an appellate authority under a statute.

In *Stassen Exports Limited v. Hebtlilabhoy Co. Ltd*[19] court discussed the issue on whether the court can suspend an interim injunction under the provisions of section 839 of the CPC. The Court held that the section 666 of the CPC expressly provides that the District Judge has power to discharge, vary or set aside an interim injunction but there is no provision which gives him the power to suspend it and the section 839 of the Civil Procedure Code gives the Court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The Court further held that this inherent power cannot be invoked to violate or override the express provisions of the Code and therefore when a remedy already exists and whenever a remedy has been given by the Code, section 839 does not provide a collateral remedy. Hence the Court has no power to suspend an interim injunction in the exercise of its inherent powers. These judgments clearly pointed out that inherent power of court cannot be invoked to disregard express statutory provisions or to override express statutory provisions.

In recent judgment in *D.R.R. Mahawithana & 2 others v. Commissioner of Co-operative Development of the Southern Province*[20] Court of Appeal held that the Court in exercising

16 2002 [2] SLR 269

17 1996 [1] SLR 70

18 https://sci.gov.in/.../9160_2016_7_1501_16812_Judgement...

19 1984 [1] SLR 129

20 CA [PHC] 37/2017 decided on 09.07. 2021

inherent Jurisdiction has full authority of Law and discretion to convert an Appeal into a Revision provided that the interest of justice so demands.

Another important question to be considered about inherent powers is that whether these powers can be used to rectify mistakes and/or negligence of a party or registered attorney to a case. This was discussed in a recent judgment in *Wimal Weerawansa v. Ravindra Sandresh Karunanayake*[21] by our Supreme Court. In this case the Court held that the Registered Attorney, who was not present in court when the date was given, to the effect that he noted down the date conveyed by the Counsel, when he had time and access to get the date verified but failed to get it verified, is not a reasonable excuse and further held that the section 839 of the Civil Procedure Code is not there to remedy harm caused by one's own action or inaction which could have been averted with due diligence and care.

Conclusion

The law as discussed in the above decisions and *expresio unius est exclusio alterius*[22] principle indicates that when there is an express provision to remedy a situation, one cannot seek relief in terms of section 839 of the Civil Procedure Code. On the other hand one can argue that the words in section 839 specifically states ***"Nothing in this ordinance shall be deemed to limit or otherwise affect ...."*** means that what is expressed through various provisions of the code cannot limit or affect the inherent power of the court to make orders necessary for the ends of justice and to prevent abuse of process of the court. What is important is the need to meet the ends of justice and prevent abuse of process of the court.

However, from some of the judgments mentioned in this article, that a practice has been developed over the years, for the aggrieved party to make an application in the first instance to the original Court which made the ex parte order. When there are express provisions one has to make his or her application as per the said provisions and Courts need not have developed a practice in such situations. The aforesaid decisions refer to a practice since that practice covers the situations not provided by any section or provision of law. However, a Court cannot confer jurisdiction on itself as conferring jurisdiction on a Court is a matter for the legislature. As such, it is my view that the practice developed over the years as aforesaid has to be used as an adjunct to the existing jurisdiction and not to create a new jurisdiction; as such it has to be practiced within the limits of inherent powers recognized by section 839.[23]

21 SC Appeal 59A/2006 decided on 29.07.2020

22 A Latin term literally meaning "the expression of one thing is the exclusion of the other"

23 Per Justice GaminiAmarasekera in SC Appeal 59A/2006

SCOPE OF COPYRIGHTS; BALANCING RIGHTS OF AUTHORS WITH GENERAL PUBLIC

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Additional District Judge, Galle

Introduction

> *The law of copyright does not impinge on freedom of trade. It protects property it is no more an interference with trade than is the law against the larceny. Free trade does not require that one man should be allowed to appropriate without payment the fruits of another's Labour, where they are tangible or in tangible. The law has not found it possible to give full protection to the intangible. But it can protect the intangible in certain states, and one of them is when it is expressed in word and print.*[1]

Since the world become more civilization, the legal regime of copyright which gives protection for authors' creations assumed move significance. It was accepted that authors and publishers should be supported, encouraged and rewarded for their works as it helps in the development of the society. As a result of this, number of statutes were adapted by national legislatures to give effect copy right protection and the Act of Queen Anne which was enacted in 1709 in United Kingdom is considered as the world's first copy right statute.[2]

Two main objectives can be identified in many copyright laws in the world such as.

a) Copyright law is developed by Nations to encourage and reward authors and other creative people.
b) Copyright law also allows general public to make some free use over protected materials of copy right.

Therefore, it is evident from most of copyright laws that it considers to make a balance between privileges given to creators of copyright protected works and general public. Therefore, the main focus of this article is to evaluate the scope and content of economic rights and moral rights in the light of protecting fundamentals and freedoms of people.

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1 Lord Devlin in Ladbroke (football) Ltd v William Hill (football) Ltd (1964) I WLR 273 at p.291

2 Dr.V.K.Ahuja, Law of Copyright and Neighboring Rights: National and International Perspectives, New Delhi India 2007, p.3

Justifications on copyrights

> *Because copyright law has the potential to inhabit the way people interact with and use cultural objects, it is important that we constantly reassess its legitimacy. More specially, we need to ask whether (and why) copyright is desirable. In this context it is important to note that not everyone thinks that copyright is a good thing.*[3]

According to Bentley and Sherman, copyrights can be justified under three theories namely Natural rights, Reward and Incentive based theories. Under the natural right theory, copyrights are considered as expressions of authors' personality. Therefore, it is considered that authors should be entitled to fruits of their efforts and also to prevent any injuries or mutilations of their intellectual offspring.

Then, under the reword theory it is considered that authors should be paid or rewarded fairly for their efforts expanded in creating in relevant intellectual work. Since most of the copyright protected works need considerable investment for its creation and distribution, investments will not be made unless the law provides adequate opportunities to make reasonable profit over it.

According to the incentive theory, since protected works under the copyright regime can be easily copied, the purpose of the copyright protection is to assure that the author's work will not be misused by a third party.

Subject matter of copyright

It is pertinent to note that in terms of section 6 of the Intellectual Property Act No.36 of 2003, eleven categories of original intellectual creations in literary, artistic and scientific domain are protected under the copyright law.[4] Therefore according to section 6 of the Sri Lankan Act, only the original intellectual creations entitle to be protected under our copyright regime. Since the Sri Lankan Act does not interpret originality of a work, the same can be interpreted through judicial decisions where courts have interpreted the concept of originality very loosely rather than accepting the ordinary dictionary meaning.

Lord Pearce in ***Ladbroke*** *(Football) Ltd v. William Hill (Football) Ltd* stated that original requires that; 'not only that the work should not be copied but should originate from the author.'[5]

This judicial dictum can be further explained by the judgment of *University of London press Ltd v. University Tutorials Press Ltd* where the Peterson J observed that;

3 L. Bently and B. Sherman, Intellectual Property Law, London, p.31

4 According to section 6 of the Act, books, speeches, dramatic works, stage production of works, musical works, audiovisual works, works of architecture, works of drawing, photographic works, works of applied arts and illustrations are the main categories of works.

5 Op cit at p.1

> *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 literary work with the expression of thought in printing or writing. The originality which is required relates to the expression of thought.*[6]

Therefore, it is evident that when considering the test of originality, courts used to look to the expression of the work and decide whether that work is a copied one or originated from the author who claims copyright over the said work.

One of the significant feature which also emerged from the above judicial decisions is that only expressions will be protected under copyright regimes and not ideas. This concept is well known as the idea- expression dichotomy in copyright law.

Idea expression dichotomy

It is a well-established principle that there will be no protection for ideas under copyright regimes and the same can be confirmed thorough many judicial decisions.

In *Donoghue v. Allied Newspaper Ltd* it was held by Farwell J. that;

> *If the idea, however brilliant and however clever it may be, is nothing more than an idea, and is not put into any form of word, or any form of expression such as a picture or a play, then there is no such thing as copyright at all.*[7]

According to *Barbara Taylor Bradford v. Sahara Media Entertainment Ltd***,**[8] the reason for limiting the protection to the originality of the expression, is to balance two conflict policies namely.

a) The authors should have a right to get the fruits from their works and to stop others from enjoying from their works. For that the originality must be protected through the copyright regime.
b) By not formulating over protection, law must ensure future creativity.

Aforesaid principles are also followed by Sri Lankan Courts in similar way to the English law approach. In *Wijesinghe Maharamahewa v. Austin Canter*[9] it was held that that originality relates to the expression and not to the ideas.

Therefore, Sri Lankan Intellectual property Act does not define the different between "idea" and "expression". On plain reading of the provisions of the Act, it is clear that protection will not be given to creations already done by another author which considered under the concept of originality. In this context then it is important to consider the legal protection given to "works" under the copyright regime.

6 University of London Press v University Tutorial Press Ltd (1916) 2 Ch.601
7 Donoghue v Allied Newspapers Ltd (1937) 3 Ch.D 503
8 (2004) 28 PTC 474
9 (1986) 1 SLR 620

Legal Protection on 'works'

Legal protections of copyrights have been influenced by many international treaties. The first international instrument on copyright was the international convention for the protection of literary and artistic works which is commonly known as the Berne convention. One of the main principles[10] which based on the Berne Convention is that it provided legal foundation for automatic protection.[11]

Since some countries refused to be parties to the Berne convention due to the reason that required level of protection was high, Universal Copyright Convention was adopted in 1952. It obligates member states to provide adequate and effective protection for copyright proprietors.

One of the significant international convention relating to copy right is the Rome convention (1961)[12] which provides member states to protect performances of performers, phonograms of producers and broadcasts of broadcasting organizations.

TRIPS agreement also provides number of provisions in respect of copy right regime. According to the TRIPS agreement, member states must implement article 1-21 of the Berne Convention in addition to its various Berne – plus features relating to various aspects of copyrights.

These main international conventions[13] have provided foundation for the copyright regime which covers under chapter I of the Sri Lankan Intellectual Property Act No.36 of 2003. Section 5 of the Act defines the ''work" as any literary artistic or scientific work referred in section 6 of the Act and section 6 of the Act clearly categories the protected works under the Sri Lankan copyright regime. Section 8 of the Act Setouts the works which are not protected by the copyright law in Sri Lanka.[14]

Rights over the protected works

A significant part of the copyright law is that the rights it creates for owners of copyright protected works. WIPO defines this as follows;

10 The other principle is that all the member states are bounded to give some legal protection to copyright protected works despite they are originated in another member state.

11 Automatic protection means that the copy right protection is generated automatically without subjected to any registration in a formal manner.

12 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

13 Apart from these international treaties following international conventions can be considered as important international conventions regarding the copyright regime; - Geneva Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms (1971); Brussels Convention relating to the distribution of programme- carrying signals transmitted by satellite (1974); Treaty on the International registration of Audio Visual Works (1989); WIPO Copyright treaty (1996); WIPO performances and phonograms Treaty (1996);

14 Ex ; idea, procedure, system, method of operation, concept, principle, discovery, mere data, text of legislative, administrative and legal nature, news of the day published.

> The owner of the copy right in a protected work use the work as he wishes –but not without regard to the legally recognized rights and interests of others and may exclude others from using it without his authorization. Therefore, the rights bestowed by law on the owner of copy right in a protected work are frequently described as '' exclusive rights" to authorize others to use the protected work. The original authors of works protected by copyright also have "Moral Rights" in addition to their exclusive rights of an economic character.[15]

Therefore it is vital to consider these economic and moral rights in detail to evaluate the scope of Copyright protection.

Economic Rights

Economic Rights are commonly known as negative rights which prevent others from exploiting copyright owners' work. Section 9 of the Sri Lankan Act stipulates economic rights of owners of a particular work. Following acts are authorized under Economic Rights';

a) reproduction of the work,
b) translation,
c) adaptation, arrangement or other transformation of the work,
d) Public distribution of the original and each copy of the work,
e) Rental of the original or a copy of an audiovisual work, sound recording etc.,
f) Importation of copies of the work,
g) Public display,
h) Public performance,
i) broad casting of the "work",
j) other communication,[16]

In *Francis Day and Hunter v. Bron*[17], Wilmer LJ has laid down following principals in determining whether the original work is reproduced or not;

i) There must be a sufficient degree of objective similarity between the two works.
ii) There must be a casual connection between two works and it is not relevant that whether the Defendant knew the said connection.
iii) Casual connection can be shown as a prima facie evidence when there is a substantial degree of objective similarity.

15 WIPO Intellectual Property Handbook: Policy, Law and use, p.44, 45
16 Section 9 of the Act
17 1963 Ch. D 587

This was more confirmed in *British North drop Ltd v. Texteam (Blackburn) Ltd*[18] where it was held that:

> *It may well be that there must be a high degree of similarity before one thing can be said to be "reproduction" of another, but minor or trivial differences will not prevent one work from being a "reproduction" of another.*
>
> *Therefore, it is observed that courts have strictly applied their judicial discretion when determining whether the economic right of the owner has been violated or not.*

According to Section 9 of the Act, works are protected from being translated into another language without the owners' authorization and it also prohibits conversion of a literary work in to a dramatic work.

The next important economic right which protected under economic right is the owner's right to public description. Owner of copyright has the exclusive right to issue copies of his work to the public. However the economic right of public distribution cannot be considered as an exclusive right as the same is limited by the doctrine of first sale which allows a third party to sale or dispose copies which are lawfully made and acquired with the authorization of the owner.[19]

The "rental" right of the owner can also be considered as an important economic right secured under the copyright regime and according to the said right, owner is entitled to prevent others from renting the work irrespective of the ownership of the original or the copy concerned.[20] Therefore although the reselling is allowed under the "doctrine of first sale" rental of the original or copy of the work cannot be made without the authorization of the owner of the copy right.[21]

The sole authority of importation of copyright protected works are vested with owners of the copy right.[22] Even if copies have been made with authority of owners, this section prohibits the importation of the same. Therefore, in respect of the economic right of importation, the doctrine of "first sale" and principle of "exhaustion of rights"[23] have no application in Sri Lanka.[24]

18 1974 RPC 52

19 The new Act No.36 of 2003 introduced the doctrine of first sale the first time in Sri Lank. Section 9(4) of the Act provides for the doctrine of first sale.

20 Section 9 (1)(e) of the Act

21 Section 9(3) further provides that right of rental does not apply to the rental of computer programs where the programs itself not essential object of the rental.

22 Section 9(1)(f) of the Act

23 The principle of 'exhaustion of rights' means that the owner of the copyright will lose his monopoly over his work when he permits the work to be placed in the market

24 under Sri Lankan law this economic right is extended even if the third party who imported the lawful copies which are available in another country.

Copyright owner has the sole economic right of display,[25] public performance,[26] and other communications[27] of the original or a copy of the work. Therefore, according to the above provisions, limitations on all forms of public expressions are ensured economic rights of owners. Since the Act does not interpret the word ''public" it should be interpreted in a manner that restraining the unauthorized persons from using the copyright protected works which is an infringement of rights of owners.

According to section 9(1)(j) broadcasting rights[28] are also protected and the Act provides a broader definition by including all forms of broadcasting rights which also includes modern forms of broadcasting technologies.

Therefore it is evident from above discussion that copyright owners have been economically well protected by copyright regime which creates a monopoly for the said owners.

Moral Rights

Most of the subject matters of copyright reflect personality of their authors. Therefore copyright regimes which are existing in the world, recognize considerable value for the authors' moral rights apart from economic rights. The most important aspect of these moral rights is that even after transferring his economic rights to a third party, author has a right to claim moral rights in respect of his work.[29]

The underpinning rationale for the concept of moral right can be explained from the judicial dictum in *Amaranath Sehgal v. Union of India*[30] where the Delhi Court held that:

> *"In the material world, laws are geared to protect the right to equitable remuneration, but life is beyond the material. It is temporal as well. Many of us believe in soul. Moral rights of the author are soul of his works. the author has a right to preserve, protect and nature his creations through his moral rights."*

Sri Lankan Act by providing provisions in Section 10, has taken measures to protect moral rights of copyrights owners. According to section 10, moral right of a work exists independently from economic rights and following rights have been identified in section 10;

a) The right to be identified as the author[31]

25 According to section 5 of the Act interpreted the 'public display'

26 Ibid

27 Section 9(1)(k)

28 Broadcast means the communication of a work, a performance or a sound recording to the public by wireless transmission, including transmission by satellite

29 Some jurisdiction allows the authors to waive their moral rights ex- Sri Lanka. But Indian Act does not allow the same.

30 (2005) 30 PTC 253

31 Section 10(1) of the Act

b) The right to use pseudonym[32]

c) The right to object to derogatory treatment of his work.[33]

The right to be identified as author of a work which is called as " Droit de paternite" is considered as the main moral right. According to this moral right, the author can prevent all others from claiming authorship in respect of his work and it also includes the right of the author to demand that his name should appear in all copies of his work. The right to paternity was discussed by Indian Courts in famous *Mannu Bhandari Case*[34] where it was held that.

> *The Court observed that section 57 (provision for moral rights) was a statuary recognition of the Intellectual Property of the author and therefore it should be protected with special care. the court observed further that author should have a right to claim authorship of the work as well as a right to restrain infringement or to claim damages for the infringement.*[35]

The right to object to derogatory treatment of his work, (right of integrity) means the authors' right to prevent other from distorting, mutilating and altering his work. It was held in *Lalitha Sarathchandra v. Upul Shantha Sannasgala*[36] that the design of the front page of the alleged reproduction has violated the moral right which is ensured under 10(C) of the Act.

Moral Rights of authors are also protected through international conventions.[37] Protections given to moral rights are considered as useful tools for protecting the quality of original works. Even economic rights are transferred to a third party, the protection given to moral rights prevents the said third party from altering the work.

The protection given to moral rights can also be regarded as a positive reply to the criticism that Intellectual Property law only concerns the economic privileged of authors or inventors. Therefore it is pertinent to note that ensure of economic rights and moral rights have resulted for creating a monopoly for authors'/ owners' protected works. Since it creates a monopoly, the rights of general public may be affected indirectly from the said protections. Therefore it is also important to consider the impact of copyright regime with regard to the Human Rights of individuals.

Copyrights and Human Rights

Many critics who criticize on copyright protection, argue that there should be a balance between interest of copyright owners and reasonable needs of the general public. This

32 Section 10(2) of the Act

33 Section 10(3) of the Act

34 Manu Bhandari v Kala Vikas Pictures Ltd AIR 1987 Del p.13

35 Op cit at 2 p.38

36 PHC(WP) 05/2004(3) decided on 2004.07.01

37 Berne Convention, TRIPS agreement, WIPO Copyright treaty

can also be considered by evaluating some international human rights conventions such as Universal Declaration of Human Rights (UDHR) and the International Covenant for Economic, Social and Cultural Rights (ICESCR).[38]

Article 27 of the UDHR provides that;

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literacy or artistic production which he is the author.

Apart from the UDHR, Article 15 of the ICESCR provides that;

(1) Steps to be taken by the state parties to the present covenant to achieve the full realization of this rights shall include those necessary for the conservation, the development and the diffusion of science and culture.

(2) The state parties to the present covenant undertake to respect the freedom in dispensable for scientific research and creative activity.

(3) The state parties to the present covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

Under article 27 of the UDHR, copy right has been identified as a human right[39] and in the meantime equal protection has been provided for rights of the general public to enjoy arts and share scientific advancements. Article 15(2) deals with moral and material interest of authors.[40] However it can be argued that there should be a balance between concepts expressed in article 27 of the UDHR. Since UDHR is considered as a part of the international customary law, Torremans argues that national courts have used Article 27 to protect authors' rights despite the uncertainty between article 27(1) and 27(2)[41]

Article 15 of the ICESCR mainly ensures right to participate in cultural life, right to enjoy benefits from scientific inventions, right to entitle for moral and material rights for works. Torremans further states that the said frame work of copy right regime provides imperative guidelines such as[42]

01. Copy rights must be consistent with the understanding of human dignity in various human rights instruments and norms defined therein.

38 Apart from the international conventions, Article 13 of the American Declaration on the rights and Duties of Man reads that 'every person has right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

39 The purpose of the Article was to prevent abusing the science and technology as well as copyright violations which took place after the second world war.

40 Paul L.C. Torrnemans, "Is copyright a human right?", 2007 MICH.ST.L.REV 271 at p.276

41 In *Charlie Chaplin v Society les films* 28 RIDA 133 (1960) the matter was considered under article 27 of the UDHR

42 Ibid at 40, p.279

02. Copy rights related to science must promote scientific progress and access to its benefits.

03. Copy right regimes must encourage development of international contacts and cooperation in scientific and cultural fields.

Although human rights recognized in above mentioned international conventions, are not enforceable through the fundamental rights chapter of Sri Lankan Constitution, Article 14(1)(a) recognizes freedom of expression and the same can be innovatively used to interpret rights recognized in various international conventions.

Birnhack observed that;

> *The "unique feature" is that knowledge is a public good; that is, once knowledge is created, it is almost impossible to exclude others from using it (unless the law creates legal means to exclude others, such as property rights). While the cost of creating a work might be high, the cost of reproduction is often low.*[43]

It is to be noted that in *Fernando v. SLBC*[44] Sri Lankan Supreme Court held that freedom of speech includes the right to receive information. Therefore it can be argued that broad interpretation given to the article. 14(1)(a) may be narrowed by copyright regime since it creates a monopoly for the authors. On the other hand, principals of good governance which stipulated in article 27 of the constitution accept responsibility of the government to;

Article 27(2)(g) and (h)

(g) raising the moral and cultural standards of the People, and ensuring the full development of human personality; and

(h) the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels.

Since copyright regime limits free sources available for education, it creates a direct conflict between right to education and protection protected for the benefit of copy rights owners.

Therefore, it is important to consider provisions provided in Sri Lankan Intellectual Property Act in respect of balancing rights of general public and rights of authors. Dr.Ahuja by explaining the above position sates that;

The copyright protection, therefore is *since qua non* for the protection of economic rights of the author/ copyright owner. At the same time it is also indispensable to confer certain rights on public in the copyright work of the author. This is known as the limitation of copyright, which are necessary to keep the balance between

43 Michel D.Birnhack, "copyright law and the free speech after *Eldred v Achcroft*" vol 76 Southern California law review, p.1301.

44 1996 1 SLR 157

two conflicting interests; the interest of the copy right owner by rewarding him and the public interest.[45]

Limitation of copy rights for balancing interests

Main statutory limitation is provided through the duration of a protected work. According to section 13 of the Sri Lankan Act, economic rights and moral rights are protected during the life time of the author and for a further period of seventy years after the death of the author.[46] It is considered that after the said protected period, works will be considered to vest in public domain. However, considering other forms of Intellectual Property rights, said duration of copy right cannot be considered as an effective way to balance conflicting rights of authors and general public as the duration of protection is too long.

The next significant limitation on copyrightable works is formation of the doctrine of fair use.[47] According to doctrine of fair use, free uses can be made in private studies, researches, teaching and reporting. The doctrine of fair use is stipulated in section 11 of the Sri Lankan Act. According to Section 11, fair use of a work for purposes such as criticism, comment, news reporting, teaching, scholarship or research shall not be considered as an infringement of copyrights.[48] However it is important to note that the above mentioned fair uses are only allowed if it is satisfied the test provided in section 11(2) of the Act.

It was held by Aldous L.J.in *Hyde Park Residence Ltd v. Yelland* that the fair use is to be determined by objective standards.[49]

It is further to be noted that under section 12, private reproduction of a published work in a single copy is permitted even without the permission of the owner of the copy right. However application of the said provision is limited to instances where the copy is made by a physical person from a lawful copy and for his own personal purposes.[50]

Therefore, whilst providing certain kind of monopoly for protected works, the Act itself provides certain exceptions for the said monopoly.

However, Covid pandemic, caused many jurists to re-think about balancing copy rights and interests of general public specially with regard to education. During the pandemic, many schools and universities were closed and teaching activities were carried out

45 Op cit at 2 p.7

46 13(1) subject to the provisions of subsections (2),(3),(4), and (5), the economic and moral rights shall be protected during the life time of the author and for a further period of seventy years from the date of his death.

47 In Hubbard v Vosper (1972) 2 Q.B.84,Lord Denning held that; it is impossible to define what is fair dealing. It must be a question of degree. You must consider first number and extent of the quotation and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them'

48 Section 11(1) of the Act

49 2000 RPC 604

50 Section 12 of the Act

through online. But amidst the rapid move to Zoom Rooms, Course Modules, home-recorded lectures, and posted PDFs, copyright restrictions reared their heads, casting into doubt the legality of the online learning practices that had suddenly become nothing short of necessary. Complete versions of computer programs which are used as online teaching flat forms were not freely available during the pandemic. There were many concerns in respect of making available text books in online due to the copy right protection of the said text books.

Conclusion

The protection provided by copyright regimes help creators and investors to engage in more research and creative activities. Since economic rights help to maximize profits, certainly it will influence more creative works to be added to the world which indirectly can be considered as an advantage for the general public.

However there should be a careful balance between other human rights such as freedom of information, access to information, rights to education, right to cultural works and copy rights.

In *Théberge v. Galerie d'Art du Petit Champlain inc*[51] it was held by the Supreme Court of Canada that;

> *"a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."*

Therefore it is the correct time for the legislature to re visit provisions of the Intellectual Property Act and bring necessary amendments to address issues arose in present context.

51 [2002] 2 SCR 336

ASSESSMENT OF DAMAGES AND AWARDING COMPENSATION IN MOTOR VEHICLE ACCIDENT CASES IN SRI LANKA

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1. Background

The *Aquilian* Action forms a considerable part of the civil jurisdiction in Sri Lanka, although there are many kinds of alternative compensation schemes. In these type of cases, damages must be sufficient enough to satisfy the victims as well. But, when it comes to the notion of satisfaction in motor vehicle accident cases, can it be said that the victims of these cases are really satisfied? Most probably the answer would be "NO" and there are many reasons for that answer. This indicates the importance of assessment of damages in these cases. As our courts pointed out over a long period of time, this is a very difficult task. A victim of an accident has to face various difficulties and undergo intolerable agonies, although he she is not responsible for any fault. These tragic incidents can never be fully compensated. But satisfying the victims with reasonable compensation should be of main concern in these type of cases. Trial judges are assigned with this careful, responsible and sacred task.

2. Kinds of award of damages in motor vehicle accident cases

It is important to pay attention to the various types of damages that can be claimed in motor vehicle accident cases. It may fall in to either General or Special damages. As well as, it may take the form of patrimonial or non–patrimonial damages.

2:1 Damages for impairment of corporeal property

As a result of an accident taken place due to the negligence of a defendant, plaintiff's vehicle or some other property may be damaged. In such a case damage is normally calculated based on the value of the property at the time, place, cost of repair or replacement of the spare parts. However, there may be some consequential damages like cost of hiring a vehicle that would be added to a claim based on this. But those damages should not be too remote. Further, Prof. Burchell has pointed out that when the cost of repairing is taken in to consideration, one has to be very careful because the cost of repair may exceed the diminution in value.

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2:2 Damages arising out of personal injury

As pointed out by eminent jurists such as Prof. Burchell, Boberg and Prof. Neethling most of the claims in accident cases fall in to this category. As a result of a victim being suffered personal injury he has to undergo various harms. This will be discussed next in a nutshell.

2:2:1 Loss of earning capacity

Loss of earning capacity would be one of the major damages arisen out of a motor accident or other form of personal injury case. As per Prof. Burchell this is a "more" flexible concept which would extend compensation to those who are not presently utilizing their ability to earn money and a person who is at present earning illegally but has the capacity to earn legally in the future.[1]

Loss of earnings up to the date of the trial is a part of the special damages. However, it is a well established principle that this has to be specially averred . In the case of *Kunene v. Road Accident Fund*[2] applicable principle in this regard has been stated.

In *Webb v. Road Accident Fund*[3] how the damages under this head could be calculated was discussed in detail as follows;

> *"..... In their assessment, the actuaries do not seem to have had regard to certain relevant factors which would have compelled them to adjust their assessment. In Gillbanks v. Sigournay*[4] *the Court per Henochsberg J, stated as follows:" In any estimate of a person's loss of earning capacity allowance must be made for all contingencies including the accidents of life and certain deductions must be made from the gross income to allow for unemployment benefits, insurance and so on. This configuration would include –*

(i) a possibility that a plaintiff's working life may have been less than 65 years,·

(ii) a possibility of his death before he reaches the age of 65 years,·

(iii) the /likelihood of him suffering an illness of long duration,·

(iv) unemployment,·

(v) inflation and deflation,·

(vi) alterations on the cost of living allowance,·

(vii) an accident whilst participating in sport such as hockey or cricket or at any other time which he would affect his earning capacity and

(viii) any other contingency that may affect his earning capacity....."

1 Jonathan Burshell, Principles of Delict, page 128

2 (07.8693.2011) ZAGPJHC 184 8.12.2011)

3 (2203/14) [2016] ZAGPPHC 15 (14 January 2016, www.safliiorg.com)

4 1959 (2) SA 11(N) at pages 17-18,

2:2:2 Pain and suffering

Actions based on pain and suffering have been developed as the Third Pillar of the law of Delict in South Africa. As a result of an accident or any other wrongful Act of a wrongdoer, victim may suffer various kinds of mild pains and severe pains like bone fractures, cuts, burns, damage to internal organs. Shock, fear, anxiety, emotional trauma etc can also be experienced by a victim. When it comes to the assessment of damages based on this, there is no precise formula for determining damages under this. Extent of the injuries of the injured party and pain that has been undergone, victim's age, pre-existing health conditions are taken together in to consideration in deciding the quantity of damages. Further, the award of damages should be proportionate to the injury and its consequences.

In *Webb v. Road Accident Fund*[5] the court has pointed out the correct approach in deciding the compensation based on this as follows;

> *"According to law of Delict 5th Edition by Neethling, potgieter, visser edited and translated by JC knobel at page 232, the concept of fairness or 'equity' is usually a phrase that summaries the following principle.*
>
> *….The court must take all the relevant circumstances in to account which disclose the extent of the injuring to personality and it must ignore irrelevant factors such as undue sympathy towards the plaintiff must be emphasized; the court must exercise its discretion carefully and conservatively and rather too little than too much and the amount awarded must not necessarily burden the defendant in the plaintiff' s favour. If these principles are applied it may safely be said that "a fair" approach has been followed…."*

In order to obtain a fair and reasonable award of compensation plaintiff has to place all the relevant evidence before the court. However the defendant's version also has to be taken in to consideration. This judgment has extensively discussed the general rules that should be followed in assessing damages in connection with pain and suffering, loss of amenities, disability with reference to the Bay passengers *Transport Ltd v. Franzen*[6]

2:2:3 Loss of amenities of life

Loss or reduction of a claimant's mental or physical capacity to do the things he used to do, suffered as a result of personal injuries could be described as loss of amenities.[7] Simply amenity refers the pleasantness of a person or a thing. As per Prof. Burchell.

> *"Legal concept of amenities of life comprises of all the facets which go to make up an enjoyable human life and, in particular, the full use of one's five senses.*

5 2203/14 (2016) ZAGPPH 15, www.safliiorg.com

6 (1975) (1) SA 267 AD 274.

7 orfordreference.com

This was stated by referring to hon. Claasen J' s following remarks in *Reyneke v. Mutual and Federal Insurance co. Ltd.*[8]

> *" The amenities of life flow from the blessings of an unclouded mind, healthy body, sound limbs and the ability to conduct unaided the basic functions of life such as running eating, reading, dressing and contracting one's bladder and bowl….."*

By going through this it could be very well understood what a tragic situation one has to face after getting injured in an accident for some other's wrongful act. Also it is noted here that money can no way restore the loss of amenities of one's life. He can only be compensated with some monetary award.

2:2:4 Disfigurement

As it is understood by the word, disfigurement is something that spoils a person's appearance. Because of this one has to face a lot of inconveniences including psychological problems. During the early ages disfigurement has been used as a mode of punishment. Also this leads to difficulties in one's social, sexual and professional lives, prejudice and intolerance.[9] Because of these reasons claiming damages for disfigurement is very important. In *Sofute v. Road Accident Fund*[10] plaintiff has sustained severe bodily injuries following a motor vehicle accident. There damages was awarded for permanent disfigurement caused to the victim.

2:2:5 Loss of Expectation of life

Injuries caused to a person due to an accident may lead to shorten the period of life expectation. Some injured persons have had to be in permanent vegetative state for some time in their young age and later say good bye to the world for no fault on their part. This is also interconnected with the other heads of damages. General period of life expectancy in a country is normally taken in to account with the effect of injuries caused to the plaintiff in this regard.

2:2:6 Medical Expenses

Medical expenses is another type of damages in motor vehicle accident cases. The plaintiff is entitled to claim the expenses that he had expended for treatments including surgeries, drugs, hospital charges, doctor's charges etc. Sometimes continuous medical treatments and past and future medical expenses could be included in to this.

2:3 Other Claims

If the injured party has died following an accident or a wrongful act, the dependents of the deceased can claim other expenses such as funeral expenses and travelling expenses. Dependents of the deceased bread winner of a family could claim damages

8 (1991(3) SA 412 (w) as " Jonathan Burshell principle of Delict" page 136

9 https:11 en.wikipedia.org

10 388/2006)2007 ZAECHC 128, saflii.org

for maintenance and loss of support which they receive from the deceased. This was considered in *Hlengiwe Mnguni v. Road Accident Fund*[11] Wcorbet JA's views expressed **in** *Evins v. shield Insurance co.Ltd* with regard to the loss of support of a bread winner has been reproduced to explain thelegal principles applicable in the case of *De Uries No and others v. Road accident Fund.*[12]

In computation of damages in a case where a person is dead, various other factors have to be considered. As it was decided in *Sirisena v. Ramachandran and another*[13] the following things are among them;

i. The relevant salary scale applicable at the time of the death.
ii. Salary revisions.
iii. Whether there are adverse comments on the service of the deceased.
iv. Pension and the relief duty allowance as per the relevant administration circulars.
v. Relevant salary scales on promotions.
vi. Life expectancy of the deceased.

However some of these things could be taken in to consideration in personal injury cases also.

3: Law relating to "Damages" in motor vehicle accident cases in Sri Lanka

3:1 Introduction

In Sri Lanka the District Court is vested with the power to hear civil cases including the cases for claiming damages as per the judicature Act.[14]

Here cases for claiming damages are filed under *Aquilian* Action in Roman Dutch Law. Then the elements prescribed by Delict law need to be proved in these kind of cases. With regard to the question of "Damages" or "Award of compensation" in an accident case, it could be seen that similar principles are used by Sri Lankan courts. Though there are certain guidelines in certain statutes in other countries like. South Africa and United Kingdom, similar legal provisions cannot be seen in our county. Section 106 of the Motor Traffic Act (as amended) provides for the mandatory requirement of adding the insurance company as a defendant in claim case of this nature. However, there cannot be seen any special provisions to deal with other aspects. Consequently, the claimant has to resort to the common law.

11 1090/2014) (2015) ZAGPPICT 1074, www.saflii org.
12 1687/2007 (2011)ZAWCHC 215(6 May 2011)
13 (2003 (3) Sri. L.R 344)
14 No.02/1978 severally amended

MC kerron's explanation with regard to claiming compensation in law of delict has been more often cited by Sri Lankan courts in this regard. In the case *North Colombo Regional Transport Board v. Aparekkage Wasantha Pushpakumara Perera,*[15] it has been quoted as follows;

"In assessing damages on personal injuries, MC kerren on Law of Delict page 117 says that;

In an action for personal injuries the plaintiff is entitled to claim compensation for

1. *actual expenditure and pecuniary loss*
2. *disfigurement, pain and suffering, and loss of general health and amenities of life.*
3. *future expenses and loss of earning capacity"*

Further, the court of appeal had paid their attention to the views of Prof. Burchell mentioned above under "loss of amenities of life". The ideology of Mckerron's can be summarized as follows;

"There are no scales by which pain and suffering can be measured, and there is no relationship between which pain and money which makes it possible to express the on in farms of the other with any approach to certainty the usual method adopted is to take all the circumstances in to consideration and award substantially an arbitrary sum."

The development of South African law on pain and suffering in Aquilian Action are used in Sri Lankan law to quantify the damages.

In *Wannakawutta Waduge Nirosh Priyasad Fernando v. Subramaniam Indrajith and H.J. Jayalal Fernando*.[16]

Her Ladyship Justice Eva Wasanasundara PC has stated that;

".....What should be considered is not what he has achieved after the incident but what he was subjected to due to the negligence which caused the incident. The aftermath of the vehicle accident should be looked at with a flash light on the substance to the detriment of the victim and not on the substance to the betterment of the victim....."

3:2 Applicability of Act No. 2 of 2019 "Recovery of Damages for the Death of a Person"

With the introduction of "Act No. 2 of 2019, Recovery of Damages for the Death of a person" some important guidelines have been come in to operation in claiming damages for death of a person.

15 CA 977/98, decided on 27.05.2016

16 sc. ap. 150/2012 decided on 11.09.2014

3:2:1 Right to maintain an action

Where a person is dead as a result of a wrongful act, omission, negligence or default of another the persons referred in section 2(2) have a right to maintain an action for damages.

3:2:2 Who can file an action

As per the section of the Act following persons can maintain an action

a. The spouse
b. A parent or the parents jointly
c. A child or the children jointly
d. A sibling or the siblings jointly
e. A grand parent or the grandparents jointly ; or
f. The guardian

3:2:3 Damages that can be recovered

- Loss of that person's love and affection, care and companionship.
- The mental pain and suffering.

Further, the Act provides provisions regarding the survival of an action where an applicant dies pending the action. Obtaining the assistance of an expert is recognized by the Act. As per section 7 of the Act the remedy available under this shall be in addition to other remedies.

4. How damages are assessed by Sri Lankan Courts

The applicable law with regard to the concept of damages in Sri Lanka has been briefly discussed above. Here it is attempted to see how the courts asses damages in a given case in order to grant compensation. It is needed to inquire whether Sri Lankan Force have followed same physical, deviations and developments in other jurisdictions. Finally, acase in this nature could be prepared and presented in a court of law. *Gafoor v. Wilson and another*[17] is a progressive judgment with regard to damages in delict cases in many aspects.

The facts of the case are briefly as follows. Plaintiff's unmarried 24 year old son Ziard (eldest of seven children) died as a result of the negligent driving of a motor vehicle by the defendant's servant. The deceased used to give Rs.250/- per month to his mother (the plaintiff) for household expenses. The court has described in detail various aspects including the duty of support arising out of relationship of parent and child, necessity of assistance of the child despite her husband's salary and the duty of the court on assessment of damages. The courts find it difficult to assess the damages if necessary evidence is not led. The court has considered the duty of assessment of damages and stated;

17 1990 (1) Sri.L.R. 142

"However no actuarial evidence was put before the court …….. we would have liked to have had such evidence. For although the formulation of a successful claim for prospective damages or the rebuttal of an extravagantly large one is never a simple exercise in actuarial mathematics……"

When it comes to calculation of loss of actual or prospective earnings it was taken in to account of the plaintiff's net earnings after deduction of tax. His gross earnings were not considered in this respect as held in many judgments. In *A. Thavathurai v. T.S. Rochai*[18] it was held that.

"The plaintiff in such a case should be awarded such a sum of many as will put him in the same position as he would have been if he had not sustained injuries and it would therefore be wrong to award the plaintiff a sum without regard to the amount of tax for which he would be liable ….. "

Similar views have been expressed in this regard earlier and *Sinnaiah Nadarajah v. The Ceylon Transport Board and another*[19] is one of them. In that case, this situation was discussed in detail. In personal injury cases, general damages are normally awarded for the physical injury itself. When it comes to disablement; damage are awarded upon the physical capacity of the injured person to enjoy life as well as for his bodily pain and suffering. In this judgment all those aspects have been paid much attention with regard to the extent of what is recoverable as damages. Above principles are applicable in Sri Lankan case law as well.

In *Jayakody v. Jayasooriya*[20] The court has categorically mentioned heads of damages with reference to the jurists like Mc kerron, Macintosh the and Scobee. In order to understand this properly the views of the court could be stated as below in the same way with due respect.

Further the court added the entitlements of a plaintiff when getting compensation in this way.

"Macintosh and Scobee, on " Negligence in Delict "5th edition at page 261, under the head of "damages for personal injury "has stated that "the general principles in relation to compensation payable for injuries negligently inflicted on oneself personally have been laid down in a number of decisions to the effect that the plaintiff is entitled to compensation for both pecuniary and non-pecuniary loss such as:

a) All necessary expenses such as medical and hospital alteration.

b) Loss of future earnings.

18 60 N.L.R. 488

19 79 N.L.R 448

20 2005(1) Sri.L.R

c) Compensation for loss of amenities.

d) Compensation of the shortening of one's expectation of life.

e) Compensation in respect of pain,

Suffering or deformity sustained…..Where damages are claimed for bodily injury, the plaintiff is not required to put a separate money value on each different element of the general damages he has suffered….. in regard to pain and suffering, there are really no scales by which pain and money….."

This has been followed in our courts for a long time in deciding the award of damages. *Sirisena v. Ramachandra and another*[21] is another important judgment in respect of computation of damages, patrimonial loss and apportionmentof the deceased's income. In this case the court has referred the case of *Ceylon Transport Board and another v. Nandawathie and another* (3 Srikantha Law report 4) and the Lord Wright' views in *Davis v. Powell Druffryn Associated Collieries* cited in that case. It is indeed a praiseworthy saying in relation to the assessment of pain and suffering. The following is the very passage which is beautifully worded.

"There is no question here of what may he called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting paint is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basis figure which will generally be turned in to a lump sum by taking a certain number of years' purchase. That some, however, has to be taxed down by having due regard to uncertainties for instance, that the window might have again married and thus ceased to be dependent, or other like matters of Speculation and doubt....."

When the dependents of a deceased person file a case seeking damages arising out of the death of their breadwinner full income received by the deceased cannot be taken in to consideration for assessing damages. Portion of the income that has been necessarily wanted for his maintenance should be deducted from calculation. This judgment clearly expressed why it is needed in this context.

The judgments discussed above bear witness to the fact that SriLankan courts also follow similar principles used in other jurisdictions like South Africa and United Kingdom in deciding the award of damages. Our courts always welcome the important principles laid down in those foreign judgments. Though some of the authorities seem to be old, the legal principles laid down in these cases are used in the same way even today.

21 2003 (3) Sri.L.R. 344

By going through the above judgments, it is clear that our courts always try to grant an award of compensation taking all the circumstances together in to consideration. When it comes to non-pecuniary loss, lump sumps awards are considered the most reasonable. As it is seen in the United Kingdom statute could be in force with regard to grant some periodical payments. If there are continuing damage, it could be dealt with considering the facts of each cases.

5: Are victims satisfactorily and adequately compensated in awarding damages?

It is very important to note that whether it can be said that the amount awarded is sufficient or would satisfy the victim reasonably. Because, no amount of money could give him early life hood back again. Therefore in a case like this assessment of damages and awarding compensation is very difficult but very important task on the part of lawyers and judges.

Not only in the other jurisdictions but also in Sri Lanka, the situation is same for various reasons. At present, number of motor vehicle accidents is increasing rapidly due to numerous reasons. As a result, the cases based on damages could be identified as a considerable part of civil jurisdiction in Sri Lanka. One would argue that as there are many insurance schemes introduced to motor vehicles and there is the office of Insurance Ombudsman whether this can be supported. But more often those insurance companies are expecting a court decision for granting relief. This leads the victims to come to courts seeking relief for their redress. Then the plaintiff has to prove his case as required by the principles of The Law of Delict in The Aquilian Action. If the elements of the Aquilian Action are not properly proved, the plaintiff is not able to get the reliefs prayed for. After establishing the other elements (voluntary conduct, unlawfulness, Fault,) damage or the loss has to be established through required evidence satisfactorily .Then it would be helpful to assess the damages properly.

As it is understood, victims of motor accident cases also have to file cases based on the Aquilian Action in order to recover damages from the defendants. By going through the decided cases and other literature reviews, it could be understood that there is no uniform method in assessment of damages. More often, damages caused to the victim is assessed considering all the facts as a whole. However, there maybe similar cases where the awarded damages are different from each other. In Sri Lanka this has been discussed in many judicial decisions. So far no statute could be seen on how to assess damages in motor vehicle accident cases. Although the insurance companies follow certain guidelines in order to calculate the narrative compensation based on their insurance policy, no other proper statutory intervention has taken place in this regard. In cases like *Agidahamy v. Fonseka,*[22] *Gafoor v. Wilson,*[23] *Yakumbuge Salma v. K.A. Tissa*

22 46 NLR 453

23 1990 (1) Sri.L.R 142

Kasturiarachchi and others,[24] the element of damages and the other factors have been extensively dealt with. Though there are many judicial decisions, it is more often said that the victims of motor vehicle accidents are not satisfied. One of the main reasons for this is that the award of compensation is not adequate and satisfactory. When it is considered what are the factors which make the assessment difficult in a case, there are procedural and other practical reasons. In a case like this the burden of proof lies with the plaintiff. More often it is seen that plaintiffs are poor in many cases. Therefore, they are not in a good position economically in calling necessary witnesses. Money should be spended for calling medical experts. Poverty is the main reason for that. It's common fact that the most of cases in this nature are filed with the help of the Legal Aid Commission. Therefore the court has to Act upon with available evidence and come to final conclusion. Somtimes, the elements are not proved as required by the law. Nevertheless even in a successful case, the minimum standard or the quantum of damages would be different from each other. More often awarded compensation is not satisfactory to the victims. This remains as a serious issue in Sri Lanka amidst the increasing motor vehicle accidents day by day.

6: Comparative analysis with South African Law and English Law

6:1 South Africa

In South Africa it could be seen that Actions for Pain and Suffering have been developed separately as the Third Pillar of the Law of Delict. When it comes to the concept of damages, South African Judicial decisions play a very important role in this regard. Also for the recovery of damages the Road Accident Fund (RAF Act) Act No.56 of 1996 provides provisions. However this Act aims at providing compensation from a fund established by law. But as the purpose is not here in relation to alternative compensation system or other procedures, the Act would not be discussed in detail.

In South Africa, even for filing a case based on damages the Supreme Court Rules have certain requirements in detail as follows.

> *" A plaintiff suing for damages shall set them out in such manner as will enable the thereof: provided that a plaintiff using for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for –*
>
> (a) Medical costs and hospital and other similar expenses and how these costs and expenses are made up;
>
> (b) Pain and suffering, stating whether temporary or permanent and which injuries caused it;
>
> (c) Disability in respect of –

24 CA 769/1997 (f) 2011.12.31

(i) The earning income (stating the earning lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

(ii) The enjoyment of amenities of life (giving particulars); and stating whether the disability concerned is temporary or permanent;

And

(d) Disfigurement, with a full description thereof and stating whether it is temporary or permanent."[25]

When a case is filed following the above requirements it is very easy for the court to assess the damages for each class.

Following the recommendation of the satchwell commission report 2002 Road Accident fund amendment Act No. 19 of 2005 came in to existence. There certain provisions were enacted in relation to the way of claiming damages in a motor accident case. Then the parties have to follow these rules in their cases. The plaintiff in this case was ordered to pursue a claim provided that he fulfills the prescribed procedural requirements. The requirements made under the Act need to submit an assessment by a medical practitioner in accordance with the regulations in relation to damages for non-pecuniary loss.

After introduction of the Act, South Africa has taken, various progressive steps towards minimizing hardships claiming damages in motor accident cases. The procedural steps for various heads of damage always regulate the claims. There by the victims could be compensated satisfactorily. But if the plaintiff does not comply with the procedural steps, his claim would not be succeeded. The above mentioned *Nicoshi v. Mhatha* case is one example for that.

In *Johana Christina Pithey v. Road Accident Fund*[26] the procedure and requirement in a claim of this nature has been discussed in detail.

In the case of *Road Accident Fund v. Azwindini Marunga*[27] the Supreme Court of Appeal dealt with the question of award of general damages in personal injury claim and the inadequate motivation by the trial court and striking disparity between amount awarded by trial court and amount considered appropriate. The trial court awarded R 375000/- as general damages (subject to 60% reduction by apportionment) In the appeal the award was substituted by the amount of Rs.175000/-

6:2 The United Kingdom

In the United Kingdom (UK); the concept of damages in relation to the principles in Law of Tort could be seen connected to certain statutes. Though the general principles of a tort are applicable in deciding a case, the provisions of the statutes play important role.

25 Jonathan Burchell, "principles of Delict"

26 319/13 (2014) ZASCA 55 (16.4.2014)

27 144/2002. www.justice.gov.za

In relation to the claims arising out of a person's death due to fault of another person or not, The Law Reform (Miscellaneous Provisions) Act-1534[28] provides certain provisions for survival of that kind of actions. Also the way of calculation of the damages without reference to any loss or gain to the estate caused by the death has been referred with this.

The Fatal Accident Act of 1976 is a great piece of statute in UK which is dealt with the damages and the way of assessing the damages. The relatives who can file an action after a death are also defined by the in the Act. Under this Act claims are allowed under three heads.

1. Dependency Claims
2. Bereavement claims
3. Funeral expenses

Under this Act damages for bereavement under that section is fixed as £ 12,580 as amended. However this has been constantly criticized because of the fact that the amount is not sufficient. Here the award is made for parents of the deceased and it is divided equally between them.

The Law Reform (Personal Injuries) Act 1948 provides provisions for limiting to extent an injured person's opportunity to obtain double payment. Because they were entitled for some compensation under the Social Security Act also. The above Act imposes 5 years time period that can be taken other benefits that considered in deduction of the awards.

Under the Administration of Justice Act 1969 the judges hearing personal injury cases have a duty to award interest on damages to be given to plaintiff. The Limitation Act 1980, Administrative of Justice Act are some of the other acts which are dealt with awarding compensation in personal injury cases and fatal accident cases.

Periodical payments are allowed to be made in respect of appropriate cases as per the provisions in Damages Act 1996.[29] Under this, court needs not to ask for the consent of parties, but should consider the other factors.

With regard to the calculation of damages in personal injury cases, Judicial Study Boards Guidelines in personal Injury cases which have been continued for several editions are very important even for the judges to assess the award of compensation. In *Sadler v. Filipiak*[30] these guidelines have been followed in order to come to final conclusion of the damages. These guidelines set various categories of injuries or damages and the monetary figures that can be awarded. For instance, for facial scarring, the range of damages as per the guidelines was £ 2000 to 9000 at that time. Most severe cases attract awards up to £66000 and moderate severe category is referred with a range of £ 15250 to £ 40000 as damages. In the above case these guidelines have been discussed in detail.

28 Dan Cassidy, Liability Exposures

29 Richard Kidner, Case Book on TORTS 8th edition

30 www.kiteleys.co.uk

Part of the table that show the guidelines that will be used for the level of damages could be reproduced below for better understanding;

Injury Area	Injury		Level of Damages
Injuries involving paralysis	Quadraplegia		£ 212500 - £ 265000
	Paraplegia		£ 144000 - £ 186500
Head injuries	Brain	Very severe	£ 185000 - £ 265000
	Damage	Moderate severe	£ 144000 - £ 185000
Psychiatric Damage	General	Severe	£ 36000 - £ 76000
	Psychiatric Damage	Moderately severe	£ 12500 - £ 36000
Orthopedic Injuries	Neck	Severe injury	£ 16400 - £ 97500
		Moderate injury	£ 5152 - £ 16400
	hand	Total or effective loss of hands	£ 92000 - £ 132000
		Serious damage to hands	£ 36000 - £ 55000

Judicial study Board, Guidelines (10th edition) in personal injury cases as mentioned in 1 rcsolicitors.co.uk

These kind of guidelines indicate the award of damages that can be claimed in a personal injury case. This has great importance not only for the judges, but also for the others including the parties to a case.

By careful examination of the case law and the other enactments, it is very well understood that the claims in motor accidents cases are regulated and governed by certain statutes in UK. Therefore, minimum standards for the amount of damages could be identified. As a result, there seems to be uniformity in awarding compensation in the country.

7: Conclusion

Based on the difficulties identified above, it is recommended to introduce a seperate chapter in to the Code of Civil Procedure providing provisions for the requirements in a plaint of damages case as it was observed in South Africa. There it should be made it mandatory to follow the requirements mentioned in the Act. Then every action is regulated under that and there cannot be any plaint presented to the courts without a full description of the claim. Also provisions can be enacted to make it compulsory to annex an assessment report on injuries prepared by a qualified registered medical practitioner. Also it can be introduced certain guidelines on minimum standard of damages in accident cases similar to the Study Board's Guidelines in The United Kingdom as mentioned above. This would help the court to assess damages in a fair and uniform way and award damages. However, this has to be done after full research and study of all the aspects of personal injuries and other loss.These recommendations would help the claimants to have a satisfactory and adequate award of compensation.

DOMESTIC AND TRANSNATIONAL CYBERCRIMES: GATHERING, PRESERVATION, AND DISCLOSURE OF DIGITAL EVIDENCE

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1. Introduction

Over the last few decades, the scope of cybercrimes committed via the Internet, Cloud, Blockchain, and other computer networks has rapidly expanded. Big data and the Internet of things (IoT) pose additional hazards to security and privacy in the context of internet-based business models that increasingly rely on the exploitation of private information. It may be utilized for illegal purposes, such as data harvesting through new criminal tendencies. New digital payment methods, such as mobile money, could increase the likelihood of fraudulent and other financial crimes.[1] Since there are more transnational cybercrimes than domestic ones, international cooperation has become a need of the hour to successfully investigate those crimes. This article provides an overview on the different kinds of digital evidence, the importance of preserving them, the possibility of using them in courts and ways to keep and share them in cases of domestic and transnational cybercrimes.

2. Digital Evidence in Cyber Offences

Digital evidence consists of information including data, text, images, audio, video, codes, computer programmes, databases microfilm etc. Such evidence is generally recorded in a 'storage medium' such as, any electronic or similar device, from which information is capable of being reproduced, with or without the aid of any other article or device.[2] Information referred to in Computer Crimes Act No.24 of 2007, shall be deemed to be property for the purpose of the application of the provisions of the Penal Code (Chapter XIX).[3] The term 'property' now includes currency as well as documents or instruments in electronic or digital form.[4] Digital currency includes a digital representation of value that is used as a medium of exchange, unit of account or store of value. But that may

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1 Jayantha Fernando, 'The impact of the Budapest Cybercrime Convention on Sri Lankan Legal System' (APB Sri Lanka 2016) p 84.

2 Computer Crimes Act No.24 of 2007, s 38.

3 ibid s 31 (b).

4 Mutual Assistance in Criminal Matters Act, No. 25 of 2002 (as amended in 2018), s 24.

not be denominated in legal tender.[5] Tracing of crimes committed while trading in digital currencies has also become one of the objectives of transnational cyber crime investigations.[6]

There are various categories of digital evidence concerning cyber crimes. These are commonly referred to as 'computer data', and they represent facts, information, or concepts in a format suitable for processing in a computer system, including a program that causes a computer system to perform a function.[7] Cyber criminals use 'computer programmes', which are capable of causing a computer to perform or achieve a particular task.[8] If unauthorized 'electronic documents' are found in the possession of a suspect, that could be used as primary evidence during the trial. Such documents are articles on which information has been stored or recorded electronically.[9] Information, record or data generated, stored, received or sent in an electronic form or microfilm, or by any other similar means are now considered as 'electronic records' in cybercrime investigations.[10]

Any information, contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services is called 'subscriber information'. Such information is highly useful for the digital forensic study of a cyber offence. In addition to that, 'traffic data' are vital to identify three critical things in relation to a cybercrime. First, it helps to discover the attributes of communication through a computer system. Secondly, it supports finding out data generated by a computer system that is part of a service provider. Thirdly, it displays communication's origin, destination, route, time, date, size, duration or details of subscriber information.[11]

A distributed ledger technology such as 'Blockchain' that uses a decentralized, shared and replicated ledger, which is sometimes driven by crypto economics has also become a part of digital evidence today. The data on such ledger shall be protected with cryptography, be immutable and auditable and shall provide true information.[12]

3. Admissibility of Digital Evidence in Courts

In one of the landmark cases *Benwell v. Republic of Sri Lanka*[13], the court held that computer evidence was in a category of its own. It was neither original evidence nor derivative evidence. Under the law of Sri Lanka, computer evidence was not admissible under section 34 of that Ordinance nor any other section of the Evidence Ordinance.

5 ibid s 24.
6 ibid s 3 (1).
7 ibid s 24.
8 Computer Crimes Act No.24 of 2007, s 38.
9 Mutual Assistance in Criminal Matters Act, No. 25 of 2002 (as amended in 2018), s 24.
10 Computer Crimes Act No.24 of 2007, s 38.
11 Computer Crimes Act No.24 of 2007, s 38 and Mutual Assistance in Criminal Matters Act No.25 of 2002 (as amended in 2018), s 24.
12 Mutual Assistance in Criminal Matters Act No.25 of 2002 (as amended in 2018), s 24.
13 (1979) 2 SLR 194.

This urged the necessity of introducing laws governing cybercrimes and digital evidence, which ultimately resulted in the enactment of several statutes such as Evidence (Special Provisions) Act No.14 of 1995, Computer Crimes Act No.24 of 2007, Electronic Transactions Act No.19 of 2006, Payment and Settlement Systems Act No. 28 of 2005 and Payment Devices Frauds Act No. 30 of 2006.

Digital evidence is admissible in Sri Lankan Courts as held in many cases including *Marine Star (Pvt) Ltd v. Amanda Foods Lanka (Pvt) Ltd*[14], *Millennium Information Technologies Limited v. DPJ Holdings (Private) Limited*[15], *People's Leasing Company Limited v. Muthuthantrige Iran Fernando and others*[16], *Shaul Hameed and Another v. Ranasinghe and others*[17], *Independent Television Network Limited v. Godakanda Herbals Private Ltd and Another.*[18]

According to Evidence (Special Provisions) Act No.14 of 1995, in any proceeding where direct oral evidence of a fact would be admissible, any information contained in any statement produced by a computer and tending to establish that fact shall be admissible as evidence of that fact.[19] However, before admitting such evidence, the court needs to ensure that (a) the statement in the form that it was produced, or reproduced, is capable of being perceived by the senses; (b) at all material times the computer producing the statement was operating properly or, if it was not, any respect in which it was not operating properly or out of operation, was not of such a nature as to affect the production of the statement or the accuracy of the information contained therein; (c) The information supplied to the computer was accurate and the information contained in the statement reproduces or is derived from, the information so supplied to the computer.[20]

Similarly, any contemporaneous recording shall be admissible as evidence in Court.[21] In *Mananage Susil Dharmapala v. OIC Special Crimes Division Colombo*[22], court held that what is contemplated by 'contemporaneous audio-visual recordings' are recordings of the occurrence of the facts in issue or relevant facts embedded in certain media, and they can take the form of audio recordings, video recordings, audio-visual or video recordings, and still photographs.[23] In *Abeyagunawardane v. Samoon and others,*[24] it was held by the Court of Appeal, that admission of video recordings was governed solely under the Evidence (Special Provisions) Act No.14 of 1995. Additionally, even audio

14 [H.C. (Civil) 181/2007/MR] (K.T. Chithrasiri, HCJ).
15 [HC (Civil) 257/2009/MR].
16 [H.C. (Civil) 201/2008/MR] (Ruwan Fernando HCJ).
17 (1990) 1 SLR 104.
18 S.C. CHC Appeal 29/11 (Decided on 2017.03.14).
19 Evidence (Special Provisions) Act No. 14 of 1995, s 5 (1).
20 Evidence Special Provisions Act No.14 of 1995, s 5 (1).
21 ibid s 4 (1).
22 SC Appeal No. 155/14 (Decided on 2022.06.28).
23 ibid Yasantha Kodagoda, PC, J. in page 12.
24 [2007] 1 Sri. L.R. 276, 287 (Imam J).

itself has been admitted as evidence by Courts. In *Abu Bakr v. Queen,*[25] it was held that contemporaneous recordings of speeches could be admitted as evidence. In the matter of *In re S.A. Wickramasinghe 1954*, Court held that an electrical recording of a speech made on a tape recorder could be admitted as evidence.[26]

When admitting contemporaneous recordings as evidence, the court needs to ensure that (a) the recording or reproduction was made by the use of electronic or mechanical means[27], (b) the recording or reproduction is capable of being played, replayed, displayed or reproduced in such a manner so as to make it capable of being perceived by the senses,[28] (c) at all material times during or after the making of the recording or reproduction, or if it was not, any respect in which it was not operating properly or out of operation was not of such a nature as to affect the accuracy of the recording or reproduction[29]; (d) the recording or reproduction was kept in safe custody at all material times during or after the making of such recording or reproduction, and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered with during the period in which it was in such custody.[30]

If any party to a proceeding proposes to tender any evidence under sections 4 or 5, in such proceeding the party proposing to tender such evidence shall, not later than forty-five days before the date fixed for inquiry or trial, file, or cause to be filed, in court, after notice to the opposing party, a list of such evidence as is proposed to be tendered by that party, together with a copy of such evidence or such particulars thereof as is sufficient to enable the party to tender such evidence.[31] If any party proposing to tender any evidence under the provisions of the said Act fails to give notice as aforesaid, or upon application being made for access and inspection, fails to provide a reasonable opportunity therefor, or fails to comply with any order or direction given by the court under subparagraph (a), such party shall not be permitted to tender such evidence.[32]

4. The Importance of Preserving of Digital Evidence

Preservation of digital evidence has become an important task in cybercrime investigations and prosecutions because a lack of originality in the data and information could reduce the credibility of such evidence. The originality of information depends on its integrity, and therefore, maintaining the integrity of information is essential in such investigations. Once the integrity of digital evidence is properly maintained, both data and information become more reliable. Unless otherwise proven, the court would consider such information to be original and admissible in evidence during proceedings.[33]

Information is original if, there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form as a data message,

25 (1953) 54 NLR 566 (Gunasekara J).

26 (1954) 55 NLR 511 (Gunasekara J).

33 Electronic Transactions Act No.19 of 2006, s 21 (3).

electronic document, electronic record or communication or otherwise; and the information contained in the data message, electronic document, electronic record or other communication is available and could be used for subsequent reference.[34]

The integrity of information should be assessed by checking, whether such information has remained complete and unaltered, apart from the addition of any endorsement or any change which arises in the normal course of communication, storage or display.[35] The standard for reliability of the assurance shall be assessed having regard to the purpose for which the information was generated and all other relevant circumstances.[36]

5. Gathering, Preservation and Disclosure of Digital Evidence

5.1 Domestic Cyber Crimes

Domestic cybercrimes are generally limited to the offences defined in the Act, such as securing unauthorised access to a computer, doing any act to secure unauthorised access to commit an offence, causing a computer to perform a function without lawful authority, offences committed against national security, dealing with data unlawfully obtained, illegal interception of data, using illegal devices, unauthorised disclosure of information enabling access to a service, attempting to commit an offence, abetment of an offence, and conspiring to commit an offence.[37]

In order to preserve digital evidence at a domestic level, it is important to identify the jurisdiction over such material. the jurisdiction to hear, try and determine all offences under the Computer Crimes Act. No.24 of 2007 ('the Act') shall be vested with the High Court.[38] Where the provisions of the Extradition Law, No.8 of 1977 are applicable in relation to the commission of an offence under the Act, the High Court held at Colombo shall have exclusive jurisdiction to hear, try and determine such offence.[39] During the period of investigations, the magistrate in the relevant jurisdiction could assist the expert and police officer.

The limitations of the jurisdiction are explained in section 2 of the Act According to section 2(1), the provisions of the Act apply where(a) a person commits an offence under the Act while present in Sri Lanka or outside Sri Lanka, (b) the computer, computer system, or information affected, or which was to be affected, by the act constituting an offence under the Act was at the material time in Sri Lanka or outside Sri Lanka or (c) the facility or service, including any computer storage, or data or information processing service, was at the material time in Sri Lanka or outside or (d) the loss or damage is

34 ibid s 5(1).
35 ibid s 5 (2) (a).
36 ibid s 5 (2) (b).
37 ibid s 3-13.
38 Computer Crimes Act No.24 of 2007, s 25.
39 ibid s 25.

caused within or outside Sri Lanka by the commission of an offence under the Act, to the State or to a person resident in Sri Lanka or outside Sri Lanka.[40]

According to section 31 of the Act, for the application of the provisions of the Penal Code (Chapter XIX) in relation to an offence committed under the Act, an offence committed under this Act committed outside the territory of Sri Lanka shall be deemed to have been committed in Sri Lanka.[41] According to section 36 of the Act, an offence specified in the Act shall for the purposes of that law be deemed not to be an offence of a political character or an offence connected with a political offence or an offence inspired by political motives, for the purposes of the extradition of any person accused or convicted of any such offence, as between the Government of Sri Lanka and any requesting State, or of affording mutual assistance for investigations to a requesting State under section 35.

An expert could gather digital evidence in general by entering any premises with police, accessing any information system, computer, or computer system, or any programme, data, or information held on such a computer to perform any function or to do any other thing, and asking any person to disclose any traffic data.[42] Under the authority of a warrant issued by a magistrate, an expert or a police officer may obtain any information, including subscriber information and traffic data, in the possession of any service provider, intercept any wire or electronic communication, including subscriber information and traffic data, at any stage of such communication.[43] However, an expert or a police officer may, without a warrant, exercise their powers referred to in that subsection if the investigation needs to be conducted urgently, there is a likelihood of the evidence being lost, destroyed, modified or rendered inaccessible, and there is a need to maintain confidentiality regarding the investigation.[44]

In *United States v. Gorshkov*[45] police accessed suspect's computer system in Russia and downloaded some contents before the warrant being applied for and obtained. Court held that their actions were reasonable under the exigent circumstances. The FBI agents had a good reason to take immediate action as someone could easily destroy digital evidence, or make it unavailable before mutual assistance could be obtained by Russian authorities or obtain warrant issued by a court.

If an expert or a police officer believes that information stored in a computer is reasonably required for an investigation and that there is a risk that such information would be lost, destroyed, modified, or rendered inaccessible, he may, by written notice, require the

40 ibid s 2.

41 Computer Crimes Act No.24 of 2007, s 31.

42 ibid s 17 (4).

43 ibid s 18 (1).

44 ibid s 18 (2).

45 2001 WL 1024026, U.S. Dist. LEXIS 26306 (W.D. Wash. 2001).

person in control of such computer or computer system to ensure that the information is preserved for a period not exceeding seven (07) days.[46] This period may be extended by a magistrate in the relevant jurisdiction for such a further period. But the aggregate shall not exceed a period of ninety days.[47]

The police officers and experts who conduct any search or inspection during the course of an investigation should make every effort to ensure that the ordinary course of legitimate business for which any computer may be used is not tampered with by such search, inspection, or investigation.They shall not seize any computer, computer system, or part thereof, if such seizure would prejudice the conduct of the ordinary course of such business. However, two exemptions provided to this are (a) where it is not possible to inspect the premises where such computer, computer system or part thereof is located; or (b) where seizure of such computer, computer system or part thereof is essential to prevent the commission of the offence or the continuance of the offence or to obtain custody of any information which would otherwise be lost, destroyed, modified or rendered inaccessible.[48]

During the course of an investigation, a police officer may exercise powers of arrest, search, or seizure of any information accessible within any premises, in the manner provided for by law.[49] He may not, however, access any computer for the purpose of conducting an investigation under the Act unless the Inspector General of Police certifies that such police officer possesses adequate knowledge and skill in the field of ICT and thus possesses the required expertise to perform such a function.[50] Once any item or data has been seized or rendered inaccessible in the course of an investigation, the police officer, who is conducting the investigation, shall provide a complete list of such items and data, including the date and time of such seizure or of rendering it inaccessible, to the owner or person in charge of the computer or computer system.[51]

Any person who is required to make a disclosure or to assist in an investigation under the Act must do so.[52] Anyone who obstructs the lawful exercise of an expert's or a police officer's powers or fails to comply with a request made by such an expert or police officer during an investigation is guilty of an offence.[53] Experts and police officers engaged in an investigation under the Act should maintain strict confidentiality about all information that may come to their knowledge during the course of such investigations, and they

46 ibid s 19 (1).
47 ibid s 19 (2).
48 Computer Crimes Act No.24 of 2007, s 20.
49 ibid s 21 (1).
50 ibid s 21 (2).
51 ibid s 22.
52 ibid s 23 (1).
53 ibid s 23 (2).

should not disclose to any person or use any information obtained for any purpose other than the discharge of their duties under this Act.[54]

Even the service provider from whom the information has been requested or obtained and anyone to whom a written notice has been sent requiring the preservation of information must keep that information and the fact that it has been requested, obtained, or required to be preserved in strict confidence and cannot talk about it without legal permission.[55] He shall not be held liable under civil or criminal law for disclosing any data or other information in connection with an investigation under the Act.[56] Any person who contravenes the provisions of subsections (1) and (2) of section 24 of the Act shall commit an offence.[57]

5.2 Transnational Cyber Crimes

As Sri Lanka is a signatory to the Budapest Cyber Crime Convention, it is important to review Article 22, which defines cybercrime jurisdiction. Accordingly, each party shall take whatever legislative and other measures are necessary to establish jurisdiction over any offence established under Articles 2 through 11 of this Convention, when the offence is committed (a) on its territory; or (b) on board a ship flying the flag of that Party; or (c) on board an aircraft registered under the laws of that party; or (d) by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.[58]

In providing assistance between Sri Lanka and other States, the provisions of the Mutual Assistance in Criminal Matters Act, No.25 of 2002 (MACM 2002) shall apply.[59] In the case of a country which is neither a Commonwealth state specified by the Minister by order under section 2 of the aforesaid Act nor a Non-Commonwealth country with which Sri Lanka has entered into an agreement in terms of the aforesaid Act, then it shall be the duty of the government to afford all such assistance to, and may through the Minister request all such assistance from, a convention country, as may be necessary for the investigation and prosecution of an offence under this Act (including assistance relating to the taking of evidence and statements, the serving of process and the conduct of searches).[60] The grant of assistance may be made subject to such terms and conditions as the Minister thinks fit.[61]

54 ibid s 24 (1).
55 ibid s 24 (2).
56 ibid s 24 (3).
57 ibid s 24 (4).
58 Budapest Cyber Crime Convention, art 22.
59 Computer Crimes Act No.24 of 2007 35 (1).
60 Computer Crimes Act No.24 of 2007 s 35 (2).
61 ibid s 35 (3).

The provisions of the MACM 2002 were amended in 2018 addressing the cross-border nature of cybercrimes to obtain and provide assistance in their investigations. Hence, it is now possible to execute requests for search and seizure in such matters[62]; obtain or provide information relating to the location of a computer system or any other property connected with any criminal activity; the forfeiture or freezing of property pursuant to the relevant laws on such matters[63]; the tracing of crimes committed via the internet, information communications technology, cloud computing, blockchain technology, and other computer networks, including the trading in of any digital currencies[64], the expedited preservation and disclosure of stored computer data and preserved traffic data and applicability of evidence led from a specified country through video conferencing technology.[65]

There should be a Central Authority (the Authority) for the purposes of the said Act which could designate competent authorities who should process information requests as directed by the authority.[66] The Authority shall take all reasonable steps to ensure prompt action in respect of all requests, together with the assistance of such other entities or persons as may be necessary.[67] In addition to that, it may direct a request received under section 5 to a competent authority to provide necessary information or assistance.[68]

An application could be made to the Central Authority by the appropriate authority of a specified country or specified organization requesting information or assistance in respect of such criminal and related matters referred to in the MACM 2002. This kind of information must be gathered in order to stop, find, investigate, or start criminal cases inside or outside of the country.[69] A request could be sent directly to the right Authority through the right authority of a certain country or organization. This can be done through electronic means.[70]

If a request is made directly to a competent authority, the said competent authority should immediately inform the Central Authority by forwarding a copy of the relevant request.[71] The Court can't refuse a request just because the Central Authority didn't get it directly from the appropriate authority of a certain country or organization.[72] Once a request is received by the authorities, they may as soon as possible either approve, approve partially, approve

62 Mutual Assistance in Criminal Matters Act No.25 of 2002(As amended in 2018)s 3 (1) (e).
63 ibid s 3 (1) (k).
64 ibid s 3 (1) (l).
65 ibid s 3 (1) (q).
66 ibid s 4 (3).
67 ibid s 4A (a).
68 ibid s 4A (b).
69 ibid s 5 (1).
70 ibid s 5 (3).
71 ibid s 5 (4).
72 ibid s 5 (6).

subject to some conditions, postpone or refuse such a request.[73] Upon receipt of a request, the Authority should promptly direct a competent authority to process the information in respect of the request, inform the appropriate authority of a specified country or specified organization of the outcome of the execution of the request, with reasons, and of any reasons that render impossible the execution of the request or are likely to delay it significantly.[74]

The Authority may further direct a competent authority to spontaneously transmit information requested relating to a criminal matter to an appropriate authority of a specified country or specified organization in exigent situations, on the assurance of reciprocity and on such conditions as may be necessary for the purposes of confidentiality.[75] Authorities must decide what 'urgent situations' are by writing down their reasons and thinking about how bad the crime was or how sneaky the criminal was.[76]

A request by the appropriate authority of a specified country for assistance under this Act should be refused only for the given reasons mentioned in section 6(1) of MACM 2002.[77]All matters should be considered strictly confidential by every officer involved in the aforesaid process.[78] Unless otherwise authorized by law, a person who, because of his official capacity or office, and being aware of the confidential nature of the request, shall not disclose such content or facts except to the extent that the disclosure is necessary to execute the foreign request.[79] Any person who fails to comply with this section commits an offence. For the purposes of this Act, a request for information relating to a criminal matter may be granted after ensuring the authenticity of the requesting person.[80]

According to section 11(1), the Central Authority may, on the request of a court or a competent authority, request the appropriate authority of a specified country or specified organization to arrange for evidence, including computer evidence, to be taken and investigative material to be produced for the purposes of investigating a criminal matter and a criminal proceeding.[81] Where the Central Authority receives from the appropriate authority of a specified country or specified organization,any evidence taken, and where such evidence is in relation to computer evidence, being certified as a true copy by any judicial authority or the appropriate authority, such evidence shall be admissible in any proceeding to which such request relates. However, any information received under this section shall not be used for any purpose other than the criminal matter specified in such request, without the written consent of such appropriate authority.[82]

73 ibid s 5 A (1).
74 Mutual Assistance in Criminal Matters Act No.25 of 2002 (As amended in 2018) s 5 A (2).
75 ibid s 5 B (1).
76 ibid s 5 B (2).
77 ibid s 6 (1).
78 ibid s 6 A (1).
79 ibid s 6 A (2).
80 ibid s 6 A (5).
81 ibid s 11 (1).
82 ibid s 11 (2).

If a proceeding or investigation relating to a criminal matter involving a serious offence has commenced in a specified country and there are reasonable grounds to believe that a thing relevant to the proceeding or investigation is located in Sri Lanka and the appropriate authority of such specified country requests the Central Authority to arrange for the issuance of a search warrant for that purpose, the Authority may authorise a police officer in writing to make an application to the Magistrate within whose jurisdiction that thing is believed to be located for the search warrant requested by the appropriate authorities of such specified country.[83]

Then, the Magistrate may issue a warrant authorizing a police officer, with such assistance, and by such force, as is necessary and reasonable, (a) to search the person for such things; and (b) to seize anything authorised to be seized by the warrant and found in the course of the search that the police officer believes, on reasonable grounds, to be relevant to the proceeding or investigation.[84] If the Magistrate issues a warrant allowing a police officer to (a) enter the land, or upon or into the premises; (b) search the land or premises for such things; and (c) seize anything authorized to be seized by the warrant and discovered during the search that the police officer believes, on reasonable grounds, to be relevant to the proceeding or investigation.[85]

If a thing is delivered into the custody and control of the Inspector-General of police under section (9), the Inspector-General of Police shall arrange for such a thing to be kept for a period not exceeding one month from the day on which it was seized. pending a direction in writing from the Central Authority as to the manner in which the thing is to be dealt with, which may include a direction that the thing be sent to an authority of a specified country.[86] The provisions of the Criminal Procedure Code Act, No.15 of 1979 relating to the execution of search warrants issued under that Act shall, so far as they are not inconsistent with the preceding provisions of this section, apply to the execution of warrants issued under the MACM 2002.[87]

Subject to the provisions of subsection (9), the Magistrate issuing a warrant under this section shall forward to the Central Authority anything seized in the course of a search following such warrant, together with a certificate setting out the place and circumstances of the seizure and the custody of such thing after its seizure, for transmission to the appropriate authority of the specified country requesting such search warrant.[88]

If the Central Authority is of the opinion that expedited preservation is required of stored computer data or traffic data, the Central Authority shall inform the Secretary

83 ibid s 15 (1).
84 ibid s 15 (2).
85 ibid s 15 (3).
86 ibid s 15 (10).
87 ibid s 15 (11).
88 ibid s 15 (12).

to the Ministry of the Minister assigned to the relevant subject to make an order for the expedited preservation of stored computer data or traffic data, as the case may be, or for both such data, for the period specified under section 20B.[89] All data for which an order is made under section 20A shall be preserved for a minimum period of six years.[90]

The digital evidence preserved under this part shall be maintained in a manner and form that will enable an institution to immediately comply with the request for information in the form in which it is requested. A copy of such data may be kept in a machine-readable form to conveniently obtain a print thereof or be kept in an electronic form to enable a readable copy to be readily obtained and an electronic signature of the person who keeps the records to be inserted for purposes of verification; or where necessary, entail freezing of the stored computer data; or be updated, if necessary.[91]

Preserved data shall be released for criminal investigation or judicial proceedings on a request duly made by the appropriate authority for such period as specified in the request. Every order made under section 20A shall lapse on the expiry of the period of time specified under section 20B or on the expiry of the period specified in the request.[92] If, while granting a request to preserve traffic data relating to a specific communication, the Central Authority learns that a service provider in another country was involved in the transmission of the communication, the Authority should instruct the relevant competent authority to disclose such amount of traffic data as is sufficient to identify that service provider and the path through which the communication was transmitted, before the request being granted.[93]

If a request is made by an appropriate authority of a specified country or specified organization for computer data or information to investigate a criminal matter, the Magistrate may issue an order to enable the production of (a) specified computer data in the possession or control of a person stored in a computer system or a computer data storage medium; and (b) the necessary subscriber information in the possession or control of a service provider.[94]

In addition to that, Magistrate may issue a warrant under section 15, to search or otherwise access any computer system or part thereof, as well as any computer storage medium on which computer data may be stored.[95] The search warrant issued by the Magistrate whose jurisdiction such computer or computer system is believed to be located may authorize a police officer or any other designated person to(a) seize or otherwise

89 ibid s 20 A.
90 ibid s 20 B.
91 ibid s 20 C.
92 ibid s 20 D(2).
93 ibid s 20 D (3).
94 ibid s 20 E (3).
95 ibid s F(1).

secure a computer system or part thereof, or a computer data storage medium; (b) make and retain a copy of that computer data; (c) maintain the integrity of the relevant stored computer data; and (d) render inaccessible or remove that computer data.[96]

6. Conclusion

In order to assure a fair trial in a case involving cybercrime, one of the most important responsibilities that must be fulfilled is the gathering, preservation, disclosure of digital evidence. There is no possible way for there to be any reasonable doubt regarding the originality, integrity or reliability of the data and information once they have been effectively kept in accordance with the standards of the law. Then, it shouldn't be too difficult to use this evidence in court. Due to the rapidly growing nature of cybercrimes, it is no longer possible for individual nations to investigate and prosecute them on their own. Therefore, to effectively prevent cybercrimes on both the national and international levels, there has to be a great deal of international collaboration and assistance between states.

96 ibid s 20 F (2).

THE NEED FOR DYNAMIC EFFECTIVENESS IN LEGAL FRAME WORK GOVERNING FOREIGN EMPLOYMENT AND MIGRATION AS AN IMMEDIATE INSTRUMENT IN OVERCOMING CURRENT ECONOMIC CRISIS

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The current economic crisis in Sri Lanka has reached catastrophic proportions vastly on account of the foreign exchange dilemma characterized by striking balance payment deficit, import inflation and epidemic foreign indebtedness. The significance of remittance from outmigration to Sri Lanka's balance of payment and economy is of such magnitude that Sri Lanka's economy could be described as a foreign remittance-dependent economy[1]. During the decade 2000-2010, foreign remittances were much larger than official development assistance that it was estimated that foreign remittances contributed 8 per cent of the Gross Domestic Product (GDP)[2]. In the early 1990s migrant worker remittances were ranked third in terms of foreign exchange earnings alongside tea and garment exports (including apparel and textile) and the growth in remittances was phenomenal, increasing from 20 per cent of total export in 2000 to 63 per cent in 2017.[3] This is the very reason why an intense focus must be placed on foreign expatriate or the migrant worker in confronting the current economic crisis. However, starting from Sri Lankan female domestic servants employed in Middle East, semiskilled workers interested in countries like Korea to skilled migrants to attractive destinations like Australia, the UK, and Canada suffer from a multiplicity of complicated issues subduing the intended outcome. These problems include social costs like child abuse, school dropout children, family breakups and neglect of ageing parents in connection with female domestic servants. Simultaneously, a variety of problems common to skilled, semi-skilled and unskilled migrants ranging from high cost in the recruitment process, unpredictability in the entire process and formidable risk to vulnerability under foreign environment invariably creates foreign employment a hyper-risk business venture even

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1 Nimal Sadaratne, 'Economic benefits and social costs of Migration', The Sunday Times Economic Analysis dated 21st August 2011

2 Ibid, paragraph 2

3 Pg. 6, International Labour Office Geneva, Review of Law, Policy and Practice of Recruitment of Migrant Workers in Sri Lanka.

for skilled migrants. Although migration consultants and consultancy firms perform an important function to the Sri Lankan economy while performing similar functions to foreign employment agencies high-cost factor associated with the same inevitably makes foreign employment nothing but a high-risk business venture even for skilled migrants. Sri Lanka has a strong and detailed regulatory legal framework ranging from Sri Lanka Bureau of Foreign Employment Act No.21 of 1985 as amended by Act No.4 of 1994 and Act No.56 of 2009 ('SLBFE Act'), regulations made thereunder, International law Treaties and Conventions ratified by Sri Lanka like Convention on the Protection of All Migrant Workers and Families to National Labour Migration Policy for Sri Lanka ('NLMP'). Moreover, on account of the considerable increase of migration consultants and migration consultancy firms functioning strikingly similarly to foreign employment agencies, an urgent social necessity has arisen to interpret migration consultants under the definition of a foreign employment agency and thereby ensure that the important function of migration consultancy is exposed to regulation and control under SLBFE Act. Nevertheless, despite such an extensive legal platform, the implementation regime of the same is considerably frustrated invariably depriving Sri Lankan public from the real benefits of foreign employment or migration. A strong institutional framework exists to regulate and supervise the recruitment sector with Sri Lanka Bureau of Foreign Employment ('SLBFE') ensuring adherence to defined standards and procedures and reforms are also proposed. Despite these efforts, this sector is plagued by widespread allegations of malpractices, corruption and exploitation of migrant workers[4]. The routine court work of Magistrates' courts in all parts of the country reflects considerable amount of criminal actions under the Penal Code, based on fraudulent undertakings of foreign employment instituted by police even though said offences entail rigorous punishment under an amendment to the SLBFE Act in 2009. Especially in the context where the scheme of the SLBFE Act in its very nature focuses on strong prosecutions as the crucial element of the implementation regime this paper strives to ascertain how effective criminal prosecutions could be maintained and how institutional structure including the Sri Lankan Diplomatic Missions in receiving states could be encouraged in the eyes of law for the best interests for the migrant public. In the circumstances, an innovative approach focusing on efficacious execution of existing legal framework and imputing effectiveness to institutional structure is urgently demanded by crisis circumstances. Thus, the objectives of the paper are as follows:

1. Analyzing the structural framework of SLBFE Act and thereby identifying the key elements of the implementation regime of the same with special attention to the intention of the legislature underlying Sri Lanka Bureau of Foreign Employment (Amendment) Act No. 56 of 2009;

4 Pg. 3, Transparency Intentional Sri Lanka, Integrity in Foreign Employment, An analysis on corruption risks in recruitment

2. Ensuring strict compliance with the provisions of SLBFE Act and the intention of the legislature is fulfilled through facilitating legal arguments facilitating a strong prosecuting arm;
3. Ascertaining the possibility of identifying the migration consultancy contracts under the scope of the definition of the business of foreign employment agency under SLBFE Act so that the migration consultancy is subjected to regulation and control under the same;
4. Ascertaining how writ jurisdiction under Article 140 of the Constitution and fundamental rights like equality could be resorted in strengthening criminal prosecuting capacities under the SLBFE Act in pursuance of intended objectives;
5. Comprehending the significant function to be performed by the Sri Lankan Diplomatic Missions and exposing their conduct to judicial review in pursuance of providing relief to migrant workers and discovering legal provisions, regulations and constitutional provisions in order to enforce implied duties and legitimate expectations in connection with diplomatic missions in the following manner:
    a. Invoking writ jurisdiction of the Court of Appeal under Article 140 of the Constitution and fundamental rights concerning National Labour Migration Policy, sovereignty under Article 3, duty on state organs under 4(d) and equality/equal protection under Article 12 of the constitution in giving effect to legitimate expectations;
    b. Utilizing the persuasive effect of International Law Treaties and Conventions like the International Law Convention on the Protection of the Rights of Migrant Workers in view of combining Directive Principles of State Policy of the Constitution, Article 3 Sovereignty and public trust doctrine;
    c. Application of the scope of diplomatic immunity in taking action on the conduct of Diplomatic Missions.

Historical Development of Migration and Foreign Employment

In analyzing the nature of Sri Lanka's current legal facet of foreign employment and migration, ascertaining brief history of migration is of vital importance. Five post-independence migration waves[5] have been identified with the first and second waves being identified with the immediate aftermath of Sri Lankan independence in 1948 and the 2nd being identified with the National Language Act in 1956. The most notable wave of emigration at that time was Ceylonese Burgers of European Decent[6]. The period commencing1950s to 1970s can broadly be characterized as one of the increases in the migration of skilled persons. Although in fifties the professionals left the country

5 Pavitra Jayawardene, University of Colombo, Sri Lankan Out Migration: Five Key Waves Since Independence

6 Ibid quoting Dias & Jayasundara, 2004; Sriskandarajah, 2002, Ukwatta, 2013)

in small streams since the late sixties brain drain tended to intensify due to variety of factors including a change in national language from English as a medium of instruction in schools and universities, pervasive state regulation of the economy, controls on the external sector including foreign exchange, imports and travel and political unrest[7] etc. The next phase of migration is from the mid-1970s to the late 1980s, which is the Gulf migration dominated by male workers. Given the market-oriented reforms based on the liberalization of Sri Lankan economy facilitated the opportunities opened by the Middle East oil boom. The bulk of opening in this period was for low-skilled male workers in construction and small enterprise. The period from the 1990s to about 2000 is known as the female-dominated migration, which commenced with the completion of construction in Middle East on account of the demand for various services. The growth in demand was for domestic servants and housemaids. There was also a demand for skilled migration in Middle East. Since 2001 male migration has grown faster than female migration. The Sri Lankan Migration system has now attained maturity spanning over decades and there is a felt need for greater diversification of destinations and skills[8]. The mission statement of the Corporate Strategic Plan of SLBFE 2022-2026[9] is to create an efficient and equitable pathway for people to benefit from their skills in their overseas employment markets securing the interests of all stakeholders while contributing to growth. Thus, the current focus is very much on skilled migration

Existing Legal Framework Governing Foreign Employment and Migration

Current legal framework governing foreign employment, based on the Foreign Employment Bureau Act and regulations strengthened and guided by International Law Standards seems an extensively solid legal platform for accomplishing the intended objectives. However, the pragmatic implementation of the same seems a complicated scenario that creates a foreign employment hyper risk and costly venture even for skilled employment. Constant foreign employment frauds, the fraudulent business of foreign employment agencies and the presence of a series of unauthorized actors are a clear indicators of the failure of the actual practice of said elaborate legal regime.

Although Sri Lanka has a strong migration policy and regulatory framework, there are gaps with International standards, especially in the area of recruitment. Recruitment is a significant portion of the migration process and one which happens within Sri Lanka[10].

7 Pg. 5, Piyasiri Wicremanayake, International migration and employment in the post reforms economy of Sri Lanka, quoting (Karunathilake,1987;Korale, 2004)

8 Ibid, pg. 6

9 Pg. 3, Sri Lanka Bureau of Foreign Employment, Corporate Strategic Plan 2022-2026

10 International Labor Office, Geneva, Review of Law, Policy and Practice of Recruitment of Migration Workers in Sri Lanka July 2019

Sri Lanka Bureau of Foreign Employment Act No.21 of 1985 as amended by Act No.04 of 1994 and Act No.56 of 2009

SLBFE comprising members appointed by ministers in charge of finance, foreign affairs and women affairs along with a representative of the licensed foreign employment agent[11] is bound by objects of fundamental objects of promotion and development of foreign employment opportunities outside Sri Lanka, assisting and supporting foreign employment agencies in their growth and development and undertaking measures to develop the overseas market for skills available in Sri Lanka[12]. Foreign employment agencies are the key stakeholders in foreign employment /migration that the regulation and development of the same constitute an integral element of the act. Assisting licensees in the negotiation of terms and conditions with the agencies abroad, regulation of business foreign employment and recruiting Sri Lankans for employment outside Sri Lanka, issueing licenses and determining terms and conditions of licenses, setting standards for negotiating contracts of employment, entering into agreements with relevant foreign authorities, employers and employment agencies etc. are the objectives in controlling foreign employment agencies[13]. Formulation and implementation of model contracts, which ensure fair wages and standard of employment and objects of ascertaining the authenticity of documentation issued to Sri Lankan recruits reflect the interventionist role that SLBFE is expected to perform. Undertaking research and studies into employment opportunities outside Sri Lanka,[14] for Sri Lankan creates an integral element of the dynamic role the SLBFE is required to undertake in contributing to economic growth. Undertaking welfare and protection of Sri Lankans employed outside, the establishment of the workers' welfare fund, training orientation of workers going abroad in collaboration with licensees and using donations received by Sri Lankans for the purpose of rehabilitation, guidance and assisting families of such workers[15] are social protection aspects that focus on predictability and reducing risk element of foreign employment.

In terms of section 16, SLBFE is entrusted with extensively wide powers in doing anything necessary for, or conducive or incidental to the objects. Moreover, the SLFBE is empowered to enter into agreements for the promotion and develop foreign employment opportunities outside Sri Lanka and appoint members who are duty-bound to the promotion of foreign employment as well as safeguarding the interests of the Sri Lankans[16].

11 Section 3,4 & 5 of SLBFE Act
12 Section 15(a),(b) & (c) of the Foreign Employment Bureau Act
13 Sections 15(d), 15 e) , 15(f), 15(g) & 15(h)
14 Section 15(j) of SLBFE Act
15 Sections 15(m)(n)(o) & 15(p) of the SLBFE Act
16 Sections 20 & 22 of the SLBFE Act

Regulation of Foreign Employment Agencies

Licensing is defined as a compulsory requirement for conducting the business of foreign employment agencies and regulation is ensured by mandatory conditions such as the requirement of individuals, partners, and/or majority shareholders being Sri Lankan citizens. Under section 28 of the SLBFE Act applicant foreign employment agencies are required to enter into agreements with SLBFE confirming the conduct of foreign employment business in a morally irreproachable manner, best efforts to ensure that the contracts of employment between the foreign employer and recruited employee are complied, entering into bonds with sureties and bank guarantees to the satisfaction of SLFBE.

Regulation of Migration Consultancy

The scope of said regulation is determined by the definition of *the "business of foreign employment agency"* under section 72 of the SLBFE Act that the same encompasses any business which purpose is to obtain foreign employment.

…….The key emphasis of the said definition is focused on *"business of providing services (whether by provision of information or otherwise)for the purpose of finding persons for employment"*

Migration Consultancy firms operating in Sri Lanka focusing especially on skilled migration providing information and advice on attractive destinations like Australia are neither registered under the list of licensed Foreign Employment Agencies nor regulated by the SLBFE Act. Although these firms are regulated with the registration in the destination countries like MARA (Migration Agents Registration Authority) the presence of these unregulated actors in Sri Lankan foreign employment context inevitably makes even the skilled migration highly risky and costly business venture. This process is where migration contracts are equipped with dramatic exemption clauses that exclude liability for foreign employment, which is the ultimate object of the same. This uncertainty scenario demonstrates drawbacks in recruitment, which is a crucial element of migration or the foreign employment process.

It is important to ascertain how this strategic evasion from the regulation of the SLBFE Act defeats the very purpose intention of the legislature of said Act and the negative effects of the same.

The enforcement mechanism under SLBFE is given effect in the following manner:

a) Making a non-compliance with the provisions of the SLBFE Act and regulations made thereunder a criminal offence in respect of sections 67 A(1) & 67A (2) of the SLBFE Act as amended by Act No.4 of 1994.

b) Defining major offences like unauthorized recruitment in respect of section 62(1) (a) SLBFE Act and Unauthorized Conducting of the Business of Foreign Employment Agency without a license under section 62(2) of the SLBFE Act reflect the fundamental safeguards striving to ensure compliance with the Act. In this regard, any person who makes, or attempts to make, any agreement purporting to assist emigration or departure from Sri Lanka for the purposes of employment or demands or receives money for such purpose is defined as an offence. Furthermore, causing or assisting or attempting to assist with said tasks is a separate offence.

c) Registered foreign employment agencies are subjected to SLFBE supervision in the following manner:

   i. Legal provisions for cancellation of license on the grounds of contravention with any provision of the SLBFE Act, regulations, any agreement or bond and being convicted of an offence under the Act[17]

   ii. Mandatory requirement for obtaining prior approval of the Bureau both for advertising and calling for applications in terms of section 37 of the SLBFE Act

   iii. A compulsory requirement for all licensees to maintain records in a prescribed manner[18]

   iv. Powers of the SLFBE issue directions to licensees and conduct inquiries made by persons recruited for employment outside Sri Lanka[19]

d) The requirement of furnishing returns by Licensees containing particulars of the business of foreign employment, evidence of bank remittances of the commissions, written information required by the Bureau and documents in relation to foreign employment business conducted by the licensed agency demonstrate a scrutiny mechanism [20]and this is guaranteed by criminality element attached such non-compliance in terms of specific offences in connection with inquiry and failure to furnish information or return required by the Bureau[21].

Considering the scheme of regulation under the SLBFE Act, the most decisive migration process intended to be regulated by the Act is recruitment. Except for instances workers welfare funds and inquiries conducted by the Bureau upon complaints by aggrieved migrant employees subject sequent protection operates in a limited scope.

17 Section 31 of SLBFE Act
18 Section 41 of SLBFE Act
19 Sections 44 & 45 of the SLBFE Act
20 Section 42(a),(b),(c),(d) of the SLBFE Act
21 Sections 65 & 66 of the SLBFE Act

The compliance mechanism under the SLBFE Act is predominantly criminal in nature that institution of criminal prosecution is an indispensable feature of this legal regime. Simultaneously, major mischief scenarios in the foreign employment system and /or migration for employment are the presence of unauthorized actors/entities conducting the unauthorized business of foreign employment agencies and migration consultants who are vastly unregulated by the legal regime based on SLBFE Act. Therefore, in order to achieve the intended ends of foreign employment/migration, strong prosecutions in courts must be placed a vital focus.

Sri Lanka Foreign Employment Bureau (Amendment) Act No.56 of 2009

This final amendment to SLBFE Act ascertains the significance of strong criminal prosecutions in terms of the enforcement mechanism in several aspects by introducing several new offences, increasing penalties and focusing on procedural elements of criminal actions under the act.

New Specific Offence of Unauthorized Advertising and Publication

Restriction on Publication of Advertisement without Approval of Bureau, which is a specific criminal offence introduced under section 37A of the SLBFE (Amendment) Act No. 56 of 2009 imposes a duty on both advertisers and agencies to satisfy themselves that the same is approved by the bureau and failure of any persons comply with such obligations constitutes a criminal offence. This ensures compliance mechanisms are strictly adhered.

Aiding and Abetting any Licensee Agency or its Employees for the Commission under section 67B of SLBFE Amendment Act is another new offence, which imposes vicarious liability is a safeguard against corruption.

Increase of Fines and Imprisonment

By said SLBFE Amendment Act in 2009 gravity of the major criminality aspect of conducting the unauthorized business of foreign employment agency under section 62(2) of the SLBFE Act was emphasized by increasing the minimum mandatory fine to one hundred thousand rupees and the maximum period of imprisonment extending to four years. The minimum fine concerning unauthorized recruitment under section 62(2) was increased to one hundred thousand rupees and the imprisonment period was extended to four years. Sentencing for offences such as charging unauthorized fee under section 64 was amended with a minimum mandatory fine of fifty thousand rupees to one hundred thousand rupees and imprisonment not exceeding two years. It is noteworthy that not prescribing a maximum fine for the most harmful offence of the unauthorized conducting of the business of foreign employment agency reflects that intention of the legislature under section 11 of the SLBFE (Amendment) Act is

to place an unfettered discretion on the sentencing judge to ascertain maximum fine considering all circumstances. Moreover, the increased fines involving the general criminality offence concerning non-compliance provisions or regulations of the Act in respect of section 67A (2) was increased to twenty five thousand rupees.

Procedural Aspects Strengthening the Prosecuting Arm under SLBFE Amendment Act No. 56 of 2009

In relation to section 60B added by said 2009 SLBFE Amendment Act where every officer or servant of the bureau is deemed a public officer or a peace officer under Code of Criminal Procedure Act No.15 of 1979 and in terms of section 60C of SLBFE Amendment Act every officer or servant of the bureau are deemed to be public officers within the meaning of the Penal Code.

In terms of section 60D of said SLBFE (Amendment) Act, both Bureau and the any member, officer, servant or agent are entitled to immunity from suit in relation to any lawful act, which is done in good faith or purported to be done by the Bureau or any such member or officer of the bureau. These immunity provisions are similar to the general defences available to public officers under section 169 of the Penal Code which demonstrates that the legislative intention is to empower investigation powers to the Bureau or officers as if the police officers.

One of the most striking procedural aspects introduced by the section 69A of the said SLBFE Amendment Act is several major offences like unauthorized Advertising without approval under section 37A, the unauthorized business of foreign employment agency, unauthorized recruitment, charging unauthorized fees etc. being defined as cognizable offences where the Bureau officers can arrest without a warrant. Thus, police officers as well as Bureau officers are empowered to arrest such suspects who are concerned with aforesaid offences.

One of the recommendations of Transparency International about Law enforcement is that law should be enforced more effectively and penal sanctions brought against those found guilty of illegal recruitment fraud, deceit bribery and corruption as prescribed in the amendment to the Act.[22] Frequently in criminal actions are instituted by local police against frauds and cheating based on promises or undertakings of foreign. Since this happens only upon penal code offences such as cheating under sections 400/403 and dishonest misappropriation under section 386 without the concurrence of the Bureau or without any reference to the SLBFE Act the very purpose of the amendment seemed to have been defeated in practice. This is because the effectiveness of those cases is limited consequent to considerable delay and lack of expertise of the police to handle such

22 Pg. 52, Transparency International Sri Lanka, Integrity in Foreign Employment, An Analysis of corruption risk in recruitment 2010

criminal actions. Section 59 of the SLBFE Act demonstrates that SLBFE is empowered to appoint anyone for discharging the functions. Failure on the part of Bureau officers to prosecute upon complaint or when the substances demand said failure to exercise the discretion vested in the SLBFE is subjected to judicial review in terms of Article 140 of the Constitution.

Ascertaining the Function of Migration Consultancy Firms from the Perspective of Foreign Employment Laws

Migration Consultancy is synonymous with immigration consultants who help people to emigrate from one country to another through legal and documentary processes to increase chances of immigration for study, work, travel or business purposes[23]. Especially under the current economic crisis prospective skilled migrants in Sri Lanka resort to migration consultants with the hope of foreign employment and such demand is amply catered by Sri Lankan migration consultants with an informal assurance of the same. However controversial it may be the ultimate purpose of the majority of skilled, semi skilled and unskilled migrants who in desperation resort to migration consultancy is foreign employment. While informal migration consultants directly assure foreign employment, formal migration consultancy firms with implied assurance despite contractual exemption clauses focus on foreign employment. The cost of migration consultants in Sri Lanka is so high that seeking foreign employment opportunities even for skilled labour has inevitably become a high-risk business venture. Even though foreign employment in this context has become a heavy risky and costly scenario the function of migration consultancy is a vital function for the Sri Lankan economy that the same must operate under desirable regulation. Thus, the focus of this chapter is placed on ascertaining how this vital function of the migration consultants could be exposed to desirable regulation in pursuance of accomplishing the intended object of immediate provisional solution to the foreign exchange economic dilemma.

The interpretation of *"business of foreign employment agency"* as defined in terms of section 72 of the SLBFE Act is as follows:

- Business (whether or not carried on by charging fees or otherwise and whether or not carried on in conjunction with any other business)
- Of providing services (whether by the provision of information or otherwise)
- To find persons for employment(including apprenticeship and training) with employers outside Sri Lanka
- Or of supplying employers outside Sri Lanka with Sri Lankan labour

23 Wikipedia Encyclopedia on Immigration Consultant

- And includes advertisement or notice calling for applications from persons for employment outside Sri Lanka
- Or taking any other action in connection with or incidental to such employment

This interpretation is so broad that naturally covers the function of Sri Lankan migration consultants since the definition reflects the business of providing services (whether by the provision of information or otherwise) for foreign employment outside Sri Lanka and includes taking any other action in connection with or incidental to such employment. Thus, whoever providing migration consultancy in Sri Lanka is subjected to the scope of the SLBFE Act thereby being exposed to the relation therein and those migration consultants must be registered under the SLBFE Act.

This view is further confirmed by the ingredients of the offence of unauthorized recruitment under section 62(1) (a) of the SLBFE Act, which states whoever except in conformity with the provisions of the Act makes, attempts to make, any agreement with any person to emigrate or depart from Sri Lanka for purposes of employment or demands receives any money and whoever causing, or assist or attempt to cause the same commits said offence.

In the event of criminal action instituted against a migration consultant if such suspect argues that Sri Lankan migration consultancy does not fall within the ambit of regulation under the SLBFE Act the following passage where N.S Bindra quotes Burton J in *Warburton v. Loveland* Case in relation to the golden rule of interpretation is of vital importance:

1. Golden Rule

(a) Warburton's Case (1929) 1 H & B IR 623p 648

Burton J in *Warburton v. Loveland,*[1] observed:

I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, in declared purpose of the stature, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged so far as to avoid such inconvenience, but no further.[24]

The absurdity of the operation of law consequent to migration consultants interpreting the definition of the business of SLBFE Act that they are not subjected to regulation under the Act is as follows:

a. As the ultimate purpose of migration consultancy in most occasions is none other than emigration for foreign employment if any person or actor advertising himself can evade the compulsory requirement of registration under the SLBFE Act and thus freely operate unregulated.

24 pg. 564, N.S Bindra, Interpretation of Statutes 10th Edition.

b. If such an interpretation is accepted the same would defeat the purpose of the Bureau to regulate foreign employment agencies, issue licenses, regulate the business of foreign employment etc., which are paramount functions of the Bureau and thereby reduce the effect of a series of provisions of the SLBFE Act including offences to a nullity.

c. Thus, different actors committing violations and offences being treated differently is an absurdity in terms of the operation of the law.

d. Therefore, the definition of the business of foreign employment is extended or modified to include the work of migration consultants whose real intention under contractual obligations with their clients is nothing but foreign employment. This must be done cautiously to avoid absurdity but no-further especially considering the significant economic role performed by migration consultant firms.

The Mischief Rule

The mischief rule of interpretation is described in Maxwell's Interpretation of Statutes quoting Haydon's case as follows:

In Haydon's case in 1584, it was resolved by Barons of the Exchequer (at p 7b) "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:

> *1st: what was the common law before making of the act?*
>
> *2nd: what was the mischief and for the defect for which common law did not provide?*
>
> *3rd: what remedy the parliament hath solved and appointed to cure the defect of the common wealth*
>
> *4th: The true reason for the remedy; and then the office of all judges is always to make such construction as shall suppress the mischief and then the office of all judges is always to make such construction as shall suppress the mischief and, to suppress the subtle inventions and evasions for the continuance of the mischief, and pro privato commodo, and to add force to life and add force and life to cure, and remedy according to true intent of the makers of the act, pro bono publico.*[25]

The long title to the Sri Lanka Bureau of Foreign Act read with section 15(e) and (f) objects of the bureau convey the fundamental mischief intended to be suppressed by the legislature. They are the deregulation or unregulated business of foreign employment agencies. Licensing and regulation based on licensing as well as a criminal offence for the unauthorized business of foreign employment agencies are the mechanisms adopted by the legislature in suppressing the mischief and advancing the remedy. Therefore, imputing a broad interpretation of the "business of foreign employment agency" and

25 Pg. 40, P St. Langan, Maxwell Interpretation of Statutes

identifying migration consultants who perform strikingly similar functions to foreign employment agents within the scope of said definition and thereby ensure regulation in a manner oppressing mischief in pursuance of the intention of the legislature.

In Sri Lankan context, in interpreting 'owner' under section 40 of the Forests Ordinance, the confiscation provision, an interpretation preventing absurdity based on the rule was adopted by His Lordship Sisira de Abrew in *Ceylinco Leasing and Finance Corporation v. M.H Harrison, Officer in Charge, Kuttigala*[26]. Moreover, in relation to the fundamental right of the freedom against torture and who is entitled to institute fundamental rights application under Article 126 of the Constitution, a liberal interpretation in pursuance of the mischief rule was adopted in *Sriyani Silva v. Iddamalgoda*[27].

Diplomatic Missions

Sri Lanka's Diplomatic Missions play a vital role in safeguarding the rights of the Sri Lankans employed outside the country and these missions are expected to provide myriad services including migrant worker grievances. The Sri Lanka National Labour Migration policy recognizes this important role played by Sri Lankan diplomatic missions in labour-receiving countries in safeguarding the rights and ensuring the protection of migrant workers[28]. In the SWOT analysis of the Corporate Strategic Plan 2022-2026 of the SLBFE the operation of Sri Lanka diplomatic missions in more than 60 countries was identified as one of the strengths[29]. This important function performed by the diplomatic missions is critical in ensuring predictability, a sense of security to workers and in reducing the high risk of foreign employment. However, it is a question of whether our diplomatic missions are successful in this regard. The Transparency Intentional observes that welfare officers and labour officers are appointed to the consular section of Sri Lanka Missions by the SLBFE and Ministry of Labour to look after the interests of migrant workers. Irregularities and fraudulent activities in their appointments have often been criticized by the auditor general and the Committee on Public Enterprise (COPE)[30]. Said documentary recommends that the appointment of welfare officers to diplomatic missions in countries where there are migrant workers should be done on approved selection criteria. Once selected these officers should serve at SLBFE for a specific period to become familiar with the issues faced by migrant workers before taking up appointments[31].

26 CA(PHC) APN 45/2011 dated 25th August 2011

27 2003(2) Sri LR 63

28 ILO Country Office, Sri Lanka and Maldives, Operation Manual for Labour Sections of Sri Lankan Diplomatic Missions in Destination Countries: *To Serve Sri Lankan Migrant Worker Better*

29 Corporate Strategic Plan 2022-2026, Sri Lanka Bureau of Foreign Employment, Planning Division06

30 Pg. 21, Transparency International Sri Lanka, Integrity in Foreign Employment, An analysis of corruption risks in recruitment 2010

31 Pg. 52 ,Ibid

These problems must be addressed as soon as possible and if remedial measures are not effecteive, especially in the current economic crisis where failure to effect urgent remedial measures would inevitably cause irreversible damage to our country.

Legal Provisions Enforcing Duties of Diplomatic Missions

The introduction to the operation manual for Sri Lanka for the Labour sections of Sri Lankan Diplomatic Missions in Destination countries ascertains that the most trustworthy place for migrant workers to seek assistance during their stay in a foreign land is the Diplomatic Mission of their country of origin. The perception of many migrant workers is that the official representation on their behalf while the host country can only be provided by a Diplomatic Officer from the home country who is mandated to look after their interests as a priority task. In this context, the labour welfare officer of a Diplomatic Mission in a labour-receiving country has to engage in rather sensitive and responsible work related to migrant workers who are vulnerable to abuses and exploitation or otherwise in need of official assistance to overcome a variety of difficulties that they may confront in a foreign country[32]. These observations contained in the operation manual emphasize the point of view of the overseas Sri Lankan public that desperately demands a dynamic role to be performed by the diplomatic missions in destination countries in safeguarding the rights of the vulnerable public. (ILO Country Office for Sri Lanka and Maldives, 2013).

National Labour Migration Policy declared by Sri Lankan government in 2008 concentrates on the protection and welfare of the country's migrant workers while promoting good governance and practices in the recruitment process[33]. One of the main objects of the operational manual for Diplomatic Missions in labour-receiving countries is to streamline the actions of Diplomatic Missions, particularly the labour sections, including Honorary Consulates, in delivering services for migrant worker-related issues more transparently within a structured frame work[34].

Diplomats are appointed in terms of Article 33(c) of the Constitution of the Democratic Socialist Republic of Sri Lanka. Under said Article 33(c) the President is empowered to appoint accredited Ambassadors, High Commissions, plenipotentiaries and other diplomatic agents. Under Article 4(d) of the Constitution, all organs of the state including the diplomats are bound by a profound duty to respect, secure and advance fundamental rights, which are declared and recognized by the constitution. Said article further emphasizes that such articles shall not be abridged, restricted or denied except in the manner provided by the Constitution. Thus, the Sri Lankan diplomat failed to address

32 Pg. 9, ILO Country Office for Sri Lanka and Maldives, Operational Manual for Labour Sections in Sri Lankan Diplomatic Missions.

33 Ibid, pg.4

34 Ibid,pg. 9 objective d)

the grievances of Sri Lankan migrant workers, which constitutes an influential element of their duties acts arbitrarily and acts in contravention of article 12(1) of the constitution. In 2011, with the aim of improving the current system of migrant worker grievance handling in Sri Lanka and Sri Lankan Diplomatic Missions in labour-receiving countries two studies were commissioned to receive grievance and redress mechanisms available to Sri Lankan Migrant Workers within Sri Lanka. Said reviews were titled 'Strengthening the Grievance and Complaint Handling Mechanisms to Address Migrant Workers Grievances in Sri Lanka' and promoting decent work through good governance, protection and empowerment in Sri Lankan Migrant Workers: A review of operational guidelines, procedures, and process of Diplomatic Missions in Labour receiving Countries.' These studies highlighted the need to lay down standard operational guidelines incorporating existing guidelines and practices and fill any gap in the system relating to providing services to the migrant workers.[35]In the circumstances, the best avenues of utilizing the maximum benefits of diplomatic missions must be ascertained in remedying complicated issues confronted by Sri Lankan migrant workers.

Concernig the protection and empowerment of migrant workers and families under the National Labour Policy Migration for Sri Lanka identifies policy response that Sri Lankan Embassies in host countries shall have a well-defined system to be in contact with all migrant workers in each country. Officers in Sri Lankan diplomatic missions in host countries, particularly the labour-sending countries shall have special capacity and ability to handle the grievances of migrant workers and work towards their protection and welfare proactively.[36] The action plan concerning the promotion and development of employment opportunities outside Sri Lanka for Sri Lankans it is declared that SLBFE and Diplomatic Missions in host countries will be responsible for monitoring the implementation of bi-lateral agreements/Memoranda of understanding with the receiving countries for developing employment opportunities and taking up following up action[37]. These policy responses by the ministry for foreign employment and promotional welfare reflect implied duties on the part of Sri Lankan diplomats of receiving countries.

In the case of *W.K.C Perera v. Professor Daya Edirisinghe*[38] His Lordship Mark Fernando discerned as follows:

Article 12 of the Constitution equality and equal treatment even where a right is not granted by common law, statute and regulation, and it is confirmed by the provisions of article 3, 4(d) of the Constitution. Thus, where the Rules and examination shall have statutory force or not, Rules and Examination criteria read with Article 12 of the Constitution confer the

35 Pg. 4 Operational Manual Labour Sections in Sri Lankan Diplomatic Missions in Destination Countries, Ensuring Protection and Welfare of Migrant Workers, *To Serve Sri Lankan Workers better.*

36 Pg. 26, Ministry for Foreign Employment Promotion and welfare, National Labour Migration Policy for Sri Lanka(NLMP)

37 Ibid 34

38 1995(1) SLR 148

right of duly qualified candidate to the award of degree and a duty on university to award such degree without discrimination even where the university has reserved some discretion, the exercise of that discretion would also be subjected to Article 12 as well as the general principles governing the exercise of such discretion.

In *Multinational Property Developers Limited v. Urban Development Authority*[39] under this expansive jurisdiction concerning orders in the nature of writs in the republican context declared that in the public law field the individuals may not have strictly enforceable rights but they have legitimate expectations. The decisions effective such legitimate expectations are subjected to judicial review.

In the case of *De Silva v. Athukorala*[40] where the *mala fide* acquisition under the Land Acquisition Act was questioned in a Writ application, His Lordship Mark Fernando upheld as follows:

I hold that the true intent and meaning of the amending Act was to empower the Minister to restore to the original owner land for the acquisition (or retention) of which there was originally (or subsequently) no adequate justification, upon the fulfillment of the stipulated conditions. It was a power conferred solely to be used for the public good, and not for his personal benefit; it was held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.

This developed as the public trust doctrine recognizes that the powers vested in the statutory functionaries are neither absolute nor unfettered and they are held in trust for the public exclusively to be exercised for the purposes for which they are conferred. Extension of public trust doctrine by the expansion of doctrine and liberalization of *locus standi* rule in the public interest could be observed in the famous *Galle Face Green Environmental Foundation Limited v. Urban Development Authority*[41] case where his Lordship Sarath N. Silva held as follows:

Although the right to information is not specifically guaranteed under the Constitution as a fundamental right, the freedom of speech and expression including publication guaranteed by Article 14(l)(a), to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain. It should necessarily be so where the public interest in the matter outweighs the confidentiality that attaches to affairs of State and official communications.

The Urban Development Authority (UDA) is an organ of the Government and is required by the provisions of Article 4(d) to secure and advance the fundamental rights that are guaranteed by the Constitution. The UDA has an obligation under the Constitution to ensure

39 1996(2) Sri LR 51, Hon. Dr.Ranarajah
40 1993(1) Sri LR 283
41 2010(1) Sri LR 180

that a person could effectively exercise the freedom of speech, expression and publication in respect of a matter that should be in the public domain. Consequently, a bare denial of access to official information amounts to infringement of the petitioner's fundamental rights as guaranteed by Article 14(l) (a) of the Constitution. The arbitrary refusal of information required by the Petitioner is an infringement of the Petitioner's fundamental rights.

This demonstrates the operation of Article 4(d) of the Constitution

In this context where prerogative writs under English Law are well distinguished from the orders in the nature of writs under Article 140 of the Constitution, Article 3 of the Constitution declaring that sovereignty is in the people and is inalienable, as well as Article 4(d) under which all organs of state are bound by profound duty to respect, secure and advance fundamental rights and the same shall not be abridged, restricted or denied, are a decisive legal scenario. The legal notion of Legitimate Expectation and Public Trust Doctrine are could be applied to Sri Lankan Diplomats and consulates in destination countries. The Nation Migration Policy declared by the Foreign Ministry in 2008 read with Article 3 sovereignty and paramount duty to advance and secures fundamental rights under Article 4(d) read with Article 12 of the Constitution demonstrates constructively imputes duty on the part of Sri Lankan Diplomatic Missions and Consulates to sensitively handle grievances of migrant workers and thereby by act towards protection of migrant workers. Furthermore, the Diplomatic Missions are bound by clear but implied duties in relation to monitoring the implementation of agreements or MOUs for foreign employment developments among sending state and destination state. Said constructively imputed duties on diplomats read with aforesaid Articles of the Constitution invariably expose the conduct of Sri Lankan diplomats including consulates to judicial review under Article 140 of the Constitution as a remedial approach.

International Law and International Law Obligations in Protecting Migrant Workers

Sri Lanka ratified the International Convention on the Protection of Rights of All Migrant Workers and their Families in 1995 and by 2008 Sri Lanka had ratified the core conventions of the ILO. Moreover, Sri Lanka endorsed the Multilateral Frame Work on Labour Migration as a solid foundation for the elaboration of the national policy[42]. The preamble to the International (UN) Convention on the Protection of All Migrant Workers and Families 1990 states that the same into account the principles embodied in the basic instruments of the United Nations concerning human rights, in particular the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the

42 Keheliya Rambukwella, then Minister of Foreign Employment Promotion and Welfare, Preface to National Migration Policy for Sri Lanka 2008

International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. Article 23 of the said Convention reflects that the Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of the origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right[43]. This article stresses the importance of diplomatic missions and the influential role expected by Diplomatic Missions.

The concept of decent work has four interrelated dimensions, namely fundamental principles and right at work, employment and income, social protection and social dialogue. At the global level, it is hoped that the promotion of decent work will contribute to 'fair globalization[44].

Considering recruitment, which is the most crucial element of the migration process, the Fair Recruitment Initiative of the International Labour Organization (ILO) aims to address abusive and fraudulent practices as an important element of reducing labour migration costs and thus improving development outcomes for migrant workers and families.[45]

These international law Conventions and Treaty obligations could be utilized for the best interests of the Sri Lankan Migrant workers in pursuance of the recent developments in the public law sphere. This innovative judicial approach in terms of writs and fundamental rights jurisdiction is to combine the effect of Article 3 Sovereignty in pursuance of public trust doctrine, Article 4(d) mandatory obligation on all organs of state for the protection of fundamental rights along with Directive Principles of State Policy Chapter VI of the Constitution and thereby consider the same as persuasive guidelines, especially in the Environmental Law context. Her Ladyship Thilakawardena J in *Wattegedara Wijebandara v. Conservator General of Forestry* decided that

"The right of all persons to the useful and proper environment and conservation thereof has been universally recognized and also under the national laws in Sri Lanka. While environmental laws are not specifically under the fundamental rights chapter of the Constitution, the right to clean environment and the principles of intergenerational equity with respect to preservation and protection of environment are inherent and meaningful reading of the Article 12(1) of the Constitution"

43 Article 23 of the UN Convention on the Protection of All Migrant Workers and their Families 1990.

44 Decent Work

45 Pg. 2, International Labour Office Geneva, Review of Law. Policy and Practice for Recruitment of Migrant Workers in Sri Lanka.

Article 27(5) of the Constitution under Directive Principles is as follows:

"*The State shall eliminate economic and social privilege and disparity, and the exploitation of man by man or by the State*"

Article 27(15) of the Constitution is as follows:

"The State shall promote international peace, security and cooperation, and the establishment of a just and equitable international economic and social order, and shall endeavour to foster respect for international law and treaty obligations in dealings among nations."

In light of this legal development concerning environmental law treaties and conventions, a similar approach could resort in relation to the migration context. Thus, International Law Treaties and Conventions like the Convention on the Protection of Rights of All Migrant Workers and Their Families and ILO Conventions, which Sri Lanka has ratified read with Article 27(5), 27(15) involving directive principles of state policy, Article 3, 4(d) concerning the people the state and sovereignty along with Article 12(1) fundamental right of equality provide fertile ground in giving effect to International Law of Migration.

Diplomatic Immunity under Vienna Convention and Recent Tendencies

The Vienna Convention on Diplomatic Relations provides for the declaration of *persona non grate* and if the person does not leave the receiving state within a reasonable time, they are no longer protected by immunity. The reason for this is that expulsion is a domestic issue but not an international issue[46].

In view of the Article of said Vienna convention diplomats are exposed to legal action in the sending state. This was confirmed in the Sri Lankan court of Appeal writ application *Ranasinghe v. Minister of Foreign Affairs*[47] on the question of whether a stenographer attached to Sri Lankan Mission in Pakistan who returned to Sri Lankan upon completion of services is entitled to diplomatic privileges it was held that Vienna Convention on Diplomatic Relations of 1961 and Vienna Conventions on Consular Relations of 1963 have been given effect to in terms of Diplomatic Privileges Act No. 09 of 2009. In terms of Article (e) a Diplomatic Agent is the Head of the Mission or a member of the diplomatic staff of the mission. His Lordship Hon. Sathya Hettige, discerned that customary laws based on International Convention have no application to the petitioner once she returns to Sri Lanka on termination of her duties as a non-diplomatic officer in a foreign mission abroad and she is subjected to laws of Sri Lanka and is subjected to Customs Ordinance and other laws in Sri Lanka. This case confirms the limitations to diplomatic privileges and immunities.

46 Alan Franklin(former UN Ambassador in USA), Diplomats and Immunity from Sending State

47 2010(1) Sri LR 179

The controversial issue of waving diplomatic immunity against illegal conduct of diplomats has come into the social discussion with the Supreme Court Leave to Appeal application from the Writ application of the Court of Appeal *Mr. Jaliya Wicremasuriya*[48] *v. Hon. Thilak Marapana, Minister of Foreign Affairs, Secretary to the Ministry of Foreign Affairs*. In this case, the Petitioner, former Ambassador of the United States of America in 2008 and relinquished duties in 2014 was arrested by the Financial Crimes Investigation and remanded by the Magistrate's Court of Fort under the Offenses against Public Property Act. Upon being enlarged on bail when he was on the way to the medical treatment he was stopped by Atlanta Airport on the basis that he was under investigation about the said Magistrate's court action. The nature and scope of diplomatic immunities were subjected to intensive discussion based on the preliminary objection by the state that the court of appeal does not have jurisdiction on the basis that the decision to waive diplomatic immunity enjoyed by the petitioner was based on a decision taken by His Excellency the President, which was conveyed to the Embassy of the United States of America by the Secretary to the Ministry of Foreign Affairs.

His Lordship Hon.Vijith K. Malalgoda PCJ discerned that, "Sri Lanka, being a signatory to the Vienna Convention on Diplomatic Relations 1961 had given effect to its observations by introducing Diplomatic Privileges Act No.9 of 1996. Section 2 of the said Act had provided "Articles in the Convention" to have the force of law in Sri Lanka.

The Diplomatic immunity enjoyed by diplomatic agents (A diplomatic Agent is identified under the Convention as "the head of the mission or a member of the diplomatic staff of the mission"). Its limitation and waiver are discussed under the Convention in Article 31, 32 and 39 as follows:

Article 31(1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state from its civil and He shall enjoy immunity from administrative jurisdiction, except in the case of ….

Article 39(1) every person entitled to privileges and immunities shall enjoy them from the moment he enters the receiving State on proceeding to take up his post, if already in its territory, from the moment when his appointment is notified to the Ministry of Foreign affairs or such other ministry as may be agreed.

Article 39(2) When the functions of a person enjoying privileges and immunity shall cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time even in the case of armed conflict. However, with respect to acts performed by such person in the exercise of his functions as a member of the mission, immunity shall come to subsist.

48 SC Appeal 26/2021 SC Minutes dated 19th October 2021

Article 32(1) the immunity from the jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending state.32(2) Waiver must be express.

It was held that…….since what was challenged before the Court of Appeal was the decision of the Sending state to waive the diplomatic immunity that was enjoyed by the petitioner under Article 39(2) of the Convention. When Sending state had decided to act under Article 32 of the Convention on a request by receiving state, there is no dispute with regard to acts performed by diplomatic agent whether it comes within the immunity or not."

This case law demonstrates that when sending state decides to waive diplomatic immunity even diplomats are exposed to legal action in the receiving state. On the other hand, in view of the legal provisions of the Vienna Convention quoted hereinabove, the conduct of diplomats are exposed to judicial review and even same is subjected to criminal action in Sri Lanka in the capacity of sending state. Therefore, diplomatic immunity is no-bar for taking action against challenging the conduct of Diplomatic Missions under writ and fundamental rights jurisdiction and prosecuting diplomats in criminal courts.

It is noteworthy that there is limited case law in relation to the SLBFE Act and connected and incidental matters thereto in the superior courts. Therefore, especially in the context where strong criminal prosecution is an integral element of the implementation regime of the SLBFE Act and Foreign Employment Law, an urgent need has arisen in national interests to regularize criminal actions under the SLBFE Act and strengthen the capacity for strong criminal prosecutions and exposing the conduct of foreign employment official for judicial review under writ and fundamental rights jurisdictions.

Conclusion

The two vital segments of migration or foreign employment, where legal regulation is essentially required are recruitment and subsequent protection upon migration. Recruitment, which is the most crucial element of the foreign employment or migration process, is regulated by a multiplicity of aspects such as registration of migrant workers, licensing of foreign employment agencies, regulating the advertising of agencies to defining series of specific criminal offences under the SLBFE Act. These criminal offences in connection with foreign employment agencies ranging from unauthorized recruitment and unauthorized conducting of the business foreign employment agency to unapproved advertising introduced by the SLBFE Act No.56 of 2009 reflect the most influential compliance mechanism in the implementation regime. The scheme of the implementation regime of SLBFE is considered criminal in nature that strong prosecuting authority with efficient institutional framework is the potential instrument for ensuring strict compliance with SLBFE Act. Despite detailed regulations even extending towards advertising, the effectiveness of the implementation regime substantially

suffers on account of deficiency of criminal prosecution under the SLBFE Act against unauthorized and wrongdoing actors. Police prosecutions concerning foreign employment frauds under Penal Code offences such as cheating, dishonest misappropriation etc. are naturally inadequate due to delay and ineffectiveness. Therefore, specialized prosecutions under offences SLBFE act by the officers of the Bureau are an integral element in providing protection and predictability to prospective migrants for foreign employment. In these circumstances, failures or omissions on the part of Bureau officers to prosecute when the circumstances demand is subjected to judicial review in terms of writs and fundamental rights jurisdictions. Subsequent protection of migrant employees upon commencing employment is realized by the registration process, workers' welfare fund and inquiries under the SLBFE Act. However controversial it may be identifying the migration consultancy or consultants who perform strikingly similar functions to agencies to ensure regulation of the same is a progressive approach in the public interest. In this regard, interpretations preventing absurdity of the operation of the law and suppressing mischief and advancing remedy following the intention of the legislature will assist protection of the public as this is highly demanded by the current circumstances of the country. The subsequent protection for Sri Lankan migrant worker, which develops protection and predictability ensures that the ultimate object of receiving foreign remittances from the satisfied migrant worker has a limited scope in the SLBFE Act. Therefore, International Law treaties and conventions could be utilized for subsequent protection. Thus, concerning the significance of subsequent protection, Sri Lankan Diplomatic Missions including consulates in destination countries are required to perform a vital function. Diplomatic immunity is not a barrier to the sovereign people of Sri Lanka to take appropriate legal recourse against those who neglect their legitimate expectations while failing in duty. The National Labour Migration Policy 2008, International Law Treaties and Conventions like Protection of Rights of All Migrant Workers and Their Families read with Article 3 Sovereignty, 4(d) duty protect fundamental rights and Article 12 ensuring equality/equal protection of the Constitution provide fertile grounds enforcing rights and legitimate expectations against who fails to address protection of migrant workers.

SENTENCING

S. Anwer Sadhak*
Additional Magistrate, Batticaloa

a. Introduction

In criminal trials the process of sentencing plays a pivotal role to achieve the core purpose of sentencing a convicted person. Criminal trials ends up either with the conviction or the acquittal of an accused person at the end of the full-scale trial or subsequent to the own plea of an accused as unqualified admission to the charges levelled against him.

The crux objectives of the criminal justice system and a criminal trial are meant for doing justice to the accused, victim and the society so that law and order is maintained. In the case of *State of Uttara Predesh v. Anil Singh*[1] it was held that, "*it is necessary to remember that a judge does not preside over a criminal trial merely to see that no innocent man is punished, a judge also presides to see that a guilty man does not escape. One is as important as the other*". This view is emphasized in the case of *Ambika Pradad and another v. State (Delhi Administration)*.[2]

A foresaid principle is also identified in the legal maxim known as Blackstone's formulation which says ***"it is better that ten guilty persons escape than one innocent suffers."*** The same is based on the essential principle of our criminal law that a criminal charge has to be established beyond reasonable doubt (Vide – Glanville Williams, Proof of guilt, 3rd edition, 186-190).

As observed by the Chief Justice, Jayantha Jayasuriya, PC, in the case of *Rathnasingham Janushan and another v. OIC, Headquarters Police, Jaffna*[3], *"Maintaining law and order, bringing in perpetrators to justice, convicting accused whose guilt is proved according to law and subsequent sentencing are important stages that has to be preserved and protected to ensure that members of the society enjoy rule of law and democracy".*

b. Practical aspect of sentencing

It is to be noted that core targets of sentencing of a convicted person might be categorized and confined to the followings.

✶ BA (Honors) Special Degree in Economics

1 AIR 1988 SC 1998

2 200 SC CRL 522

3 SC (Special) Appeal 07/2018 dated 04.10.2019

a. Deterrence.

b. Incapacitation.

c. Rehabilitation.

d. Restitution.

e. Retribution.

Though the golden rule traditionally followed by the judicial institutions is that "Presumption of innocence of an accused until proven guilty", every convicted person in a criminal cases shall properly be punished according to the penal provisions of the statutory laws of the country. Unfortunately, some brutal and gruesome convicted criminals are escaped from the net of justice in the guise of non-custodial sentence (suspended sentence) by the shade provisions of section 303 of the Code of Criminal Procedure Act (CCPA) without being appropriately and properly sentenced. The consequence of this practice encourages criminals to engage in criminal offences which have adverse impacts on victims and society. Even though provisions regarding suspended sentences might be applied in an appropriate case after having thoroughly considered the facts and circumstances of each and every proper case, contrarily, it shall not be applied to make room for offenders to escape.

Not adopting the proper sentencing policy, shall affect the entire society and leads to no-confidence by general public who are still expecting care and protection of the law and order. To realize the practical importance and main purposes of the proper sentencing policy judicial dictums held in following cases are important.

In the case of *Asan Mohamed Rizwan v. Attorney General*[4], Justice Chitrasiri has stated that;

"Judges are to address their minds to the objective of sentencing particularly when exercising the discretion given to them under the law. Objectives of sentencing include the following:

a. To punish offenders to an extent and in a manner, which is just in all the circumstances;

b. To protect the community from offender;

c. To deter offenders or other persons from committing offences of the same or similar nature

d. To establish conditions so that rehabilitation of offenders may be promoted or facilitated;

e. To signify that the court and the community denounce the commission of such offences;

f. To maintain the required standards of societal expectations in making decisions;

4 CA (PHC) APN 141/2013 decided on 25.03.2015

g. *To prevent overcrowding prisons also could be considered as one such objective particularly when it comes to developing counties such as ours.*

Keeping those objectives in mind, it is the prime duty of the judges to pass the sentence in accordance with the law. Hence, it is necessary for the court to first look at particular punishment stipulated for the offence that was committed by the accused. Therefore, the judges must be mindful of the provisions of law for which the accused is convicted before passing the sentence. Otherwise, it will be an illegal order".

In the case of *Attorney General v. H.N.De Silva*[5], Justice Basnayake observed as follows;

"In assessing the punishment that should be passed on an offender, a judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too prone to look at the question only from the angle of the offender. A judge should, in determining the proper sentence, first consider the gravity of the offence, as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. The reformation of the criminal, thought no doubt an important consideration is subordinate to the others I have mentioned. Where the public interest or the welfare of the state (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail."

In the case of *Wijendra Acharige Saman Nayana Wijendra v. Attorney General*[6], Justice Devika Abeyratne held that;

"It is correct that when a sentence is imposed, the seriousness of the crime, the objective of the punishment and the intention of the legislature have to be considered"

In the case of *Dhannanjoy Chatterjee v. State of West bengal*[7], it was held that;

"The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminals"

In the case of *Sevaka Perumal v. State of Tamil Nadu*[8] it was held that;

"Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law"

In the case of *Mahesh v. State of Maddya Predesh*[9] it was held that;

"It will be a mockery of justice to permit the Accused to escape the extreme penalty of law. To give the lesser punishment for the criminals would be to render the justice system of the country suspect"

5 57 NLR 121
6 CA (PHC) APN 012/2019 decided on 21.07.2020
7 (1994) 2 SCC 220
8 (1991) AIR SC 1463
9 (1987) 2 SCR 710

In the case of *The King v. E.T.M. Saram*[10] it was held that;

"The Court of Criminal Appeal will not interfere with the discretion of the Trial judge with regard to the sentence unless that discretion has been exercised on a wrong principle or the sentence is manifestly excessive"

In the case of *Yahalawatta Wilbert v. Attorney general*[11]**,** Justice Padman Surasena held that;

"Judge had given an undue weight to the welfare of the Accused while failing to consider the other aspects which he ought to have considered"

To achieve above purposes and targets of sentencing, the courts should be mindful in imposing sentences on convicted criminals and should not make room for convicted persons to easily scot free from the stipulated sanctions in the light of provisions pertaining to the suspended sentence without having considered the severity and nature of the offences committed. No doubts that a judge is legally powered to sentences on accused persons who in fact deserves it after care perusal of the facts and circumstances of the case. This maxim cannot be applied in each and every case on the premise of having not committed any offence previously and other silly reasons adduced by Accused persons.

It is incumbent to mention that suspended sentence shall not be an option for the accused persons and it is to be judiciously entertained by only judicial officers whenever it is necessary and most appropriate. In the case of *Wijendra Acharige Saman Nayana Wijendra v. Attorney General,* (Supra), Justice Devika Abeyratne held that;

"It is unclear how the petitioner envisaged a non custodial sentence as sentencing is in the hands of the trial judge, who has to consider several aspects when deciding on sentence."

Further it was held that;

"It is very surprising that having legal representation and with the knowledge that he was convicted and sentenced for a similar offence previously, that the petitioner was expecting to get a non custodial sentence and walk home. Therefore, the argument of the petitioner that he pleaded guilty with the intention of getting a non custodial sentence is not tenable…….. The petitioner being charged a second time for the same offence makes it more serious."

In the case of *Bandaranayake Mudiyanselage Nuwan Bandaranayake v. OIC, Badulla*[12]**,** it was held that;

"The facts of the case shall warrant the suspended sentence."

10 42 NLR 575

11 SC/APP 239/2017, dated 31.05.2022**.**

12 CA (PHC) 186/2013, dated 19.05.2022

The other point usually avers by the accused to be considered by courts in sentencing is that the period of remand spent by him during the investigation, inquiry and trial process. However, this cannot be taken as an exceptional circumstance or a factor for the reduction of sentencing or suspended sentence where it necessitates the enhancement of sentencing in a suitable case. In *Attorney general v. Sampath*[13] where it was held that, *"the trial judge could not have in directed that the period spent in remand should be taken into consideration as a part of the period of sentence that he has served"*.

It is noteworthy that to produce a society with highly standard morality and safe, the mechanism available in the country is judiciary. Hence, the burden on the judiciary to maintain the law and order according to the accepted principles is irresistible and inalienable. To implement the responsibility vested with courts, the policy on sentencing shall be strengthened and empowered. As we all are very well aware that Justice not only must be done, it is seen to be done. Protecting rights of the innocence is very important in one hand and on the other hand the convicted criminals shall not be escaped from the eyes of the justice.

Finally, ordinary people of the country still have a huge trust on the judiciary in adjudicating and administration of justice. People will definitely lose their confidence in the entire judiciary if convicted criminals are easily set free by courts. So, it is the bounden duty of the Judiciary to comply with a proper sentencing policy to maintain the justice system.

13 (1997) 3 SLR 390

THE LEGAL ASPECT OF THE WILD ELEPHANTS IN SRI LANKA

(A compact review on Law relating to the Wild Elephants in Sri Lanka)

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Abbreviations

DG - Director General

DWC - Department of Wild Life, Sri Lanka

PR - Production

CrPC - Criminal Procedure Code

Amended Ordinance - Amended Fauna & Flora Ordinance

1. Introduction

The elephants who live in the National reserves and sanctuaries or any other area without the humans captivity and control are called as wild elephants. The reasons for using the phrase "any other area" is that sometimes the wild elephants live and roam in the human's habitats like villages and cultivated lands which were forests a long time ago and later on the human development activities were taken place.

The major statutory law governing offences against wild elephants in Sri Lanka is the Fauna and Flora Protection Ordinance (chapter 469) as amended by the Act No.22 of 2009. The principal Act was passed by the legislature then in 1937 – in the colonial period of Sri Lanka. It was gradually amended in the years of 1942, 1944, 1945, 1949, 1964, 1990, 1993 and 2009. Accordingly, it has been recently amended by Act No.22 of in the year of 2009.

Section 2 of the Amended Fauna and Flora Protection Ordinance states that the Minister may declare the National Reserves and Sanctuaries though a gazette notification according to section 2 of the amended ordinance. The National Reserves are categorized where the same section as;

a) Strict Natural Reserve
b) National Park
c) A National Reserve
d) A Jungle Corridor
e) A Refuge
f) A Marine Reserve
g) A Buffer Zone

There is difference between National Reserves and Sanctuaries. The National Reserves consist of only state lands.The Sanctuaries may consist of state lands or private lands. The Amendment Act No.22 of 2009 has introduced another land called "elephant Management Zone" that has the same legal attributes like Sanctuaries.

Chapter 2 of the Amended Fauna and Flora Ordinance is allocated for the provisions regarding elephants such as both wild and Domestic.

2. Offence against the Wild Elephants

The Amended Fauna and Flore Ordinance has prescribed the offences against the wild elephants and the punishments for such offences.

According to sec 19(a) of the amended ordinance, a person who exports a part of an elephant, such as a tusk or a tush or a part of them or any article made out from such body part of an elephant shall be guilty of an offence punishable by rigorous or light imprisonment not less than two years and not exceeding five years or a fine not less than Rs.50,000/- and not exceeding Rs.250,000/- or both imprisonment and fine.

Section 20(1) (a) of the amended ordinance states that any person in contravention of the the license issued under this ordinance, who hunts, shoots, kills, causes an injury, uses electric wire to kill or to cause injury or to capture an elephant or use any method to harm an elephant shall be guilty of an offence punishable with the rigorous or light imprisonment not less than two years and not exceeding five years or a fine, not less than Rs.150,000/- and not exceeding Rs.500,000/- or both imprisonment and fine. Outside the Natural Reserves or Sanctuary, the elephants are killed by way of shooting, making them to eat "hakkapatas", electrocuting or making them to fall in to trapped pits. The significance of this section is that those who kill the elephants in these ways outside the National Reserves or Sanctuaries are charged and sentenced under this section.

After perusing the above section, a doubt emerges that whether an elephant can be killed or injured or captured upon a License issued under this ordinance. Section 13 of the Ordinance states that if the DG of DWC thinks fit that an elephant outside the National Reserves is likely to cause damage to the general public or crops, he may take necessary steps to chase or capture such elephant. In that event, if the DG of DWC is of the opinion that such elephant is needed to be captured, he may issue a license delegating powers to someone to capture such elephants. Section 13 further states that if the DG of DWC thinks fit that such as elephant is dangerous to the human life in the area, he may issue a license to someone to kill or shoot or capture the elephent subject to the specific fee and conditions. The DG should inform the same to the Minister and then the Minister has to publish it in the Gazette subject to the necessary changes regarding the specified time period mentioned in the license. However, any act done as per the license before publishing of such Gazette notification is considered as legal. When an elephant was

captured or killed upon above mentioned license, the license holder should inform the same to the DG of DWC without delay [1]When the licensee acted upon such license, the captured elephant or the carcass of the elephant would become the private property of the licensee, unless otherwise stated in that license.[2]

Now in this point, the article is again focusing on the instant sub topic named offences against the wild elephant.

Section 20(1) (b) states that a person who exports either wild elephant or tame elephant without a special permit, such person shall be guilty an offence punishable with rigorous or light imprisonment not less than two years and not exceeding five years or a fine not less than Rs.150,000/- and not exceeding Rs.500,000/- or both imprisonment and fine.

According to section 21, a person who cut or remove a body part from the carcass of a dead elephant or purchase or sale such thing shall be guilty of an offence punishable with rigorous or light imprisonment not less than two years and not more than five years or a fine not less than Rs.150,000/- and not more than Rs.250,000/-. In Sri Lanka, the poachers kill the elephant for the smuggling of tusks. In addition to that, such poachers smuggle the tusk shells (the small pebbles stored in the tusks.) In the illegal market such transactions are made in high rangers of prices for these tusks and tusk shells. The Police and wild life officers do raids regarding these smuggles and arrest the suspects under the offence stipulated in the section 21.

According to section 24 of amended ordinance, a person who keeps a tush or tusk or a part thereof his possession without the registration in DWC should be guilty of an offence punishable with rigorous or light imprisonment, not less than two years and not exceeding five years or a fine not less than Rs.30,000/- and not more than Rs.150,000/- or both imprisonment and fine. A person who possesses a registered tusk or tush or part thereof, should obtain an annual license for such registered tusk or tush or part of the tusk from DWC. Section 24(a) 4 states that a person who fails to obtain a license shall be guilty of an offence punishable with rigorous or light imprisonment, not less than two years and not exceeding five years or fine not less than Rs.30,000/- and not exceeding Rs.150,000/- or both imprisonment and fine.

Section 22(7) relates to the offence of having possession of an elephant without a registration or a license. Section 23(1) relates to the offence of illegal possession an elephant or tusker. These offences are related with tamed (domestic) elephants only and therefore, these sections have not an impact towards the wild elephants. Hence, the offences described in these sections are not emphasized in this article.

The offences mentioned earlier in this article are set out in 2nd chapter of the Amended Fauna & Flora Ordinance. In the same chapter, the term 'elephant' has been defying

1 s 16
2 s 17

under section 28. Accordingly a tusker is also included in the definition of the elephant for the purposes of the instance chapter. Therefore if any wrongful act described in the above offences was committed against a tusker, it would be also an offence as mentioned above.

As above mentioned in this article, it is an offence under section 20 when an elephant is killed, hunted, shot or caused an injury Notwithstanding that, section 58(a) of the amended ordinance articulates that a person who kills or hunts or shoots an elephant or causes injury to an elephant living in the National Reserve or Sanctuary shall be guilty of an offence punishable with rigorous or light imprisonment not less than two years and not exceeding five years or a fine not less than Rs.250,000/- and not exceeding Rs.500,000/- or both fine and imprisonment. This section 58(a) is not set out under 2nd chapter which specially defines the offences against the elephants. The applicability of section 20 and section 58(a) depend on the circumstances of each case. Section 58(a) specifically states the phrase "In the National Reserve or Sanctuary." Accordingly section 58(a) is applied only for the cases where the elephant was killed or hunted or shot or caused injured in the National Reserve or Sanctuary that has been proclaimed by the Minister under section 2 of the amended ordinance. Section 20(1)(a) is applied only for the cases where the elephant was killed or hunted or shot or caused injury in the places other than the National Reserve or Sanctuary.

After perusing the English and Sinhala version of section 58(a) of the amended ordinance, there is a controversy regarding the *status quo.*The English version of section 58(a) states about an elephant. The Sinhala version of section 58(a) states about tuskers viz "වල් ඇතෙකු". The original ordinance was enacted and promulgated in English language by the legislature in the colonial period. Therefore, the legislative language of the said ordinance was English. That is the reason for not having a section in the original ordinance to resolve the situation where there is an inconsistency between English and Sinhala text of the original ordinance. For an instance, there is no section stating which language should prevail when there is an inconsistency between two languages. Even though the section 58 (a) has been amended recently for the purpose of increasing the fine range of the offence, the core or the merits of the said section has not been amended so far. Therefore, the English version in this section of the amended ordinance is still valid overruling the Sinhala version where an inconsistency exists between two languages. Subsequently, the English version of section 58 (a) is valid. Section 28 of the amended ordinance has interpreted the word "elephant". It says that the word of elephant includes the elephants as well as the tuskers. But this section itself states that this section is relevant only for the purposes of the 2nd chapter. The above mentioned section 58 (a) is set out in 6th chapter which clarifiers the general provisions in the amended ordinance.

At this moment, it is important to scrutinize whether section 58 (a) applies only to the elephants or both elephants and tuskers. The interpretation rules are utilized by the courts when there is an ambiguity of the words of an Act. "*ut res magis valeat quam pereat*" is also a rule of interpretation. According to this rule, the courts can interpret the words of a statute in a manner that such statue is enforced effective and operative rather than becoming nullity.

> *"A principle of legal instrument construction dictating that one should avoid reading the instrument in a manner that would render language in the instrument redundant, void, or ineffective. It follows that a tribunal will interpret ambiguous, vague, or apparently conflicting provisions of a legal instrument in a manner that best sustains the validity and enforceability of the instrument."*[3]

This rule has been recently adopted by Sri Lankan courts in the case, *Mercantile Credit LTD. v. Jayathilake & two others*[4]. In the light of this rule, there is an inference that section 58(a) has deemed to protect not only the elephants in the National Reserves Sanctuaries, but the tuskers are also in such places protected via the same section. Accordingly, section 58(a) applying to elephants as well as tuskers. In that view, the word "elephant" in section 58(a) has impliedly construed the "tusker" as well.[5]

3. Aiding and Abetting for the above offence

According to the section 59 of the Amended Ordinance the aiding or abetting to commit an offence prescribed in the ordinance is also as offence punishable under same sentence stipulated for the same offence. Accordingly, the aiding and abetting to commit above mentioned offences against the wild elephants is also an offence punishable under same sentence and stipulated fine for the relevant offence.

4. Offences against the wild elephants under special Laws

Sometimes the perpetrators cause injuries to the wild elephant by using "*hakkapatas*". It is a type of explosive concealed in pumpkin or cucumber that are sweet meals for the elephants. When an elephant eat them the *hakkapatas* would be exploded once it was chewed in the mouth, causing the entire mouth wounded. It leads to a tragic death in starvation, because such elephant cannot eat further more due to the wounds occurred by *hakkapatas*.

It is apparent that the cases are filed under either Explosive Act or Offensive Weapons Act for keeping *hakkapatas* in the possession of someone. The charge sheets are filed under section 27 of Explosive Ordinance for the offence of keeping *hakkapatas* in the possessing. According to section 27 of Explosive Act, a person who fails to comply with the provision

3 Aaron X Fellmeth, *Maurice Horwitz, Guide to Latin in International Law*, 1st ed, (OUP Oxford 2009) p 263

4 [1993] 2 SLR 418

5 *Emphasize is mine*

of the act or condition of the license granted under the act, or obstruct any officer in excising his powers under the act, shall be guilty of an offence punishable with rigorous or light imprisonment not more than five years or a fine not more than Rs.25,000/- or both imprisonment and fine. More often, the indictments are filed under section 2 of the Offensive Weapons Act for the offence of keeping *hakkapatas* in the possession. According to section 2 of the OffensiveWeapons Act, a person who manufacture or keep an offensive weapon in his possession is an offence punishable with rigorous or light imprisonment not more than ten years or a fine not more than Rs.10,000/- or both imprisonment and fine.

In the Offensive Weapons Act, "the term of offensive weapon" has been interpreted. According to that interpretation, "an offensive weapon" means a bomb or grenade or any other device or contrivance made for a use or purpose similar to that of a bomb or grenade.[6]

Hakkapatas is an item that contained explosives and the function of it is that explode when the detonator is switched on. (the detonator of the *hakkapatas* is switched on when it is chewed by the elephant in its mouth.) Accordingly the *hakkapatas* has the same attributes of a bomb.When perusing section 27 of the Explosive Act, it is deemed that this section is applied only to those who keep the explosives without a valid license or contrary to the provisions of the license. Accordingly, the correct way for enforcing the law for "hakkapatas" is that taking steps under Offensive Weapons Act.[7]

The Magistrate's Courts vests the bail jurisdiction under the Explosive Act. Whereas, the Magistrate's Court has no bail jurisdiction under the Offensive Weapons Act. The bail jurisdiction under the Offensive Weapons Act is vested in the Provincial High Court[8].

The offences under the Offensive Weapons Act are cognizable offences (arrest without warrant)[9] The searches of the promises can be executed without search warrants when a suspicion occurs regarding such offence under this Act[10]. It should be noted that, the cases regarding the offences under Offensive Weapons Act are tried only upon an indictment filed in the Provincial High Courts.[11]

5. Arrests of Suspects & Eligibility for Bail

A person who had committed an above mentioned offence against the wild elephant under the Amended Fauna and Flora Ordinance he can be arrested without a warrant (a cognizable offence)[12] by any wild life officer or police officer. In such an arrest, the

6 s 16
7 Emphasize is mine
8 S 10
9 s 7
10 s 8
11 s 2
12 s 66(1)(bb), 67(b)(1) read with s 72

wild life officers can bail out the suspects upon the bond with or without sureties to confirm the presence of the suspect before the court[13]. As well as any premises can be searched without a search warrant[14] and something can be seized by such wild life officer or police officer[15], when a suspicion was there regarding any offence mentioned in the Amended Fauna and Flora Ordinance. Such arrests and searches should be carried out according to the provisions stipulated for the arrests and searches in the Criminal Proceeding Code.[16]

The offences mentioned in the Amended Fauna and Flora Act are bailable, notwithstanding that the offences mentioned in sections 6, 7, 8, 20 and 30 are non bailable offences.[17] The meaning of "bailable" and "non bailable" mentioned in this ordinance should comply with the definitions given in the Bail Act No.30 of 1997.[18]

Accordingly, the offence of killing or hunting or shooting or causing injury to the elephant as mentioned in section 20(1) (a) is a non bailable offence. As discussed above the section 20(1) (a) is related only to the killing or hunting or shooting or causing an injury to an elephant outside the National Reserve or sanctuary. Whereas if such an act was conducted in a National Reserve or Sanctuary, the offence mentioned in section 58(a) would be applied as afore discussed in the article. But the offence mentioned in section 58(a) is bailable according to section 67(b) (3) of the ordinance.

Herein after, it is important to explore the practical approach of granting bail in a situation where an elephant was killed or hunted or shot or caused injury within the territory of the National Reserve or Sanctuary.

5.1 The Bailability of an elephant was killed or hunted or shot or caused injury in a National Reserve or Sanctuary…?

The killing or hunting or shooting or causing an injury to a wild animal in a National Reserve is a punishable offence under section 6(1) of this Ordinance. As well as, killing or hunting or shooting or causing an injury to a wild animal in a Sanctuary is a punishable offence under section 10 read with section 7(1) of this Ordinance. As mentioned in section 67 (b), the offences in section 6(1) and 7(1) are non bailable offences.When an elephant was killed or hunted or shot or caused injury in a National Reserve or Sanctuary, the wild life officers or police officers practically report facts to the court under section 6(1) or section 10 read with section 7(1) along with section 58(a). At there, even though the bailable situation exists under section 58(a), the non bailable situation is also prevailed, because of the influence of section 6(1) or section 7(1).

13 s 67(b)(2)
14 s 66(1)(d) read with s 72
15 s 66(1)(e) read with s 72
16 s 67(e)
17 s 67(b)(1) read with s 67(b)(3)
18 s 20(2)

6. The disposal and the confiscation

According to section 18 of the Amended Ordinance, the tusks or the carcass of a dead elephant shall be disposed of by the DG of DWC and he can dispose it by way of selling or in other any other way. (eg: offering the tusks to temples or keeping the carcass or tusks in the Museums governed by DWC) However, this provision is not applied to the carcass or tusks mentioned in section 13.

According to section 64 of the Amended Ordinance, a gun, vehicle, boat, artificial light, snare, net, trap or any other instrument used to commit an offence under this ordinance shall be confiscated. The same section further states that if a such thing was owned by third party (not the offender) the confiscation shall not be made, when the court is satisfied by such third party that he had taken precautions in due diligence to prevent the use of such thing to commit the offence.

As mention above, section 64 was amended by the Fauna & Flora Amendment Act No.22 of 2009. Before the amendment, section 64 did not cover a situation where the equipment, tools or such other items used to commit the offence was owned by a third party.

The lacuna of the law in such a situation was filled by the case laws such as *Manawadu v. Attornay General*[19]. In that case it was held that, if the owner of such item was not present for the commission of the offence or had no knowledge of the offence, such item should not be confiscated. However, the amendment Act No.22 of 2009 has filled the said lacuna.

7. Production of carcass of an elephant in the court proceedings

In an incident of killing a wild elephant, the carcass of the dead elephant should be a production and therefore the article at this point draws the attention how the carcass of the elephant is produced before the court under a PR number.

According to section 60(a) of the Amended Ordinance, a production like carcass which cannot be produced before a court physically because of practical difficulties, the officer not below than Wild Life Ranger or Assistant Superintendent of Police shall issue a certificate in this regard and at there, such a certificate is relevant as evidence for such production.

8. Jurisdiction for the offences against the Wild Elephant

According to section 63 of the Amended Ordinance, the jurisdiction for the offences under this ordinance is vested in Magistrate's Courts to conduct the proceedings in summery manner. Accordingly,the cases regarding the offences against the wild elephants are tried in Magistrate's Courts. Such cases are filed by wild life officers or

19 1987 2 SLR 30

police under section 136(b) of CrPC and subsequently the charge sheet is prepared by the Magistrate.

Notwithstanding that, according, to section 393 of CrPC, the Attorney General has the exclusive powers to submit an indictment to the High Court regarding an offence triable summarily in a Magistrate's Courts, after considering the nature of the offence. Accordingly, the Attorney General may submit the indictments to High Court regarding the offences against the wild elephant and subsequently such case is triable in High Court.

9. Observation of the current situation and suggestions

Wild elephants are one of extinguished species in Sri Lanka. Not only they are a foreign currency earning source through tourism, but also elephants are placed in a special place in Sri Lankan culture and Buddhism - the religion that is assured by the 1978 constitution to foster and protect. Accordingly, the strategies taken by the stake holders so far in the aspect of the law to protect them are not at a satisfactory level.

At this point, this article emphasizes the issues in law enforcement regarding the offences against the wild elephants and the suggestions for them as follows.

- The punishment is not sufficient to control the crime rate regarding the offence of killing wild elephants. It is apparent that concurrently to recent wild elephant slaughterings, there is a social deliberation demanding to amend the laws to impose death sentence to the culprits of the offence of killing wild elephants.[20] Therefore the prevailing punishment for the offence of slaughtering wild elephants should be revised. According to my view, it may be more fruitful if the Judiciary concerns and adjusts the sentencing policy for such an offence.
- The DWC officers are lack of knowledge and facilities to investigate the crimes against wild elephants.[21],[22] As a result of that, such crimes are categorized under **"C3 Letter"**[23] as non-resolved crimes or the crimes that offender has not been identified. Therefore, the stake holders should take steps to educate the DWC officers regarding such investigations and relevant laws, while facilities for the such investigations are promoted.
- There are certain ambiguities in the language of the amended Fauna & Flora Ordinance. It necessitates legislative intervention to clear the ambiguities in the law.

20 https://www.ft.lk/front-page/Govt-assures-tougher-laws-to-protect-wild-elephants/44-686881

21 http://www.auditorgeneral.gov.lk/web/images/special_report/wildlife/Wildlife-Dep.full-reportperformance-E.pdf

22 H.M Gamini Wijesinghe – Auditor General, Performance of the Department of Wild Life Conservation, (Audit Report, 2018) p28- 36

23 Form – Police 11

THE CONCEPT OF BANKER'S DUTY OF SECRECY

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Introduction

Banker's Duty of Secrecy is one of the cardinal principles of banking Law[1] and a crucial component of the banker-customer relationship. The Black's Law Dictionary defines Banker's Duty of Secrecy as follows;

> *"Banking secrecy, alternately known as financial privacy, banking discretion, or bank safety, is a conditional agreement between a bank and its clients that all foregoing activities remain secure, confidential, and private".*[2]
>
> *"The obligation of the bank and its employees to keep secret information referring to its customers".*[3]

This duty of the bank involves, not disclosing to any unauthorized third party, information it has received as part of its handling of a client's account[4] except under certain conditions.[5] Bank secrecy is an extension of the concept of banking discretion, which implies the professional obligation of bankers to keep clients' personal and financial information strictly confidential.[6]

Secrecy principle seems to be derived from the universal principle of right to privacy. The right to privacy being universally accepted human right under and by virtue of Universal Declaration of Human Rights (UDHR and International Convention of Civil and Political Rights (ICCPR) which give more importance to right to privacy. Regardless of this right not being absolute in nature, it vehemently demonstrates the need to secure

1 Sarabdeen Jawahitha, 'Banking Confidentiality: A Comparative Analysis of Malaysian Banking Statutes', Arab Law Quarterly (2002) Vol 17 No 3 255-264, Kluwer Law International

2 *"Black's Law Dictionary: Bank Secrecy". The Law Dictionary. December 12, 2012. Retrieved June 1, 2018, The bank's promise to keep financial affairs and dealings of the customer confidential. This doesn't apply to credit information that is shared freely. Certain information must also be made available due to antiterrorist legislation*

3 *Bank secrecy is also defined in UBS dictionary of Banking and Finance Pus. No. 66 (1984)*

4 S Kotler 'Banking Secrecy-Legislative Anchoring Here and Now'(Financial Secrecy Index 2020) Tax Justice Network <http://kotler-law.co.il>

5 Aleksey v. Aleksandrov and Nikolay A. Zubarev, 'Banking Secrecy, Transparency and New Business Principles: Challenges of the Modern Financial World', Banking System under Modern Conditions, Financial Space (2013) No4 (12)

6 Bashkim Nuredini and Vesna Paunkoska, 'Protection of privacy and banking secrecy in Swiss banking', Dodevska<https://www.researchgate.net/publication/343214803_Protection_of_privacy_and_banking_secrecy_in_Swiss_banking?>

confidentiality. This is equally applicable to banking sector and therefore the right to privacy is the underlying principle for banker's duty of secrecy.

However, it is important to note that bank secrecy is generally not an absolute obligation, and banks are allowed to reveal customer information in reasonable circumstances. The said exceptions have grown more prominently as banks have come under intense international pressure to reveal customer information during the investigations of money laundering, terrorist financing and to combat cross border tax evasion.[7]

Any breach of secrecy could result in liability for damages if loss occurs to a customer. This duty arises between a bank and its customer upon opening of an account and continues even after closure of the account.[8]

In Sri Lankan context the exceptions to the banker's secrecy principle are stipulated in Section 77 of the Banking Act No.30 of 1988. Further any willful breach of secrecy by a banker has been declared as a criminal offence under Section 79 of the Banking Act.

The Importance of Securing Secrecy of Customers Confidential information

The importance of maintaining confidentiality or secrecy is surrounded with the sensitivity of certain information which is private in nature, and if such information is disclosed to the public, impact it would have on the owner/author of such information would be detrimental.[9]

The principle of banking secrecy provides the client, his family, his capital an important component: the protection of personal information from falling into wrong hands.[10] If bank confidentiality would not be an inherent feature of the interaction between bank and client, the public would have no confidence on banks.[11]

The following statement indicates the importance of securing the secrecy principle;

> *"To a large extent, relationships between banks and their customers depend on their confidence in the bank's discretion with respect to matters relating to client's private sphere of life. If there is no guarantee that such facts, once revealed or learned, will remain secret; then the client's confidence in the bank would disappear, and hence, one of the essential conditions for a viable banking business would collapse."* [12]

7 Dora Neo, '*A conceptual overview of Bank Secrecy: Can Bank Still Keep a secret*' (Cambridge University Press) <www.assets.cambridge.org>

8 J Speck D Wilson, Bank Confidentiality: Duty and Exceptions <https://www.internationallawoffice.com/Newsletters/Offshore-Services/Jersey/Mourant-du-Feu-Jeune/Bank-Confidentiality-Duty-and-Exceptions>

9 <https://www.linkedin.com/pulse/dont-ask-wont-tell-when-practice-does-make-perfect-ranga>

10 Aleksey V. Aleksandrov and Nikolay A. Zubarev, 'Banking Secrecy, Transparency And New Business Principles: Challenges Of The Modern Financial World', Banking System Under Modern Conditions, Financial Space (2013) No 4 (12)

11 Djowharzadeh v. City Nat'l Bank & Trust Co. of Norman (1982) 646 P. 2d 616, 619

12 C c. Ministère public du canton de Vaud, BGE (1985) 111 IV 74, 80 Translated from French

The gist of this theory is that banks own a duty not to disclose the records of their customers under ordinary circumstances; and so, when a client commences relationships with the bank, there exists an implied contractual obligation of non-disclosure of records that are related to him.

Nonetheless, bank secrecy as a shield from unjustified invasion of privacy will not altogether lose its importance, and will continue to add attractiveness to any reputable financial center in that respect.[13]

> *"The rules around bank confidentiality continue to evolve, in many cases to the detriment of individuals but to the benefit of the public good"*[14]

Challenges and Obstacles for Secrecy

The banking industry is undergoing a radical shift, one driven by new competition from FinTechs, changing business models, mounting regulation and compliance pressures and disruptive technologies.[15]

Further drug traffickers throughout the world have sought to conceal their ill-gotten gains and thereby prevent their seizure by law enforcement authorities. Countries with bank-secrecy laws have therefore become ideal havens for these illegal funds.

Organized-crime groups have also become more sophisticated in the use of tax havens and secrecy jurisdictions to conceal their profits from illegal gambling, extortion, and racketeering. Criminals who are involved in large-scale frauds frequently take advantage from financial institutions in bank-secrecy jurisdictions, to prevent the creation of an "audit trail" that would permit investigators to follow the movement of funds.'[16]

International instruments such as the General Agreement in Trade Assignments (GATS) uphold the protection of confidential information and prohibit member states from construing their legislation to make stipulations about the mandatory revelation of customer account information.[17]

Critique on the Concept of Banker's Duty of Secrecy

Although banking secrecy is recognized as an essential element of banker and customer relationship, this concept is much debated throughout the world. Because the theoretical foundation of banking secrecy and the way it works in reality has become significantly different. Banking secrecy has been misused for illicit purposes such as money laundering and stealing secret data from banks and that information has been used for tax probes.

13 Werner De Capitani,'Banking Secrecy', U. Pa. J Int'L Bus.L, Volume 10 :1<https://scholarship.law.upenn.edu/jil/vol10/iss1/2>

14 *Godfrey, 2016*

15 Landy Wingard,'Top 10 Banking Industry Challenges—And How You Can Overcome Them' <https://global.hitachi-solutions.com/blog/top-10-challenges-banking-financial-organizations-can-overcome>

16 Gerald L. Hilsher, Banking Secrecy, Volume I

17 Candace R Batson, The Boundaries of The Banker's Duty of Confidentiality.

For example to substantiate the above position, the facts of *Danish drug trafficking and money-laundering case* will be of greater importance. In that case, large amount of money was deposited in Danish bank accounts and was withdrawn immediately after such deposit. Later the said money was deposited in multiple bank accounts with several names situated in Spain and Luxemburg and this money had been involved with importation of hashish.

Countries like Monaco consider professional secrecy as a part of human right and intended to protect private life of the individual and the right to privacy in business affairs. Entire bank employees are bounded by secrecy even after the termination of their employment.[18] Further, British Virginia Island, Cayman Islands, Netherlands, The Channel Islands, Mauritius and Luxembourg are among some countries which are considered as tax heavens or financial heavens where secrecy is strictly secured in order to attract capital to their banks and financial institutions.

Unfortunately, the strict secrecy protection in these financial heavens has been utilized for illicit purposes. The reason for the same is to attract funds by providing depositors with "cloak of anonymity" to facilitate with chances of minimization or evasion of tax.[19] Though not necessarily harmful, the ability to deliberately mislabel and conceal funds can facilitate severe repercussions where dictators, terrorists groups and organized crime networks can easily and secretly transfer their wealth around the world.[20] Therefore the duty of secrecy today has become a bit challenging task especially as result of globalization and international nature of crimes.

Conclusion

Eventhough the duty of confidentiality is a reciprocal obligation public order and state's economic interests can be considered as limitations to the said duty.

However, as banks are working beyond their borders, transnational organized crimes are being escalated. In such cases countries have to work in greater transparency as the other countries pressure them to impose restrictions on the duty of secrecy.

However, the duty of secrecy is closely connected with the formation of banker-customer relationship and with the evolution of banking arena and also considering the variation of verdicts, one cannot deny there's a requirement to have legislations that reflects an exact provisions on the character, scope and extent to what this duty should be implemented.

18 Article 308 of the Monaco Criminal Code imposes criminal sanctions for breach of duty of professional secrecy.
19 Recknagel, supra note 22.
20 Recknagel, supra note 22.

Significance of Bankers Duty of Secrecy in Sri Lanka and the Legal Framework

Weeasooriya opined that, *"Confidentiality is a jealously guarded tradition among bankers.*[21] Further he contends that bank employees must understand that their responsibility is not just to be discreet, but also to be secretive - a responsibility that is far broader and more important than simply exercising discretion.

Banking Secrecy is almost a 100 years old principle emanating from the common law in England and it was initially laid down in *Tournier* v. *National Provincial and Union Bank of England*[22]. This principle widely known as Tournier's '*duty of secrecy*' and since then was followed by all common law countries including then Ceylon.[23] Although, the duty of confidentiality of banks, still remains as a part of the common law in England, Sri Lanka has statutorily incorporated this duty.[24]

In Sri Lanka the Banking Act No.30 of 1988 Section 77 as amended by Act No.02 of 2005 stipulates the principle of banker's duty of secrecy. Section 77 of Sri Lankan Banking Act provides that;

> *(1) "Any director, manager, officer or other person engaged in the business of a licensed commercial bank or a licensed specialized bank must maintain strict confidentiality in relation to all transactions of the bank, its customers and the status of any person's accounts. Matters related to it and will not reveal any such matters except…"*

The above section has far-reaching interpretation, because duty of secrecy according to the above section is not applicable only to specific transactions. It covers all matters commencing from the small cash credit to complex trade transactions. When considering the wordings used in this provision, it is clear that legislator intended to maintain strict secrecy which can only be lifted in given exceptional circumstances. However, this section only encompasses the bank employees within the sphere of employment and do not bound them after the termination of employment. Moreover, this provision will be applicable to all prospective customers of a bank who have shared their confidential information with the idea of borrowing a credit facility or any other purpose.[25]

For securing secrecy it is provided that; *"Every director, manager, officer or person employed in the business of a licensed commercial bank or licensed specialized bank shall*

21 Wickrama Weerasooriya, *Law Relating To Banking And Inter-Related Services*, 91

22 [1924] 1 KB 461

23 <https://www.linkedin.com/pulse/dont-ask-wont-tell-when-practice-does-make-perfect-ranga>

24 Dinuka Cooray, 'Law relating to banker's duty on confidentiality'(2013) <www.juniorbarbasl.lk>

25 As an instance: if some customer (who is not literally a "customer" of the Bank) reach the bank for a credit facility and the Bank after conducting a complete due diligence on the customer and his credit worthiness etc. rejects the application, resulting the said customer was not on boarded as a 'customer'. However under the interpretation of Section 77 of the banking Act, the Bank has a duty of secrecy on such data obtained from the above said customer during the process despite the said customer not being an on boarded customer of the Bank.

before entering upon the duties, sign a declaration pledging himself to observe strict secrecy in accordance with subsection (1)."

It can be argued that, by using the term "employed" in the above section, the scope of application has been restricted. Because today banks are hiring external resource persons, independent contractors and outsource service providers for various purposes. In such cases usually banks enter in to a written contract with them. Unless a separate secrecy clause mentioned in the said agreements, external parties may not bound by this duty and the confidential information will be vulnerable.

The law relating to secrecy does not seize from there, it goes on further in extending the obligation also to the status of banking accounts of any person and all confidential matters that comes to the bank's attention and knowledge when performing its duties.[26]

Duty of Secrecy has been also embedded in Section 90D of the Evidence Ordinance No.14 of 1895. Section 90D states as follows;

> *"No officer of a bank shall, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book…"*

This section can be considered as a supportive provision for banker's duty of secrecy, because no one can force any bank officer to produce banker's books, if the bank is not a party to that action unless by a valid court order made with reasonable special cause. The rationale for having such kind of protection is to secure the customer confidence kept with banks. Further to the above provision Section 90(D)(3) allows a bank officer to state the reasons before court as to why they are unable to provide that secret information as ordered. Therefore, unless there is a pressing need the court even cannot force the bank officer to reveal customer information.

According to the Section 130(3) of the Evidence Ordinance;

> *"No bank shall be compelled to produce the books of such bank in any legal proceeding to which such bank is not a party, except as provided by section 90D.*"

The above sections 90D and 130(3) clearly express the duty of secrecy should be preserved in every occasion, except by an order of a court. Mr. E.R.S.R Coomaraswamy states the below commentary regarding the above sections on his work as follows;

> *"Section 90D is intended to impose on the bank and its officers an immunity, in any legal proceedings, to which the bank is not a party from producing the original books of the bank or from appearing as witness to prove the entries."*[27]

As per the view of Mr. E.R.S.R Coomaraswamy, the Section 90D and Section 130(3) of the Evidence Ordinance should be read together. However, *Section 66 of the*

26 <https://www.linkedin.com/pulse/dont-ask-wont-tell-when-practice-does-make-perfect-ranga>

27 E.R.S.R. Coomaraswamy, *The Law of Evidence* (Book 1, Vol II, Lake House Investments Lt)

Code of Criminal Procedure Act, which deals with summons to produce documents emphasized in *Section 66(3)* provides that provisions of section 66 will not distress the provisions in Section 130 of the Evidence ordinance.

However, section 90E of the Evidence ordinance explains where a judge may order such disclosure of bank accounts and it seems the Evidence Ordinance itself has given exceptions to the main section. However, Coomaraswamy provides a clarification in his book that the judges' power to mandate examination of banker's books is discretionary and it should be used with extreme caution and only on substantial grounds.

Meantime when court uses its discretionary power, priority must be given as for the need of securing confidentiality of customers of banks.[28]

28 Dinuka Cooray, 'Law relating to banker's duty on confidentiality'(2013) <www.juniorbarbasl.lk>


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