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MESSAGE OF HIS LORDSHIP THE CHIEF JUSTICE

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7th November 2023

It is with great pride and pleasure that I forward this message of felicitation to Volume X of the Law Journal, published by the Judicial Service Association of Sri Lanka and to be launched in December 2023, at the ″Annual Judicial Conference.″ I am also delighted that the Sri Lanka Judges Institute has made endeavors to once again hold the ″Annual Judicial Conference″ in collaboration with the Judicial Service Association of Sri Lanka, after a lapse of three years, during which the annual conference was not held initially due to the Covid-19 pandemic and thereafter considering the severe economic crisis prevalent in the country.

Judicial education is important for developing judicial competence, to improve the quality of justice, to assist judges to keep up to date, to prevent and remedy judicial errors and also to reduce the cost of justice. Continuous judicial education is thus an inherent characteristic of the process of professionalization. To this end, the JSA Law Journal since its launch a decade ago has continued to provide the Judicial Officers serving the length and breadth of this county with an opportunity to horn their research skills, and pride itself with issues showcasing the diversity of legal questions that the Judicial Officers' engage with in this latest issue.

Whilst commending the Editorial Board and the members of the Judicial Service Association of Sri Lanka, I also wish to take this opportunity to acknowledge and recognize all Judicial Officers and court staff for all their untiring efforts during these challenging times.

Jayantha Jayasuriya, P.C.
Chief Justice

MESSAGE OF THE PRESIDENT OF JSA

Dear Colleagues,

I am pleased and proud to send this message to you as the President of the Judicial Services Association 2023 .This year has been full of challenges, but we made several progressive efforts to preserve the independence of the judiciary and the welfare of our members.

At the beginning of the year, we had a meeting with the Secretary of the Finance Ministry regarding the tax issue. Later, CA/Writ/36/2023 was filed, and the circular was revised, resulting in a nearly 50% reduction in tax from the earlier amount.

We launched the Experience Sharing Workshop Series, which has helped resolving many practical problems faced by our members. We held two successful workshops in Weligama and Kandy, making it the first time in the history of JSA.

When issues that directly affected to our official duties and security arose due to the behaviour of some parliamentarians, we took immediate action. We met with the Minister of Justice and sent letters to the JSC. We also held a meeting with the Hon. Commissioners of JSC and sent letters to the relevant authorities regarding questionable appointments made to the High Courts. We sent letters to the Inspector General of Police, the Chairman of the Police Commission, and JSC regarding issues of security provided for residents.

To strengthen cooperation and friendship among members and respect the brotherhood of our brother judges from the North and the East, we organized a successful Annual Trip to Jaffna. We published a new Telephone Directory this year, considering the long-felt need.

We forwarded comprehensive reports on the Transfer Policy for our members and the Disposal of Productions to JSC. We intervened to secure continuous funding for the LLM program after it was stopped to allocate money for that. We introduced the On-Grid Solar Power System package for our members and took continuous steps to ensure the admission of children to schools. We made representations to the minister when the relevant officials stopped paying part of the salary of our member who was on medical leave, and it was resolved.

Apart from two newsletters and the Law Journal, the Annual Conference and Rhythm of Purple are held this year after three years.

Although there may be some drawbacks, we have worked hard with great dedication of our team, the Ex-co. We held 12 Ex-co meetings and 15 special Ex-co meetings this year, which bear witness to that. It is highly appreciated the great work of the secretary, office bearers, chairmen of the subcommittees, and all the Ex-co members, with much gratitude.

Dear colleagues, this is our association. Because of the untiring efforts and dedication of our past members, you enjoy many privileges today. Please come forward and contribute to make the journey of JSA successful.

I thank you for the support and trust you have shown me during my tenure as president. I wish you a happy and prosperous new year 2024.

EDITOR'S NOTE

As Lord Denning once said, 'The judge must make the law live and breathe'. Jurists with academic knowledge of legal principles can contribute to making the law live by better analysis and critique for the improvement of the administration of justice. Thereby, they can comprehensively enhance the legal literature through the construction of law.

The JSA Law Journal is one such efforts which was first published in 2013 with the primary objective of creating a platform for judges to pen down their scholarly legal ideas. It was the turning point of diverging the JSA Newsletter into the JSA Law Journal. Hence, we are indebted to the first editor, Honourable. Ranga Dissanayake for his innovative concept of introducing the JSA Law Journal. Past editorial committees have continuously published the JSA Law Journal every year despite numerous obstacles, which resulted us JSA Law Journal Volume I to Volume IX. It is noteworthy to reminisce all past editors, members, and authors of journal articles for their tremendous support and encouragement in maintaining the standard of the journal.

We are at Volume X of the JSA Law Journal. This consists of two parts. Part I contains scholarly articles by guest authors who are foremost academic experts in the legal arena. Part II consists of articles written by members of JSA, including those that were submitted to the Justice Amarathunga Memorial Award Competition. I wish to express my gratitude to all the eminent legal practitioners, professionals and members of the JSA for submitting their academic writings to be published in this volume.

The articles submitted by the JSA members were reviewed by a panel of renowned judges for awarding the Justice Nimal Gamini Amarathunga Memorial Award for the best article. I sincerely thank the honourable panel of judges for their dedication in reviewing and selecting the best article which deserves to be awarded.

Further, I sincerely thank His Lordship Justice Mahinda Samayawardhane, the Director of the Judges' Institute and Honourable (Ms.) Geethani Wijesinghe, the Academic Coordinator of Judges' Institute for their valued comments and encouragement for the success of this effort, including their permission to re-publish one of the articles of the late Honourable Justice J. F. A. Soza, which was first published in Volume I of the Judges Journal. In addition, I wish to extend my sincere gratitude to Ms. Anandi Kanagaratnam, Secretary to Honourable Chief Justice for her generous assistance in every aspect.

Furthermore, I highly commend the efforts made by Aska Publication, especially Mrs. Amila Sandamali Kannangara and Mr. Mola Senevirathne, in designing and publishing this journal.

Finally, I invite all the members of the JSA to get the maximum benefit of this journal, as this would provide a platform for discussion and analysis of current legal issues while paving the path for future legal research.

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Part - I

NAVIGATING THE JUDICIAL LANDSCAPE: A JUDGE'S GUIDE TO APPLYING SECTION 66 IN LAND DISPUTES

Mahanil Prasantha De Silva
Retd. Judge of the Court of Appeal

Introduction

The abolition of the Administration of Justice Law 1973 marked a crucial shift in the resolution of land disputes, particularly concerning potential breaches of peace. Section 66 of the Primary Court Procedure Act No. 44 of 1979 became pivotal in preserving peace amid land disputes. This article aims to provide insights for Judges dealing with Section 66 applications, emphasizing the importance of expeditious resolution while maintaining fairness and justice.

Overview of Section 66

In a scenario where there is an imminent risk of a breach of peace, it is imperative for the police officer handling the dispute to expeditiously file an information report under **Section 66 (1)(a)** of the Primary Court Procedure Act. The intention is to bring the involved parties before the learned Magistrate, who serves as the Primary Court Judge, to conduct an inquiry into the matter in dispute.

Likewise, **Section 66 (1) (b)** of the Act grants any party involved in the dispute the authority to invoke the jurisdiction of the Primary Court. This can be achieved through the filing of an information report, enabling the court to initiate an inquiry into the substance of the dispute. This provision ensures that parties have a recourse to legal mechanisms, emphasizing the accessibility of the Primary Court for the resolution of such matters.

Judge's Role in Settlement Efforts

As per **Section 66** of the Act, subsequent to the filing of Affidavits and Counter Affidavits and before scheduling the case for inquiry, the Court is obligated to exert every effort to facilitate a settlement between the involved Parties and interested Persons, if any. A careful analysis of this section reveals that the learned Judge must exercise due diligence in persuading the parties and encouraging them to reach an amicable resolution.

It is noteworthy that a mere inquiry into the potential for a settlement does not align with the intended purpose of **Section 66 (6)** of the Act. **Section 74 (1)** of the Act underscores the duty of the Judge to elucidate the implications of the relevant sections to the concerned

parties before initiating the inquiry. The court is mandated to actively intervene and apprise the parties of the nature of the dispute, especially in cases related to possessory rights. The Judge is required to clarify that the Primary Court may not be the appropriate forum for resolving disputes concerning land rights and, instead, guide the parties to seek remedy through the competent civil jurisdiction of the District Courts.

Initiating and Conducting the Inquiry

If the parties are not agreeable for a settlement, court shall fix the case for an inquiry. After the conclusion of the inquiry and when the learned Judge is making an order, it is advisable for the Judge to explicitly delineate the nature of the civil dispute. Furthermore, it is recommended that the Judge instruct the parties to seek resolution of their civil rights by invoking the civil jurisdiction of the District Court.

Section 67 of the Primary Court Procedure Act outlines that inquiries are to be conducted in a summary manner. Accordingly:

(1) Every inquiry under this part shall be held in a summary manner and shall be concluded within three months of the commencement of the inquiry.

(2) The Judge of the Primary Court shall deliver his order within one week of the conclusion of the inquiry.

(3) Pending the conclusion of the inquiry it shall be lawful for the Judge of the Primary Court to make an interim order containing any provision which he is empowered to make under this part at the conclusion of the inquiry.

Appeals and Revision Process

The Primary Court Procedure Act, under **Section 74 (2)**, does not explicitly provide for an appeal mechanism against the orders or determinations made by the Primary Court. Consequently, it is crucial to understand that the order of the Primary Court Judge stands as final and conclusive concerning disputes related to land. The primary objective here is to maintain peace among the involved parties, and the Primary Court is not vested with the authority to decide the ownership of the disputed land.

However, in situations where a party perceives an injustice or a miscarriage of justice, the avenue of revisionary jurisdiction remains open. Parties can invoke the jurisdiction of the High Court to contest the orders handed down by the Primary Court Judge in Section 66 applications.

It's worthy to note that, while **Section 74 (2)** of the Act restricts direct appellate rights against orders from the Primary Court Judge in Section 66 applications, the orders can be subject to scrutiny through the process of revision.

Notably, the Court of Appeal is bestowed with jurisdiction for both appeal and revision, as outlined in Article 138 of the Constitution. Importantly, **Article 154 (3) (b)** of the Constitution confers upon the High Court the appellate and revisionary powers in relation to orders from Magistrate's Courts and Primary Courts.

It is interesting to note that the orders made by the learned High Court Judges exercising revisionary jurisdiction automatically grant the aggrieved party the right of appeal to the Court of Appeal by operation of law.

In the circumstances where a party is aggrieved by the decision of the Court of Appeal, the aggrieved party is entitled to file an application by way of special leave to appeal to the Supreme Court in terms of Article 128 of the Constitution.

It's paramount to recognize that in navigating these appeals and revision process, one should consider the legislative intent behind the introduction of **Section 66** of the Primary Court Procedure Act.

Time Constraints and Legislative Objectives

Section 67 stands as a testament to the legislative determination to streamline the inquiry process, mandating its conclusion within a concise three-month period. The primary goal of this provision within the Act is to curb protracted disputes, emphasizing the provisional nature of orders until a final resolution is achieved in a civil court.

A common practice among Magistrates involves directing disputing parties to seek resolution at the District Court. This practice aligns with the legislative foresight that consciously withheld the right of appeal against the order of the Magistrate. This decision, grounded in wisdom, is underscored in the case of ***Sharif and others Vs. Wickramasuriya and Others***[1] affirming the absence of a direct right of appeal from orders issued by Primary Court Judges. However, parties still exercise their right to challenge these orders, opting for recourse to the Court of Appeal through the avenue of revision under Article 138 of the Constitution, read with Article 145, to have the order set aside.

Case Examples and Judicial Interpretations

The landscape of legal proceedings, especially in matters concerning land disputes, is intricately shaped by judicial interpretations that navigate the intersection of Primary Court decisions, revisions at higher courts, and the legislative intent encapsulated in specific procedural acts. This compilation delves into notable cases and the insightful perspectives offered by learned Judges.

In the case of ***Bandulasena and Others Vs. Galla Kankanamge Chaminda Kushantha and Others***[2] *Padman Surasena, J.* states "it would be relevant to bear in mind that the

1 [2010] 1 SLR 255 (CA)

2 CA (PHC) No. 147/2009; C.A.M. 27.09.2017

appeal before this Court is an appeal against a judgment pronounced by the Provincial High Court in exercising its revisionary jurisdiction. Thus, the task before this Court is not to consider an appeal against the Primary Court order but to consider an appeal in which an order pronounced by the Provincial High Court in the exercise of its revisionary jurisdiction is sought be impugned." As such, *Padman Surasena, J.* emphasises a crucial distinction. The nature of the appeal before the Court of Appeal is not a direct challenge against the Primary Court order but rather an appeal against a judgment rendered by the Provincial High Court in the exercise of its revisionary jurisdiction.

Similarly, in ***Nandawathie and another Vs. Mahindasena***[3] *Ranjith Silva J.* held that "the right given to an aggrieved party to appeal to the Court of Appeal in a case of this nature should not be taken as an appeal in the true sense but in fact an application to examine the correctness, legality or the propriety of the order made by the High Court Judge in the exercise of its revisionary powers." This characterisation elucidates the nuanced nature of the appellate process in these circumstances. It emphasises that the role of the Court of Appeal in such cases is not to reevaluate the primary decision but rather to assess the soundness and appropriateness of the High Court Judge's revisionary actions. The focus remains on the legality and propriety of the decision rendered by the High Court in its capacity as a revising authority.

It was emphasized by *Ranjith Silva J.* that, "I am of the opinion that this particular right of appeal in the circumstances should not be taken as an appeal in the true sense, but in fact as an application to examine the correctness, legality or the propriety of the Order made by the High Court Judge in the exercise of revisionary powers. The Court of Appeal should not under the guise of an appeal attempt to re-hear or re-evaluate the evidence led in the main case".

In ***Krishnamoorthi Sivakumar Vs. Pathima Johara Packer***[4] *Prasantha De Silva, J.* expounds the legislative intention behind the introduction of Part VII of the Primary Courts' Procedure Act No. 44 of 1979. In this case, it was held; "the intention of the Legislature in introducing Part VII of Primary Courts' Procedure Act No.44 of 1979 is to prevent a breach of the peace and not to embark on a protracted trial investigating title when deciding the matter in dispute.

Thus, if the Appellant in this application wishes to establish his legal rights to the disputed portion of land, this is not the forum to adjudicate legal right of parties relating to the land in dispute. It is imperative to note that preferring an appeal to the Court of Appeal would not serve the purpose behind the enactment or the intention of the Legislature in introducing Part VII of the Primary Courts' Procedure Act. Thus, it is felicitous for the party concerned to invoke the civil jurisdiction of a competent court rather than preferring an appeal to the Court of Appeal.

3 (2009) 2 SLR 218 (CA)

4 CA (PHC) 122/18 C.A.M 27.09.2022

It is my view that the Primary Courts' Procedure Act No. 44 of 1979 stipulates that "no appeal shall lie against any determination or order under this Act" to prevent prolong and protracted hearings and also to prevent frittering away precious time of courts and parties. When examining the intention of the Legislature in including the 3 month time frame for a matter to be concluded before the Primary Court Judge, the implication is such that Legislature intended to discourage people from filing cases on frivolous grounds, devoid of merit.

Thus, in actual sense the suitable step is to have civil rights of the relevant parties adjudicated in the relevant competent civil court. Therefore, when filing an appeal against a provisional order given under the Primary Courts' Procedure Act, the party concerned must come to a degree of certainty that their claim has merit and is likely to succeed and thereupon decide on the appropriate platform from which he can receive a fair remedy. It is incumbent upon the learned High Court Judges to direct parties to a competent civil Court for a final adjudication of their legal rights pertaining to the land in question. This will enable us to witness an efficient administration of justice in our Court system"

The observation made by *Arjuna Obeyesekere, J.* in the case of ***Aluthhewage Harshani Chandrika and others Vs. Officer-in-Charge and others***[5] has been emphasised in the case of ***Ramalingam Vs. Thangarajah***[6] sheds light on the necessity for expeditious resolution in inquiries under Chapter VII. It was held that, "at an inquiry under Chapter VII, it is essential for the action taken by the Judge of the Primary Court to be disposed as expeditiously as possible. In the circumstances, although it is open to a party to prove the right he claims to be entitled to as is required under the substantial law dealing with a particular right, it is not impossible for him to be content with adducing proof to the effect that he has the right to enjoy the entitlement in dispute for the time being.

Insistence on the proof of a right as in the case of a civil dispute, in this type of proceedings, would lead to two original Courts having to resolve the identical dispute on the same evidence, identical standard of proof and quantum of proof twice over. This would indeed an unnecessary duplicity and is not the scheme suggested by the Criminal Courts Commission and could neither be the intention of the Legislature.

One has to be mindful of the fact that there are still judicial officers in this country who function simultaneously as Judges of the Primary Court, Magistrates, and Judges of the Juvenile Court, Judges of the family Court and District Judges. If disputes affecting lands under the Primary Court Procedure Act are to be heard by the Primary Court Judges and later the civil case as District Judges on the same evidence, same standard of proof and identical quantum of proof, it would not only result in the utter wastage of the precious time of the suitors and the Courts but will be a meaningless exercise as well."

5 C.A (PHC) No. 65/2003 C.A.M 21.09.2020

6 (1982) 2 SLR 693

Legislative Intent

The legislative intent behind the enactment of the Primary Courts' Procedure Act No. 44 of 1979 is clearly articulated in the Hansard discussions dated 22nd of June 1979 [Col 5 946,948], highlighting the crucial aspects of time efficiency, accessibility, and the empowerment of individuals in the pursuit of justice.

Minister M. H. M. Naina Marikar underscores the significance of adhering to specific time limits outlined in the Act. He states, "on an application made by parties not exceeding two weeks shall be given for filling plaint. We have fixed the time limit so that it will not be unnecessarily prolonged. The court shall thereafter fix the matter for inquiry after a week. Then the person interested shall get ready for inquiry not later than two weeks: Finally, every inquiry under this Part shall be held in a summary manner and shall be concluded within three months of the commencement of the inquiry. This is after the judge has failed to bring the parties to a settlement. So, we are combining your conciliation board procedure in this court in the first part of the process, that is, both parties come before a judge and the judge tries his best to settle the issue. If the judge cannot settle the issue he will go to trial. And when we go to trial, we have given the 'right of representation to anybody: it is not necessary that every party must retain a lawyer. If you want to retain lawyer you can do so. If you do not want a lawyer you can go before the courts and argue the case yourself. So, the supreme right to select and to have representation is given to that individual. We are not enforcing it by law. That is a right we have given under the Constitution." His emphasis on limiting the duration for filing a plaint, fixing matters for inquiry promptly, and concluding every inquiry within three months illustrates a clear intent to prevent unnecessary prolongation of legal processes.

In the same Hansard, Minister. R. Sampanthan's statement reinforces the legislative goal of expeditiously enabling Primary Courts to commence functioning. He states, "Mr. Speaker, this Bill would certainly enable the quick dispensation of justice in respect of many small matters that have now been vested within the exclusive jurisdiction of the Primary Court. We only hope that the Hon. Minister of Justice would also take steps expeditiously to enable these courts to commence functioning so that the provisions of this Bill can be put to the best possible use as early as we can."

Allow me to share a personal reflection based on my experience in the Court of Appeal. During my tenure, I encountered a recurring scenario where a significant number of appeals reached their conclusion after an extended period, often spanning 10, 15, or even 20 years from the initial filing of information in the Primary Court.

Regrettably, it appears that the intended purpose behind the introduction of Section 66 to the Primary Court Procedure Act by the Legislature is not effectively realized. The protracted nature of these proceedings raises questions about the efficiency and efficacy of the legal process.

It is evident that the Court of Appeal, while playing a pivotal role, does not ultimately determine the civil rights of the parties involved in disputes over land. This realization brings to light the disconcerting fact that both the courts and legal practitioners may inadvertently instill false optimism in litigants. The prolonged duration of these cases, coupled with the absence of a decisive resolution on substantive matters, leaves litigants with a sense of uncertainty and, at times, false hope.

Addressing these issues is paramount to ensuring that the legal system aligns with its intended objectives and provides a fair and timely resolution for all parties involved.

Guidance for Judges in Section 66 cases

Navigating Section 66 of the Primary Court Procedure Act No. 44 of 1979 demands a judicious approach from Judges to ensure a delicate balance between expeditious resolution and upholding fairness in land dispute cases. The following guidance provides a roadmap for Judges dealing with Section 66 applications:

(1) **Swift Handling of Section 66(1)(a) Applications:** When an imminent risk of a breach of peace is identified, Judges should encourage police officers to promptly file information under Section 66(1)(a). This initiation sets the stage for expeditious resolution by bringing the involved parties before the Primary Court.

(2) **Active Role in Settlement Efforts:** Before scheduling an inquiry, Judges are duty-bound to exert every effort in facilitating settlements between the parties. The emphasis here is on actively persuading parties to reach an amicable resolution, in line with the objectives of Section 66.

(3) **Clarity in Communication:** Judges should ensure that, as per Section 74(1), the implications of relevant sections are clearly elucidated to the concerned parties. In cases involving possessory rights, it is crucial to clarify that the Primary Court may not be the appropriate forum for resolving disputes concerning land rights.

(4) **Direction to Seek Civil Resolution:** If settlement efforts prove futile and an inquiry is initiated, Judges should explicitly delineate the nature of the civil dispute in the final order. Furthermore, they should specifically instruct parties to seek resolution of their civil rights through the competent civil jurisdiction of the District Court.

(5) **Adherence to Time Constraints:** In compliance with Section 67, Judges must ensure that inquiries are conducted in a summary manner and concluded within the stipulated three - month period. This timeframe is designed to prevent protracted disputes and emphasizes the provisional nature of orders until a final resolution in a civil court.

Conclusion

In conclusion, the journey through the intricate landscape of Section 66 in land dispute resolution under the Primary Court Procedure Act No. 44 of 1979 underscores the delicate balance that Judges must strike between expeditious adjudication and the protection of civil rights. The legislative intent, as articulated in the Hansard discussions, is clear: to prevent unnecessary delays, empower individuals, and maintain peace in land-related matters.

Guiding judges through the nuanced process, the article emphasizes the importance of active judicial involvement in settlement efforts, clarity in communication regarding the nature of disputes, and adherence to the designated time constraints. The legislative framework, notably **Section 67**, reinforces the imperative for streamlined inquiries, ensuring that disputes are resolved promptly within a three-month period.

The absence of a direct appeal mechanism from orders of the Primary Court Judge necessitates a judicious redirection of parties towards the civil jurisdiction of the District Court. This not only discourages frivolous appeals but also aligns with the legislative foresight to prevent protracted hearings. The revisionary jurisdiction, while available for instances of perceived injustice, serves as a remedy only within the confines of challenging the legality of the Primary Court's order.

In essence, the application of Section 66 in land disputes is a testament to the Legislature's commitment to swift justice and the prevention of peace breaches. Judges play a pivotal role in translating these legislative intentions into practical and meaningful resolutions in the realm of land dispute adjudication.

Though there is no right of appeal for the Order of the Magistrate in a Section 66 Case, revision is allowed for any injustice or miscarriage of justice. In a revision application, only the legality of that Order can be challenged and not the correction of that Order. Unless there is a grave injustice or serious miscarriage of justice, on the *prima facie* case, High Court Judges should direct parties to invoke the competent civil jurisdiction of the District Court and withdraw the revision application. Since the ultimate outcome of such procedure in a Section 66 case is to prevent the breach of peace, if a party wants to appeal, instead of appealing such party should go to the District Court.

Navigating Section 66 requires Judges to balance the need for prompt resolution with the protection of parties' civil rights. While revision serves as a remedy for potential injustices, the primary focus should be on encouraging parties to seek civil remedies in a competent court. The legislative intent to prevent breaches of peace can only be fully realized when parties embrace the appropriate forums for the adjudication of their rights.

THE VINDICATORY ACTION

Justice C. P. Kirtisinghe

I will first discuss the vindicatory action and thereafter compare it with the action for a declaration of title and ejectment.

The vindicatory action or the action *rei-vindicatio* is the major remedy available in Roman Dutch law to an owner who has been deprived of possession of his property. The right to gain property is one of the significant attributes of ownership in Roman Dutch law.

Voet states thus "From the right of ownership springs the vindication of a thing, that is to say, an action in rem by which we sue for a thing which is ours but in the possession of another" (Voet.6.1.2) "To vindicate is typically to claim for oneself a right in re. All actions in rem are called vindications, as opposed to personal actions or conditions" (Voet.6.1.1).

Maasdorp says "The plaintiff's ownership of the thing is of the very essence of the action". (Maasdorp's institutes 7th edition volume 02 page 96)

The requisites of a vindicatory action

To succeed in a vindicatory action a plaintiff must show that,

1. He is the owner of the property and
2. The property is in the possession of the defendant.

There are several ingredients in a vindicatory action.

(i) The burden of establishing title to the disputed property.

The burden of establishing title to the property in dispute devolves on the plaintiff. Where the plaintiff fails to prove title in himself the action of the plaintiff fails even though the defendant also had failed to prove his title. In the case of ***De Silva Vs Gunatilake (1931) 32 NLR 217*** Macdonell CJ stated as follows,

"There is abundant authority that a party claiming a declaration of title must have title himself. The authorities unite in holding that the plaintiff must show title to the corpus in dispute and that, if he cannot, the action will not lie".

In the case of ***Abeykoon Hamine Vs Appuhamy (1950) 52 NLR 49*** Dias S.P.J. stated as follows,

"This being an action *rei vindicatio*, and the defendant being in possession, the initial burden of proof was on the plaintiff to prove that he had dominium to the land in dispute".

In the case of ***Peeris Vs Saunhamy (1951) 54 NLR 207*** Dias S.P.J (with Gratiaen J agreeing) reaffirmed this principle.

In the case of ***Muthusamy v Seneviratne (1946) 31 CLW 91***, Soertsz S.P.J observed "it is an elementary rule that in an action for declaration of title, it is for the plaintiff to establish title to the land he claims and not for the defendant to show that the plaintiff has no title to it".

Walter Pereira quoting Voet states (Voet 6.1.2) "This action arises from the right of dominium. By it we claim specific recovery of property belonging to us, but possessed by someone else".

Nathan observes in "Common Law of South Africa Vol. 1 page 362, thus, "To bring the action Rei vindicatio, the plaintiff must have ownership actually vested in him".

Therefore, to institute a vindicatory action, the plaintiff must have title to the property in dispute and the burden is on him to establish his title to the property.

(ii) Once the title is established by the plaintiff, the burden of proof shifts to the defendant to prove that he has a right to possession or occupation of the property.

In the case of ***Siyaneris v Udenis de Silva (1951) 52 NLR 289***, the plaintiff proved he had title to the land in dispute which was in the possession of the defendant who asserted a legal right to possess. The Privy Council held that the burden of proof with regard to the right to possession was on the defendant.

(iii) Our law recognizes an exception to the General Principle that the burden of proving title in an action *rei vindicatio* falls on the plaintiff. That is the presumption of title which arise out of possession. The effect of this exception is that where the plaintiff enjoyed prior peaceful possession of the property and alleges that he was ousted by the defendant, there is a rebuttable presumption of title in favour of the plaintiff.

In the case of ***Mudalihamy v Appuhamy (1891) 1 C.L. Rep. 67***, the plaintiff was in bona fide possession of the chena in question and cleared it for sowing when the defendant entered upon it; sowed it and dispossessed the plaintiff. Burnside C.J held as follows, "Now, *prima facie*, the plaintiff having been in possession, he was entitled to keep the property against all the world but the rightful owner, and if the defendant claimed to be that owner, the burden of proving his title rested on him, and the plaintiff might have contented himself with proving his de facto possession at the time of the ouster".

Professor G.L. Peiris states thus:-

"In this type of cases the basis of the presumption that the plaintiff has title is the Quiet Possession enjoyed by the plaintiff as a matter of fact before he was ousted by the defendant. It follows that,

1. the fact of ouster by the defendant and
2. the previous peaceful possession of the land by himself must be clearly proved by the plaintiff" -Professor G.L. Peiris - The Law of Property in Sri Lanka - Vol. One - 2nd edition page 303.

In the case of ***Kathiramathamby v Arumugam (1948) 38 C.L. W. 27***, Basnayake J held that in a situation like this, in an action for declaration of title and for restoration to possession of the land from which a plaintiff alleges he has been forcibly ousted, the burden of proving 'ouster' is on the plaintiff. If the plaintiff fails to prove ouster his case will fail.

The Standard of Proof

The Standard according to which the plaintiff is required to prove title in a vindicatory action should be taken into consideration. Voet states that ownership is proved if the ownership of the predecessor in title is shown, and if a suitable cause or title for the transfer of ownership from the predecessor in title to the plaintiff is demonstrated (Voet 6.1).

In the case of ***Pathirana v Jayasundara 58 NLR 169***, H.N.G. Fernando J referred to "strict proof" of title in the plaintiff in a vindicatory action.

In the case of ***Wanigaratne v Juwanis Appuhamy 65 NLR 167***, Herath J observed thus: "In an action *rei vindicatio* the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, in court, prove that title against the defendant in the action. The defendant need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title".

Professor G.L. Peiris states thus:-

"However, for the modern law, it seems more appropriate to state that all that the plaintiff need prove is that the property reached him through an act which is acknowledged by the Law as being sufficient to enable the acquisition of dominium. Sale or inheritance may be suggested as examples. However, it is clear that the high standard of proof required in a Partition action does not apply to the proof of a plaintiff's title in a vindicatory action (refer to ***Cooray v Wijesuriya 62 NLR 158*** for the standard of proof in a Partition action).

Can a person who has bare title or "nuda proprietas" institute an action *rei vindicatio*?

Voet answers this question in the affirmative. In his title 6.1.3 of the Commentaries on the Pandects, Voet states thus:-

"It does not make any difference whether one has a complete right of ownership or a naked ownership while the usufruct resides in another, so long as the subject of the usufruct is in the possession of a third party, or the usufructuary himself desires to possess it not by right of servitude but by right of ownership".

In these circumstances, the plaintiff has the bare-bones of the legal *dominium,* but no beneficial use or enjoyment of the property. The owner has parted with the right

of possession to another. A lessor, for example, has no right of possession during the subsistence of the lease, although he continues to have ownership of the property throughout this period.

In the case of ***Allis Appu v Endris Hamy (1894) 3 S.C.R. 87***, it was held that under the Roman Dutch Law the *rei vindicatio* for asserting a right to immovable property lay at the suit of a person who had a mere "nuda proprietas". It was concluded that the *rei vindicatio* can be maintained by a lessor who had granted a lease of the premises for a definite term, against a third person who had taken possession of the premises, during the existence of the lease and claimed them as his own by an adverse title.

The defendant in a Rei Vindicatio Action

It is settled law that a vindicatory action in respect of a land or property cannot be maintained unless the defendant was in possession of the land at the time when the cause of action arose. The general principle applicable in this regard is that a vindicatory action lies against any person who was in possession of the property which is in dispute at the time of *Litis Contestatio* or who acquired possession of the property *pendente lite*. However, the decided cases in South Africa suggest that a person having bare *detentio* of the property will not be made liable in an action *Rei Vindicatio*, if he nominates the person on whose behalf he holds the property. Scholtens states ([1960] Annual Survey of South African law p 190) as follows,

"The plea that a defendant is holding a property as detentor is not a defence in the proper sense which leads to the dismissal of the action. If the possessor for whom the detentor hold enters an appearance, the law suit will be continued against him and the detentor is to be discharged, but if the legal possessor fails to make an appearance, the detentor will have to surrender the things to the plaintiff. The detentor cannot ask for his discharge and at the same time keep the thing".

Locus standi to institute a *Rei vindicatio* action

A vindicatory action is available only to a person who has title to the property in dispute at the time of the institution of the action.

Not only the plaintiff must have title at the time the *rei vindicatio* is instituted, but he must retain title throughout the course of the action. In the case of ***Silva v Hendrick Appu (1895) 1 NLR 13***, it was held that "When a plaintiff comes into Court praying for a declaration of title, he must possess at that time the title which he asks the Court to declare to be his. In that case, Lawrie ACJ regarded that principle as an established rule of law". In the case of ***Ponnamma v Weerasuriya (1908) 11 NLR 217***, the plaintiff instituted a *rei vindicatio* action to vindicate her title. The property in dispute had been conveyed to the plaintiff by a person who had purchased it at a Fiscal Sale, but who had not obtained a Fiscal's transfer at the date of the institution of the action which he

obtained nine days after the institution of the action. It was held that the plaintiff's title must fail as her vendor had no title at the date of the institution of the vindicatory action in the absence of a Fiscal's transfer. A similar approach was followed in ***Silva v Hendrick Appu*** cited above where the Fiscal's transfer was held to have come too late to confer title on the plaintiff to institute a vindicatory action. In the case of ***Ahamadulevve Kaddubawa v Sanmugam (1953) 54 NLR 467***, Gratiaen J held as follows,

"The plaintiff's claim fails because he had no title to the property at the time when the action commenced and the subsequent title which is alleged to have come into existence after that date cannot avail himself in these proceedings".

Voet states thus,

"If he who brought the action was the *dominus* at the time of the institution of the suit, but *lite pendente* has lost the *dominium*, reason dictates that the defendant should be absolved both because the suit has then fallen into that case from which an action could not have a beginning and in which it could not continue, and because the interest of the plaintiff in the subject of the suit has ceased to exist, and in short because the right of *dominum* has been removed and become extinct, which was the only foundation of this real action".

In the case of ***Silva v Jayawardene (1942) 43 NLR 551***, Keuneman J said "it is clear that the action contemplated by Voet was the action *rei vindicatio* and I think it follows that all rights *in rem* against the property are lost, when the dominium has been transferred pending the action to another person".

In the case of ***Silva v Jayawardene,*** the plaintiff had transferred three blocks to another party after the institution of the action for declaration of title to five blocks of land. It was held that no decree for title could be entered in favour of the plaintiff in respect of the three blocks sold, but the plaintiff could claim damages up to the date of the transfer.

Eliashamy v Punchi Banda (1911) 14 NLR 113 was an action for declaration of title, ejectment and damages and during the pendency of the action, the plaintiff sold the land to a third party. It was held that the plaintiff could not obtain a decree for declaration of title and ejectment. However, the plaintiff was allowed to maintain his claim for damages which had accrued prior to the transfer of title.

Intervention by a third party in a *Rei Vindicatio* Action

It is settled law in our country that if the plaintiff does not object, a third party should be allowed to intervene in a pending vindicatory action, where he is not in possession of the corpus and seeks to obtain a decoration of title and consequensal reliefs in his own favour. In the case of ***Ponnuthurai Vs Juhar (1959) 66 NLR 375*** Sansoni J and Basnayake CJ explicitly asserted this principle.

Defenses in a vindicatory action

In the case of ***Allis Appu Vs Endris Hamy*** reported in (1894) 3 S.C.R. 87 Withers J enumerated the following defenses to a vindicatory action.

1. Denial of the plaintiff's title.
2. Setting up by the defendant of his own title in the sense of establishing a title superior to plaintiff's title.
3. Prescription
4. The plea of Res Judicata.
5. Right of Tenure under the plaintiff example usufruct, pledge, lease.
6. The right to retain possession subject to an indemnity from the plaintiff under peculiar condition.
7. The plea of exceptio rei venditae et traditae
8. *jus terti*

The defense of the plea of *jus terti* requires consideration. In this defense, the defendant is entitled to resist the vindicatory action instituted by the plaintiff by showing that title to the property in dispute is in a third party. In this situation the title to the property in dispute is neither with the plaintiff nor with the defendant. In the case of ***Allis Appu Vs Endris Hamy*** cited above the applicability of this defense in our law was conceded. In the case of ***Dharmalankara Thero Vs Ahamadulebbe Marikkar (1952) 54 NLR 181,*** *Nagalingam* - A.C.J conceded that the defense of the plea of *jus terti* is a part of the law in this country.

The defense based on the plea of *Res Judicata* also requires consideration. In the case of ***Dharmalankara Thero Vs. Ahamadulebbe Marikkar*** cited above, Nagalingam - A.C.J observed as follows,

"I think, where a defendant sets up a *jus terti*, though he himself may not be claiming under that title, it will be sufficient and competent for the plaintiff to repel that plea by showing that a judgement secured by him against the third party operates as res judicata as between himself and the third party, for such a judgement is the best proof that the third party has no title as against the plaintiff and puts an end to the plea".

The difference between a vindicatory action and an action for declaration and ejectment

In the modern Roman Dutch Law as applied in Sri Lanka and South Africa, two actions which correspond to the action *rei vindicatio* are,

i) the action for declaration of title and

ii) the action for ejectment.

The action commonly known as an action for declaration of title and ejectment is a combination of two actions namely,

a) the action for declaration of title

and

b) the action for ejectment.

The action for declaration of title is often combined with the action for ejectment. These two actions are taken together correspond to the Vindicatory Action.

Both the *rei vindicatio* action and the action of declaration of title and ejectment are clearly designed to secure the same primary relief - namely the recovery of the property. However, some essential differences between the requisites of a vindicatory action and an action for declaration of title and ejectment can be observed which suffice to prevent the two actions from being treated as synonymous. These differences refer to the cause of action and the standard of proof of the actions.

These differences are clearly illustrated by the decision of the Supreme Court in the landmark case ***Pathirana v Jayasundara (1955) 58 NLR 169***.

The facts of the case are as follows:-

The plaintiff sued the defendant on the basis that the defendant was an overholding lessee by attornment. The defendant admitted the bare execution of the lease, but stated that the lessors were unable to give him possession of the land in question. He averred that the land in dispute was sold to him by its lawful owner who was not one of the lessors and that by adverse possession from that date, he had acquired title by prescription. The plaintiff then sought to amend the plaint by claiming a declaration of title and ejectment on the basis that his rights of ownership had been violated. It was held that the plaintiff was not entitled to amend the plaint if the amendment would cause prejudice to the defendant's plea of prescription.

The principle arising out of this decision is that a lessor of a property who institutes an action against an overholding lessee on the basis of a cause of action arising out of a breach by the defendant of his contractual obligation as lessee is not entitled to amend his plaint subsequently so as to alter the nature of the proceedings to a *rei vindicatio* based on the cause of action of the violation of the rights of the plaintiff.

In that case Gratiaen J stated as follows:-

"In a *rei vindicatio* action proper the owner of immovable property is entitled, on the proof of his title, to a decree in his favour for the recovery of the property and the ejectment of the person in wrongful occupation. The plaintiff's ownership of the thing is of the very essence of the action. The scope of an action by a lessor against an overholding lessee for

restoration and ejectment, however, is different. Privity of contract is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who had entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. The lessee cannot plead the *exceptio dominii*, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship.....

.....Both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation.

A decree for a declaration of title may, of course, be obtained by way of additional relief either in a *rei vindicatio* action proper (which is in truth an action *in rem*) or in a lessor's action against his overholding tenant (which is an action *in personam*). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner."

In the same case, H.N.G. Fernando J stated as follows,

"The two paragraphs (in the Plaint) constituted together the statement of the Plaintiff's first cause of action and it is clear that the unlawful possession of which the Plaintiff complained was the overholding by the defendant after the cessation of his contractual rights.

There is however the further point that the Plaintiff in his prayer sought not only ejectment but also a declaration of title, a prayer for which latter relief is probably unusual in an action against an overholding tenant. I have no doubt that it is open to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty which arises is whether the action thereby becomes a *rei vindicatio* for which strict proof of the plaintiff's title would be required or else is merely one for declaration (without strict proof) of a title which the tenant is by law precluded from denying. If the essential element of a *rei vindicatio* is that the right of ownership must strictly be proved, it is difficult to accept the proposition that an action in which the Plaintiff can automatically obtain a declaration of title through the operation of a rule of estoppel should be regarded as a vindicatory action. The fact that person in possession of property originally held as lessee would not preclude the lessor-owner from choosing to proceed against him by a *rei vindicatio*. But this choice can I think be properly exercised only by pleadings clearly setting out the claim of title and sounding in delict".

Several matters of importance arise out of these two judgments and the following observations could be made in respect of the differences and similarities between these two actions,

1) The vindicatory action is an action in rem in the sense that the owner of the property vindicates his title against the whole world. The action for declaration of title and ejectment is an action in personam, which arises out of a contract which existed between the plaintiff and the defendant.
2) The cause of action in a vindicatory action is the violation of the plaintiff's rights of ownership. The cause of action of an action for declaration of title and ejectment is the breach of the lessee's contractual obligation.
3) Both these actions are designed to secure the same primary relief, namely the recovery of property.
4) Although both these actions are brought to recover property which is in possession of another, the scope of the two actions are different. The scope of a vindicatory action is the proof of the plaintiff's ownership to the property in dispute whereas the scope of the other is the proof of the contractual obligation existed between the parties and breach of it by the lessee.
5) In both actions a declaration of title can be obtained as an additional relief. However, in a vindicatory action the declaration of title is based on the proof of the ownership. In an action for declaration of title and ejectment, the declaration is based on the proof of the contractual relationship which forbids a denial that the lessor is the true owner.
6) In a vindicatory action, the plaintiff has to strictly prove his title to the property in dispute. In an action for a declaration of title and ejectment, the plaintiff is not required to prove his title strictly. By operation of the principle of estoppel contained in Section 116 of the Evidence Ordinance, the defendant lessee is forbidden to deny the ownership of the lessor.
7) It is open to the lessor in an action for ejectment to ask for a declaration of title to the property in dispute as an additional relief, but the action thereby does not become a vindicatory action.
8) A plaintiff-lessor has the option of instituting a vindicatory action to eject an overholding lessee or to sue the defendant-lessee on the breach of the contract of tenancy. The fact that the person in possession of the property in dispute originally held it as lessee would not preclude the lessor from choosing to proceed against him by a vindicatory action.

Ruberu v Wijesooriya 1 Sri L.R. 58 was an action instituted to eject a licensee. The learned District Judge ordered the amendment of the Plaint on the basis that the plaintiff-appellant cannot eject a licensee without proving title and first getting a declaration of title in respect of the premises in suit. On appeal it was held (by U. de. Z. Gunawardana J)

that "whether it is a licensee or lessee, the question of title is foreign to a suit in ejectment of either. The licensee obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of the plaintiff without whose possession he would not have got it. The effect of section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must first quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff is perforce an admission of the fact that the title resides in the plaintiff".

Luwis Singho and Others v Ponnamperuma (1996) 2 Sri L.R. 320 is a different type of an action for declaration of title and ejectment. In that case the plaintiff did not have paper title to the land in dispute. Though he could not prove it, the plaintiff had enjoyed earlier peaceful possession and was subsequently ejected.

Wigneswaran J (with Weerasekera J agreeing) held thus:-

1) Actions for declaration of title and ejectment (as in this case) and vindicatory actions are brought for the same purpose of recovery of property. In a *rei vindicatio* action the cause of action is based on the sole ground of violation of the right of ownership. In such an action, proof is required that

   (i) the Plaintiff is the owner of the land in question - he has the dominium.

   (ii) that the land is in the possession of the defendant.

2) In an action for declaration of title and ejectment, the proof that a plaintiff had enjoyed an earlier peaceful possession and that subsequently he was ousted by the defendant give rise to a rebuttable presumption of title in favour of the plaintiff. This could be classified as an action where dominium is not required to be proved strictly.

Wigneswaran J further states as follows:-

"In an action for declaration of title and ejectment the plaintiff need not sue by right of ownership but could do so by right of possession and ouster. In fact in such a case, the plaintiff is claiming a possessory remedy rather than the relief of vindication of ownership.

It would appear that law permits a person who possessed peacefully but cannot establish clear title or ownership to be restored to possession and be quieted in possession. This development of the law appears to have arisen due to the need to protect de-facto possession. It is different from the right of an owner recovering his possession through a vindicatory action".

This is not a new concept introduced into our law by Wigneswaran J. In an earlier case, ***Mudalihamy v Appuhamy (1891) 1 C.L. Rep. 67*** this view was endorsed by Burnside C.J who observed thus:-

"Now, prima facie, the plaintiff having been in possession, he was entitled to keep the property against all the world but the rightful owner, and if the defendant claimed to be that owner, the burden of proving his title rested on him, and the plaintiff might have contented himself with proving his de facto possession at the time of the ouster".

Can a permit holder under the Land Development Ordinance institute a *rei vindicatio* action.

In the case of ***Palisena Vs Perera (1954) 56 NLR 407*** it was decided that a permit holder under the land development ordinance enjoys a sufficient title to enable him to maintain a vindicatory action against a trespasser. In that case Gratiaen J held as follows,

"It is very clear from the language of the ordinance and of the particular permit P1 issued to the plaintiff that a permit holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings".

IDENTIFICATION BY FINGERPRINTS*

J. F. A. SOZA

We ordinarily recognize people by sight but this conditioned by two opposite factors: Variability of the parts of the human body and the relative permanence of the features of an individual. You meet a long lost friend and you tell him "I could not make you out. You look so changed." At the same time on a close look you recognise him by the permanence of his features especially the face but here too there can be variability. You recognise the furrows and wrinkles, dimples and ridges, characteristics in his facial expression and gait. Mannerisms and quality of voice also help. Although the variations in a person's appearance could be innumerable, yet sight recognition especially by the face is generally dependable. But you can still make mistakes – twins and members of the same family can pose you a problem in identification. We all have experience of doubles and accosting people who turn out to be strangers. The great German President Friedrich Ebert lived at the beginning of this century. The Friedrich Ebert Foundation (Stiftung) founded after him found is double and used him to make pictures and a documentary of the life and times of that revered German leader.

Personal identification plays a very big part in the criminal courts. Not infrequently witnesses pick out the wrong man at identification parades. The reliability of the identification will depend on the length of time during which the witness saw the offender, how much of the face was seen and for how long, the type and brightness of the light available, the characteristics of the scene (for instance was it night and the place shaded with trees and foliage?), the nature of the incident itself and the interest of the observer, birthmarks, scars, hairstyles, beards and peculiarities of gait and numerous other factors. In the well known Whitehouse murder case a principal collaborator was identified by recognition of his face and a peculiar limp he had when he walked. A thief was once identified by is face, a gold tooth and two missing incisors. The thief smiled when he was caught and the smile earned him seven years penal servitude.

Sight recognition of unknown persons must be put through careful tests because of the very live possibilities of mistake.

Among the early savages grotesque tattoo marks and hideous scarifications served very well for identification. Artificial tattoo marks cannot easily be eradicated.

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Nature however has provided an unerring form of identification. The palms and fingers of the hand and the soles of the feet bear complex lines, creases and ridges and these vary from person to person. The possibility of two persons having identical lines, creases and ridges has been scientifically ruled out. The significance of such lines, creases and ridges has been appreciated from ancient times. In Nova Scotia there is on the face of a cliff the carved outline of a human hand showing ridges and creases. Clay seals and tablets with fingerprints having been found in China, ancient Babylonia and Assyria. At the birth of Lord Buddha it is said that the sages predicted the great mission for which He was destined by the special features of the soles of His feet. The Bible too has some very significant references to footprints: Thus in Job 13.27 we read:

"You bind chains on my feet:

you watch every step I take,

and even examine my footprints."

Notice must be taken here of the Bertillon System named after a Frenchman Alphonse M. Bertillon under which physical measurements were used for identification. The system was based on the theory that certain body parts of the human anatomy did not undergo change throughout adult life. Measurements of various parts of the body were taken in great detail and identification was established on the basis of these measurements. This system had its imperfections. The very young and the very old could not be identified by this method. It could be applied only to the period of the adult life when the bones underwent comparatively little change. There were disparities when measurements were taken by different experts. The system was costly and operating the instruments used for taking measurements was a delicate process and depended for accuracy on the expertise and skill in handling of the operators. Further the system was not readily applicable in criminal cases.

The fingerprint system was far superior, accurate and universal. In Europe in the vanguard of the medical men who pinpointed the significance of papillary ridge formations, creases and patterns on the fingers were Nohemiah Grew, Marcella Malphige, Ian Evangelista Purkinje, Herman Welcker, Professor Vurcetich and Henry Foulds. There were experimenters and scientists too in the field like Sir William Herschel an Indian Civil Servant, Sir Francis Galton a British Scientist and Sir Edward Henry Commissioner of the Metropolitan Police, London. It was sir Edward Henry who for the first time worked out a detailed method of classification of fingerprints which in due course came to be accepted as an infallible method of personal identification. His book entitled "Classification and Uses of Fingerprints" came to be regarded as a source book on the subject and he can well be described as the father of modern Fingerprinting.

It has been scientifically established that the skin patterns form between the 4th and 5th month of a child's development in his mother's womb. These skin patterns remain essentially the same throughout life until decomposition after death. Fingerprints remain unchanged in detail whatever the changes that take place during physical growth. Fingerprints come direct from the body and recording them leaves no room for human error unlike the Bertillon system of physical measurements. Taking fingerprints is a simple process and only an ink pad and paper are required. The system is fool proof and infallible and even an uninitiated person can work it. The fingerprint can be plain where you have the natural stamp of the bulb surface of the finger or it can be rolled where you have the cylindrical projection of the whole bulbous surface. A palm print or print of the sole of the foot will always be plain.

The claim for hundred percent accuracy for the fingerprinting system is based on four fundamental truths:

1. Fingerprints are formed before birth and are not artificial markings.
2. Fingerprints last unchanged throughout life from womb to grave.
3. Fingerprints cannot be eradicated or changed.
4. Fingerprints are individual and have never been found to be duplicated.

The 1st, 2nd and 3rd cardinal principles adumbrated above are scientific truths and easy to accept. The fourth can be proved to a mathematical certainty.

Every fingerprint impression has many ridges which have their own characteristics.

Ridges on a palm or finger or sole of a foot do not always run in uninterrupted lines. There are breaks in some places forming a free end. Sometimes a ridge branches and forms a fork and in other places a portion of ridge lies all by itself between other ridges making an island. The form in which all the ridges in a fingerprint traverse in relation to one another is called a pattern. In a pattern one can have a delta, that is a triangular area formed by the bifurcation of a single ridge or by the abrupt divergence of two ridges. The central area of a pattern is called a core. A pattern can be a loop pattern where there is one delta point from which two ridges emanate enclosing ridges of a loop shape or a whorl pattern with two deltas situated on either side of the impression. The details are irregular and wholly individual and one can find 40 to 50 such details in a print. The chance of duplication of any one of the details of a finger print is thought to lie between one in fifty and one in hundred. For purposes of calculation we will rate the chance of as being one in ten. At least *twelve sequent points of similarity* have come to be accepted for purposes of personal identification. Therefore the chance of finding a duplication will be 1/10 multiplied by itself 12 times by the mathematical process of permutations and combinations. This gives a figure of 1 in 1000,000,000,000. Compare this figure with the figures of the population of the world and it will then be realised why it is said that

there can never be a duplicated fingerprint. No two persons can ever have identical fingerprints and there is not a single known instance to disprove this.

An illustration

In 1917 Professor Carnella of Milan was reported missing and not heard of thereafter. In 1924 a man suffering from loss of memory was admitted to a Piedmont asylum strikingly similar in appearance to Professor Carnella. All Professor Carnella's friends and his wife and daughter identified him as the missing Professor. The patient too began to recover his memory by degrees and even recalled some incidents identified with those that had occurred in the Professor's career. Three years later a women appeared and identified him as her husband Bruneira. The Italian Police had Bruneira's fingerprints and these were identical with those of the patient thus establishing the woman's claim. No case of two persons with identical fingerprints has yet been recorded.

Fingerprints are of use in criminal cases. The tell tale fingerprint found at the scene of an offence if not explained is very good proof of personal identification. But this is only one area where it is used.

Many countries use it as a method of national personal identification. Universal national registration by fingerprints has been known to bring about a reduction in crime. Fraud by impersonation will greatly decline and imposters put out of business. Cases of unidentified bodies will no longer present the enigmatic problems they now present. On identification dead men do tell tales.

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PRESERVING LEGAL LEGACIES: THE IMPERATIVE OF ACCURATE MINUTE AND JOURNAL KEEPING IN COURT PROCEEDINGS

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Abstract:

This article delves into the often underestimated but crucial practice of maintaining accurate minutes and journals in legal proceedings, focusing on the significance of these records in preserving justice, ensuring transparency, and upholding the integrity of court cases. With the assistance of judicial precedents and contemporary legal practices this study underscores the essential nature of minute and journal keeping as a safeguard against procedural errors and memory distortions, which will come to light, by and large, in the process of review by superior courts. It is objected to establish that meticulous documentation not only enhances the accuracy, impartiality and integrity of adjudication but also it contributes to the development of legal jurisprudence.

Keywords: Court proceedings, legal documentation, minute keeping, journal recording, *Cursus Curiae*, procedural fairness, transparency, charge sheet, unconditional plea of guilt, date stamp, case law, Civil Procedure Code, Section 114 presumption in the Evidence Ordinance, *audi alterum partem*, notice of appeal.

Introduction:

In the pursuit of justice, accurate documentation of legal proceedings is an essential pillar that guarantees the precision, fairness, and integrity of the judicial process. In a court of law, journal entries are the predominant way of recording transactions in chronological order as they occur, whether it be in chambers or open court. The primary objective of journal entries is to produce a concise record of all events that occur throughout the whole legal proceeding, which will facilitate a court that may review the case in the future. It is an essential step in the administration of justice and aids the court in keeping track of every significant part of the passage of justice, from the judge's perspective or under his strict supervision.

Case records contain minutes written by the judge or a court official entrusted with relevant subject and authenticated by the judge's signature. In civil matters, the bulk of journal entries are the duty and obligation of court officials allocated with civil subject, i.e., step of the case, names of the attorney at law of record, whether parties were properly summoned, case fixed *ex parte* against a party or not, etc. By affixing his signature to

the minute, the judge confers judicial assent to the contents and assumes complete responsibility for its accuracy.

Statutory Recognition of Journal

Civil Procedure Code has a chapter dedicated to 'the journal' which is reproduced below.

CHAPTER XIV

OF THE JOURNAL

Journal. *92. With the institution of the action the court shall commence a journal entitled as of the action, in which shall be minuted, as they occur, all the events in the course of the action, i.e., the original application, and every subsequent step, proceeding, and order; each minute shall be signed and dated by the Judge, and the journal so kept shall be the principal record of the action.*

Presumption as to Accuracy of Official and Judicial Acts

Section 114 of the Evidence Ordinance is relevant to the veracity of a journal if its accuracy is questioned, as the presumption of the accuracy of judicial and official acts in that section also applies to journal entries. This section reads as thus:

> *"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case."*

Although this presumption is not a hard-and-fast rule, the Court may presume that judicial and official acts have been performed in a regular manner where appropriate. This presumption derives from the Latin maxim "*omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium,*" which may be simplified to "*omnia praesumuntur rite et solemniter esse act*" or "*omnia praesumuntur rite esse acta*."

E. R. S. R. Coomaraswamy has stated in relation to application of section 114 of the Evidence Ordinance in *The Law of Evidence*[1] as follows,

> *"The presumption applies only to mandatory forms of procedure, since "regularly done" means "done with due regard to form and procedure". In the case of mandatory provisions of procedural law, in the absence of any evidence to the contrary, the court would presume that all rules and legal forms were complied with. But this presumption cannot be raised where the provision of the procedural law is not mandatory, but only enabling."*

1 Vol. II (Book 1)] at 414

Cursus Curiae and Accuracy of Journal

It is axiomatic to reiterate the words of wisdom quoted by ***Amarasekara J.,*** in the minority judgment of ***Kadireshan Kugabalan v. Sooriya Mudiyanselage Kanthi Ranaweera***[2], with reference to the Latin maxim "*cursus curiae est lex curiae*" which means "the practice of court is the law of the court", which is excerpted from *Broom's Legal Maxims*[3].

> *"Every Court is the guardian of its own records and master of its own practice" and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in law generally stands upon principles that are founded in justice and convenience."*(emphasis mine)

Quintessentially, a court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure contrary to or inconsistent with rules laid down by statute or adopted by ancient usage, *vide*, *Halsbury's Laws of England*[4].

Rather than describing the significance of journal and minute in general, it would be more insightful to enumerate situations in which journal play a crucial role in ascertaining what transpired in the original court.

Determining when the Notice of Appeal is Lodged

In ***S. Seebert Silva v. F. Aronona Silva***[5] it was held that the Court is entitled to presume that the journal entries, made in compliance with the requirements of section 92 of the Civil Procedure Code, set out the sequence of events correctly. In that matter ***K. D. De Silva, J.*** held that '*the date-stamp on the plaint is by no means conclusive*'.

When it comes to determining the extent of applicability of section 114 of the Evidence Ordinance to section 92 of the Civil Procedure Code, i.e. journal minutes, the case of ***Nachchiduwa v. Mansoor***,[6] marks a watershed moment. The question in that case was whether the judge's journal minute or the "date stamp" on the notice of appeal should be used as conclusive proof as to when the appeal was filed. The Court of Appeal, in its infinite wisdom, has determined that it is standard practice for lower courts to affix a "date stamp" to an appeal notice at a later date. The Court of Appeal relied on the minutes in reaching its conclusion that the notice of appeal had been filed within the time limit established by section 114(d) of the Evidence Ordinance.

2 SC Appeal No. 36/2014, 12.02.2021
3 10th Edition page 82
4 4th Edition Vol.10, Para 703
5 60 N.L.R. 272
6 (1995) 2 Sri. L. R. 273

It was held by Hon. ***S.N. Silva j.,*** (as he then was),

> *"According to the journal entry of the District Court record the petition of appeal is minuted as at 09.12.94. However, Learned District Judge has found that the petition of appeal has been handed over to the Registrar by the registered attorney of the defendants on 02.12.94. The Registrar has placed his initials and entered the time as 1.20 p.m. It appears that according to the practice in the Registry the petition of appeal had to be thereafter taken to the record room where it is entered in the motion book and filed in the record. These steps have not been taken on 02.12.94."*

Paying careful attention to the practice prevalent in District Courts, it was further held,

> *"We have carefully considered the submissions of learned counsel. We note that in terms of section 755(3) the appellant has to "present" to the original court a petition of appeal within a period of 60 days of the judgment. The act of the registered attorney of the defendants- appellants in tendering the petition of appeal to the Registrar and the act of the Registrar in placing the date stamp and his initials on the petition of appeal constitute a presentation of the petition of appeal."* (Emphasis mine)

On a different note, Hon. ***Janak De Silva, J.*** reminded judges that holistic approach is the way forward rather than mechanically following precedents in ***Walimunidewage Indrasena v. Walimuni Dewage Wijewardena***[7].

> *"The presumption cannot be applied to journal entries that do not comply with the requirements of section 92 of the Civil Procedure Code. In the present case, journal entry No. 82 simply states that the notice of appeal had been filed within the stipulated time. There is no journal entry as to when it was actually filed. Therefore, I am of the view that the Court of Appeal made a fundamental error in invoking the presumption in Section 114(d) of the Evidence Ordinance, to journal entry No. 82 to conclude that the notice of appeal had been filed within the stipulated time."*

The Supreme Court has carefully reviewed the motion accompanied with the appeal, which contained a date after expiration of appealable period. Moreover, the 'registered post article' also contained the same date as in the motion. Hence, the Supreme Court concluded the date appeared in the 'minute' was made on an erroneous calculation of the person who entered the minute, in which the judge placed his signature. Evidently, the Supreme Court has left no stone unturned in its quest in determining the true position.

Due to the critical nature of deadline of appeal, black sheep in the legal profession may have gone to considerable lengths to cover their tracks by conspiring with court staff. It is worth repeating that the unsuspecting judge who signed the minute naively could have avoided this mayhem had he not been misled by the court clerk.

7 (S.C. Appeal No. 74/2019, SC Minutes 23.02.2022)

In the most recent case decided on this issue, ***Hetti Achchi Arachchilage Karunaratne v. E. M. A. A. Appuhami***[8], Hon. ***Amarasekara J***., has stated,

> *"In **Nachchiduwa V Manzoor**[9] the Court of Appeal held that the act of the Registered Attorney in tendering the Petition of Appeal to the Registrar and the act of the Registrar in placing the date stamp and his initials on the Petition of Appeal constitute the presentation of the Petition of Appeal.*
>
> *No doubt the same principle applies to the presentation of Notice of Appeal. Thus, in my view, the date stamp and the note made by the Registrar on relevant Notices of Appeal are decisive and thus the Notices of Appeal were tendered to Court only on 02.06.2003 which was out of time."*

Affidavit Contradicting the Journal Entry: Can a Court accept such Document in Appeal?

In ***King V. Jayawardena,***[10] ***Dias J***., stated that affidavits cannot contradict or impeach the record, and that it would be improper to allow an affidavit to be filed on a material point by a person who cannot be cross examined by the opposing parties. This case is known as King v. Jayawardena, 48 NLR 497.

The Court of Appeal held in Shell Gas Company v. All Ceylon Commercial and Industrial Workers Union,[11] that a petitioner cannot seek to contradict a judicial or quasi-judicial record by submitting a convenient and self-serving affidavit for the first time before the Court of Appeal. Instead, a litigant must file the necessary papers before the Court of first instance, initiate an inquiry before the Court, and then file the necessary papers before the Court of appeal (emphasis mine). In ***Vannakar V Urhumalebbe***[12] too the Court of Appeal expressed similar view.

Fixing a Mater *Ex Parte*

It was held in ***Sumanatissa vs. Harry***,[13]

> *"Where the trial Judge proceeds to dismiss the action of the plaintiff due to his non-appearance there is an implied duty cast on him to record in the journal as to the presence or absence of the defendant. The trial Judge has failed to give due consideration to this important aspect which would have had a vital bearing on the outcome of the inquiry under Section 87(3)."*

8 SC/APP/02/2014, SC Minutes 30.06.2023
9 *(1995) 2SLR 273*
10 48 NLR 497
11 [1998], 1 Sri LR, 118
12 [1996] 2 Sri LR 73
13 (2009)1 Sri Lanka Law Reports 32

Recording of Settlements in the District Court

In any legal dispute, an amicable resolution is always preferable. When a settlement is reached, the judge must record the terms of the agreement in the court records in the proceedings. In addition, ideally, he must record in his handwriting that settlement was reached, state that the terms are final and binding and sign the journal entry. The parties must also sign the record voluntarily, as a final precaution.

The District Judge's erroneous journal entries in the case of ***Thevathasan Sritharan Vs. Nadaraja Rajendra,***[14] caused unnecessary controversy. A settlement was entered for the Defendant to purchase the property in dispute for Rs. 12 million on or before 28.09.2015, having been satisfied of title to the property. However, in the event the Defendant defaults, writ to be issued without notice. When the case was called on 28.09.2015, the date relevant to the settlement, the Defendant sought one week's time to pay the Rs. 12 million to Plaintiff. District Court while granting time till 05.10.2015 wrongfully recorded in the journal entry that the Plaintiff moves date for settlement and a date is being granted for settlement, despite full and final settlement was entered previous day.

Agreement of Parties to Abide by an Order Delivered by Judge after Inspection of Site

In ***Babunhamy V. Andris Appu, Hutchinson C.J,***[15] states,

> *"Plaintiff and defendant agreed to abide by the decision of the court, arrived at after inspection, as to whether the plaintiff was entitled to a way of necessity over the defendant's land or not. The commissioner after inspection entered judgment for plaintiff. Held that the defendant had no right to appeal against the judgment as he had agreed to abide by the decision of the court."* (Emphasis mine)

Where parties agree to the judge deciding a case without hearing any evidence, but simply on an inspection of the land in question, no appeal lies against the finding of the judge, as per above decision. However, it is imperative for the judge to get the signatures of parties in such an instance, preferably in addition to writing such agreement in the journal entry by his own handwriting.

Reading the Charge and Acceptance of Plea

This may seem extraneous to the main point. Nonetheless, I shall write the following paragraphs for the purpose of completeness, and in particular for the benefit of magistrates. Unfortunately, many appeals are upheld for the very basic reason that the steps and procedures necessary to be recorded strictly under the Code of Criminal Procedure Act were not recorded properly.

14 (Supreme Court Appeal No. 8/2016, SC Minutes 09.10.2017)

15 340 C.R. Galle 10008

It is a requirement under the law that before the commencement of trial the charge should be duly read over to the accused, as enumerated in Section 182 and 183 of the of the Code of Criminal Procedure Act, No. 15 of 1979. Those sections appear as follows.

Section 182

(1) Where the accused is brought or appears before the court the Magistrate shall if there is sufficient ground for proceeding against the accused, frame a charge against the accused.

(2) The Magistrate shall read such charge to the accused and ask him if he has any cause to show why he should not be convicted.

Section 183

If the accused upon being asked if he has any cause to show why he should not be convicted makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused, his statement shall be recorded as nearly as possible in the words used by him; and the Magistrate shall record a verdict of guilty and pass sentence upon him according to law and shall record such sentence: Provided that the accused may with the leave of the Magistrate withdraw his plea of guilt at any time before sentence is passed upon him, and in that event the Magistrate shall proceed to trial as if a conviction has not been entered.

But anything herein contained shall not prevent the Magistrate from taking in manner hereinafter provided the evidence of the prosecution and of such of the witnesses for the defence as may be present, and then, subject to the provisions of subsection (3) of section 263 for reasons to be recorded by him in writing adjourning the trial for a day to be fixed by him. (Emphasis mine)

At this juncture, I wish to draw your attention to the words by ***Bertram CJ*** in the celebrated judgment in ***Cooray Vs James Appu***[16].

"The Legislature, deliberately departing from the previous practice, had declared that in every summary trial, when once the Court has decided to undertake it, there shall be from the commencement a definite written charge, which should be read to the accused, specifying precisely what he has to meet. This charge may be the subject of reference at any point in the trial, and must be the basis of any ultimate consideration of the case by the Court of Appeal." (Emphasis mine)

Therefore, there is an ingrained norm that a formal written charge must form the basis of any criminal proceeding. The Magistrate must read the charge to the accused and then ask if there is any reason the accused should not be convicted in accordance with Section

16 22 New Law Report 206

182 (2). Any statement the accused makes in answer that constitutes an unqualified admission that he is guilty of the offence for which he is being charged must be recorded verbatim. After a finding of guilt has been reached, the Magistrate shall impose the appropriate penalty and record the verdict in accordance with Section 183.

When considering the abovementioned sections, it is evident the magistrate should record what the accused had stated in his own words. Specially any plea of guilt that comes from the mouth of the accused should go to the record in full, not the words of the Attorney - at – Law representing the accused, if any.

On a perusal of record of the case it should appear that the Magistrate has duly read over the charge sheet to the Accused. Moreover, there should be proof to the satisfaction of the Court that the Accused has understood what the offence was and the language, which must be recorded by the judge.

In sum, whether an unconditional plea is given or not, trial cannot commence until the magistrate writes, in his own handwriting, the exact words the accused spoke into the journal entry. Any inappropriate language used by the accused during the reading and explanation of the accusation should be noted in the journal entry along the accused's plea of guilty or not guilty.

Anecdotally, when asked whether he had anything to say in response to the charges against him, a particular accused chose to use language unbecoming of a court where one of the most illustrious judges served as the then Magistrate of Nawalapitiya. The accused's utterances were chronicled in the case file, a referral to a psychiatrist was made and the incident was reported to the Hon. Attorney General since the doctor opined the accused was mentally sound at the time. The accused was later indicted and imprisoned after trial by the then High Court Judge of Kandy, Hon. Douglas Perera.

Rubberstamp used in the Magistrate's Court after reading the Charge

Inevitably, the rubberstamp is a component of the journal. Judge is therefore accountable for its contents. No judge may absolve himself of responsibility just because he used the same format as his predecessor if the contents run contrary to the letter and spirit of the Code of Criminal Procedure Act.

Hon ***A W A Salam*** in ***A Jaleel V. OIC, Anti Vice Unit, Police Station, Anuradapura,***[17] has made pertinent observations with regard to format of rubberstamp used by Magistrates for their convenience, while applying ratio of aforementioned judicial pronouncements.

> *"This being the set up that prevailed at that time, I am hopeful that the rubberstamp which had been affixed on to the reverse of the report, is now re-done with the deletion of the Sinhala equivalent "I am guilty/I am not guilty" which phrase presupposes that*

17 CA PHC 108/2010, CA Minutes 26.08.2014

that the Magistrate knew as to what exactly the statement of the accused was going to be in response to the charge. Instead, the phrase "I am guilty/ I am not guilty" may be taken out from the rubberstamp and left blank for the Magistrate to fill the blank in his own handwriting thus making an attempt to record as nearly as possible the very statement of one or more of the accused, in compliance of the requirement of Section 183 of the Code." (Emphasis mine)

Evidently, His Lordship is quite concerned with the fact that the rubberstamp only had two alternatives, "I am guilty/I am not guilty," despite the fact that subsection (2) of section 183 requires the Magistrate to record the precise words the Accused utter. Since the Magistrate is supposed to write down everything the accused says, His Lordship proposed leaving that section blank for the Magistrate to record what the accused utters in verbatim in his own handwriting, instead of two alternatives.

Instances where Charge is not properly read over to the Accused.

There is little doubt that the Magistrate's Courts are the busiest courts in the country. More often than not, the Magistrate does not have enough time to even read the chargesheet to ensure its accuracy. In certain cases, the original record lacks a copy of the charge sheet even if the Magistrate has claimed to have provided the accused with an explanation of the allegations against them as per the rubberstamp. In several situations, this is a fatal defect.

In ***Tissera Vs Foster***,[18] a full bench ruled that framing of a charge is a fundamental requirement. The decision was followed in ***Perera Vs Cooray***,[19] ***Goonawardena Vs Babun***,[20] and in ***Andiris Appu Vs Nicolas***,[21] and ***Abdul Sameem V. The Bribery Commissioner***,[22]. His Lordship ***A W A Salam*** in ***A Jaleel V. OIC, Anti Vice Unit, Police Station, Anuradapura***,[23] has, as quoted above, has made valuable remarks pertaining to this issue.

Magistrate Not Signing the Charge sheet

In the case of ***Imiyagamage Gunawathie V Attorney General***,[24] the Court of Appeal found that although the learned Magistrate has not put his signature on the charge sheet, he had signed the journal entry, which showed that the learned Magistrate has in fact framed the charge. This ratio was followed in ***Adhikari Mudiyanselage Suraj Sanjeewa V. Attorney General.***

18 (1891) 9 SCC at page 173
19 (1912) 7 Weerakoon's Report at page 2
20 (1908) 4 ACR 141
21 (1902) 3 Brown's Report at page 144
22 1991 1 SLR 76
23 CA PHC 108/2010, CA Minutes 26.08.2014
24 CA (PHC) 139/2009, CA Minutes 09.10.2018

Defective Charge sheet: Test of whether the Accused was misled or not?

The law and the specific section of that law under which the purported offence falls under must be stipulated in the charge, as required by Section 164(4) of the Code of Criminal Procedure Act. Nevertheless, in accordance with Section 166 of the Criminal Procedure Act,

> *"Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or those particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omission."*

Accordingly, it is understood that a mere omission or defect in the charge sheet would not be regarded as material unless said defect has caused prejudice to an accused. Sometimes it is contended the confiscation of the vehicle is bad in law due to the relevant charge being framed under a repealed and non-existing provision of law and due to the failure of the Magistrate to charge the accused under the specific penal provision which empowers liability of confiscation.

In the case of ***H.P.D. Nimal Ranasinghe V. OIC, Police, Hettipola,***[25], it was held that,

> *"The question that must be decided is whether any prejudice was caused to the accused-appellant as a result of the said defect in the charge sheet or whether he was misled by the said defect. It has to be noted here that the accused-appellant, at the trial, had not taken up an objection to the charge sheet on the basis of the said defect.*
>
> *In this connection judicial decision in the case of* ***Wickramasinghe Vs Chandradasa***[26]*, is important. Justice* ***Sri Skanda Rajah*** *in the said case observed the following facts.*
>
> > *"Where in a report made to Court under Section 148(1)(b) of the Criminal Procedure Code, the Penal Provision was mentioned but, in the charge sheet from which the accused was charged, the penal section was not mentioned."*
>
> *Supreme Court was of the view omission to mention in a charge sheet the penal section is not a fatal irregularity if the accused has not been misled by such omission."*

It was held in ***H.G. Sujith Priyantha V. OIC, Police Station, Poddala and others,***[27]

> *"In this instance, the claim of the appellant who is not an accused in the case had been made after the two accused were found guilty on their own plea. Therefore, it is understood that the Court was not in a position to consider the validity of the charge sheet at that belated point of time.*

Their Lordships therefore concluded,

25 SC Appeal 149/2017
26 *67 NLR 550*
27 CA (PHC) 157/2012, CA Minutes 19.02.2015

"Therefore, I conclude that the appellant who made the application relying upon the proviso to Section 40 is not entitled to raise an issue as to the defects in the charge after the accused have pleaded guilty to the charge under Section 40 of the Forest Ordinance."

In the case of ***A.K.K. Rasika Amarasinghe V. Attorney General and another***,[28] it was held that,

"The Accused-Appellant has not raised an objection to the charge at the trial. In the first place we note that at page 97, the Accused-Appellant has admitted that he knows about the charge. As I pointed out earlier the Accused-Appellant has failed to raise any objections to the charge at the trial. In this regard I rely on the judgment of the Court of Criminal Appeal in 45 NLR page 82 in ***King V. Kitchilan*** *wherein the Court of Criminal appeal held as follows:*

"The proper time at which an objection of the nature should be taken is before the accused has pleaded."

"It is well settled law that if a charge sheet is defective, objection to the charge sheet must be raised at the very inception."

As a result, it is crystal clear that a party may not make a belated objection to a defect in the charge sheet, such as a vehicle inquiry. However, this is not the same as there being no charges at all, as in ***Abdul Sameem V. The Bribery Commissioner***,[29] and ***Jaleel V. OIC, Anti Vice Unit, Police Station, Anuradapura.***[30]

In ***Liyanarachchige Sarath Vijaykumara V. the Attorney General***,[31] it was decided since the charge of the case contained relevant details of the offence such as the date of the offence, the place of offence committed, vehicle number, value of the timber, section of the 9ffence, relevant gazette notifications and relevant amendments, the Accused was reasonably noticed of the matter with which he was charged, notwithstanding lack of express reference to section 40(1) of the Forest Ordinance.

Nevertheless, in the most recent case decided on this issue, ***Ranbandarage Hasitha Sulochana Priyarathne v. The Attorney General***,[32] *Hon.* ***Sampath Abayakoon J.*** was inclined to apply ratio of ***Abdul Sameem V. The Bribery Commissioner***,[33] and ***Jaleel V. OIC, Anti Vice Unit, Police Station, Anuradapura***,[34]. In that case, *Hon.* ***Sampath Abayakoon J.*** states,

28 SC Appeal 140/2010
29 1991 1 SLR 76
30 CA PHC 108/2010, CA Minutes 26.08.2014
31 CA (PHC) 97/2015, CA Minutes 20.09.2019
32 CA(PHC) 143/2017, CA Minutes 02-08-2023
33 1991 1 SLR 76
34 CA PHC 108/2010, CA Minutes 26.08.2014

"Therefore, it is my considered view that the learned High Court Judge was misdirected as to the relevant principles of law when he decided not to follow the stare decisis of the case CA(PHC) 108/2010, and to follow the case of CA(PHC) 157/12.

I am of the view that the facts relevant to the case under appeal is not a situation where there was a proper charge, but with some technical defects, which has not caused any prejudice to the accused as well as the owner of the vehicle, as contemplated in the case considered by the learned High Court Judge to dismiss the application before him.

It is my view that there was no valid conviction of the accused under the provisions of the Forest Ordinance, and therefore, there was no basis for the owner to be called upon to show cause against a possible confiscation, which was an order based on illegality."

writer's note: abovementioned CA (PHC) 157/12 is ***H.G.Sujith Priyantha Vs. The Attorney General*** *while CA(PHC) 108 is* ***Abubackerge Jaleel Vs. The Attorney General****. Both were mentioned in above paras.*

Withdrawal of an Unconditional Plea

The proviso to section 183 (1) makes it clear that withdrawing a plea requires the Magistrate's leave. The Magistrate has the legal authority to grant or deny leave. How a judge should use his discretion was articulated in the case of ***Fathima Rinsa and another V. Attorney general,***[35]. In this mater portion of the judgment of ***Wijewardena V. Lenora,***[36] was referred, as follows;

> *"The mode of approach of appellate Court to an appeal against an exercise of discretion is regulated by well-established principles. It is not enough that the judges composing the appellate Court consider that, if they had been in the position of the trial Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. It must appear that the Judge has acted illegally, arbitrarily or upon a wrong principal of law or allowed extraneous or irrelevant considerations to guide or affect him, or that has mistaken the facts, or not taken into account some material consideration. Then only can his determination be reviewed by the appellate Court."*

Hence, an accused must show valid reasons why his plea is allowed to be withdrawn. Possibility of losing of employment due to sentence was not considered as a valid reason to exercise discretion, as held in the case of ***Adhikari Mudiyanselage Suraj Sanjeewa V. Attorney General,***[37]

> *"Nowhere the Petitioner says that he was misled or that he could not understand the charge. The reason adduced in the application for withdrawal of his guilty plea is that later he found that the sentence imposed would affect his employment.*

35 CA(PHC) 48/2009, CA Minutes 30.03.2019

36 60 NLR 457 at 463

37 Court of Appeal Case No. CA PHC APN 17/19, CA Minutes 24.09.2019

The learned Magistrate has not acted illegally or arbitrarily. He has not acted upon a wrong principle of law."

Altering a Case Record after Day's Proceedings are concluded: *In Re Amarasinghe Attorney – at – Law*,[38].

The person who was accused for a theft, that led to this Rule matter, was charged with two crimes: criminal breach of trust and retention of stolen property. His lawyer, a former President's Counsel who has since deceased, said that his client wants to compound the case by tendering a plea, having the charge altered to one of criminal misappropriation. The former Magistrate of Homagama, Hon. Amarasinghe, to whom against the Rule was issued in the capacity of a lawyer, submits to the Supreme Court that he indicated to the parties that following his normal policy in the matter of sentence, if the accused admits his guilt and found to be of clean record on identification, he will impose a suspended sentence on him.

When the case came up for identification and sentencing, a junior lawyer who appeared for the Accused, quite unfortunately, did not advert to the circumstances in which the plea of guilt was tendered. The Magistrate sentenced the accused to six months rigorous imprisonment on each count. On this day itself, when the Magistrate was in chambers after end of the day's work, senior counsel met the Magistrate and explained that the accused was a young man with no previous convictions, and the complainant admitted that he had recovered the property in full. In good faith, the Magistrate changed the custodial sentence to one year sentence suspended for five years.

As is common, someone instantly petitioned the Honorable Chief Justice about this debacle. After about a week or so, the Supreme Court summoned the case record. In an unfortunate turn of events, a member of the court staff accompanied by the senior counsel himself brought the court case to the residence of the Magistrate, where the page pertinent to the change of sentence was torn off and a new page was attached.

The Supreme Court, while discharging the Magistrate from the Rule, as he has not acted with dishonesty, frowned upon the irregular way he has acted nonetheless. The Supreme Court, notwithstanding discharging the Magistrate from the Rule because he had not acted dishonestly, criticised his irregular behaviour. Notably, it was noted that the Magistrate should have amended the record in open court or in chambers and signed his initials in order to rectify it in the proper manner.

It was further held by the Supreme Court that as ***Bonser CJ*** stated in ***Sinnatangam v. Sinnen***,[39] the Magistrate should have initialled and dated it after taking appropriate action, as opposed to the course of action he took.

I believe the words of ***Bonser C.J.*** to be of profound significance; therefore, I reproduce them.

38 1981, 1 SLR, 384

39 1 NLR 220

> *"I agree that the proceedings should be quashed as altogether irregular. The Police Magistrate no doubt acted with the best of intentions, and desired to do what he could to bring the dispute between the parties to a speedy and satisfactory conclusion. But in so doing he has acted ultra vires. The law may be defective, as he points out, but the Magistrate is not a legislator, and be must give effect to the law as it stands:*
>
> *My brother Withers, before whom this record came first, and who ordered it to be sent for the observations of the Magistrate, is of opinion that it is not in the same state as it was then. Certainly there are interpolations in the record in different coloured ink. The Magistrate should be called upon for an explanation as to whether he did make any alterations in the record, for if he did that, his act was quite irregular. If he did make any alteration, he should have a note in the margin initialed by him to show when the alteration or addition was made."* (Emphasis mine)

Although it should not be taken for granted, it shall be observed that in the cases detailed above the Supreme Court was not inclined to view any alteration of the record as dishonesty, to begin with, without sufficient evidence to that effect as opposed to irregularity. Generally speaking, it is not dishonest to alter a record, but this is not always the case depending on.

It should be noted that the Supreme Court was not predisposed to view any alteration of the record as dishonesty without sufficient evidence to that effect, as opposed to irregularity, but this should not be taken as granted. Our legal system is based on the principle of *Audi Alterum Partem*, so any amendments that might have an impact on the other party must first undergo a proper hearing. As clear from ***In Re Amarasinghe Attorney – at – Law***,[40] it would not be improper for the Magistrate to hear both parties, record his reasons, and deliver an order regarding sentence within the course of the day, based on the principle of *nunc pro tunc*. For legitimate reasons, altering the journal according to the above procedure is neither dishonest nor irregular. The altered part of the record shall be intact and legible so anyone can see the change and why it was necessary to be changed.

Conclusion

Accurate minute and journal keeping are indispensable components of a just and accountable legal system. Decided cases exemplify the consequences of inadequate record-keeping and the ratios underscores how inaccurate or incomplete records can undermine the integrity of legal decisions and hinder access to justice. Moreover, meticulous documentation is not a mere procedural formality but a powerful tool for ensuring fairness, transparency, and the preservation of legal legacies.

40 1981, 1 SLR, 384

NOVATION OF CONTRACTS IN RESCHEDULING AND RESTRUCTURING OF LOANS – LIABILITIES OF THE BORROWERS AND THE GUARANTORS

Chamath Madanayake
Judge of the High Court

The pandemic prevailed across the country resulted in a massive economic setback and the borrowers who obtained loans found extremely difficult to settle their dues to the banks. With a view to ease the burden of payments and to make recovery flexible, on the instructions of the Central Bank, banks and financial institutions took steps to reschedule or restructure the facilities extended to their customers. However, with the growing concerns regarding ever rising inflation, the borrowers, and guarantors to such facilities, when sued will be forced to go all out at every defence available to evade or to delay the payments. In such circumstances, the novation of the loan agreement is a defence, most likely to be raised. Thus, it could well be argued that as a result of novation of the original contract governing the loan, the borrowers and the guarantors are no longer liable to comply with the original loan agreement.

This article attempts to effectively disseminate knowledge and insights among the judicial officers who are entrusted with matters relating to the recovery of loans, on the concept of novation and its applicability in the area of rescheduling and restructuring of loans. The first part would deal with the definitions relating to rescheduling and restructuring of loans and the concept of novation. The second part discusses the context in which novation is applied and its' effect on rescheduling and restructuring of loans with reference to the liabilities of the borrowers. It also focuses on the proof of novation. The impact of novation on the guarantors will be discussed in the final part. The article will also focus on some of the decisions pronounced by the superior courts in relation to the subject under discussion.

Rescheduling and Restructuring of loans

Rescheduling of loans often means a change in some of the terms of the loan agreement as to the mode of repayment. This might include extending or adding extra time to the existing loan tenure. This would result in a revision of the monthly instalment amount, enabling the borrower to pay a lesser amount each month and gain more time to adjust the repayment plan. This would avoid default on their loans. However, rescheduling sometimes result in the borrowers paying more interest than what they originally had to pay as they are compelled to comply with the loan agreement for a longer period.

Restructuring of loans, on the other hand means changing the type or structure of the existing loan. For example, the conversion of an overdraft in to a term loan could be identified as a restructuring of the facility. Compared to rescheduling, in restructuring, a major change of the terms and conditions of the existing loan might take place.

Rescheduling may be in the form of-

(1) Reduction in the size of the debt (concessional rescheduling);

(2) Prolonging the period during which the repayments are collected;

(3) Reducing the monthly instalment /repayment amount;

(4) Arranging for a later repayment date; (provision of a breathing space)

(5) Lowering the interest payments at a time but raising the total amount payable eventually.

The Financial Times Glossary of Terms defines 'debt rescheduling' as "*An agreed delay in the repayment of a debt, usually applying to both interest and principal payments, and also often involving a renegotiation of the terms*."

The Concept of Novation

The concept of novation, which is a part of the modern law of contract, both in English and the Roman Dutch law, had its origins in the Roman Law. Novation is one of the methods in which a contract may be terminated by mutual agreement.

Cheshire and Fifoot describes novation in the following terms. "*Novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made*".

Wessels- Law of Contract[1] defines as-

> *'the novation occurs whenever an existing obligation is discharged in such a manner that another obligation is substituted in its place.'*

According to the **Black's Law Dictionary** (8th Edition) 'novation' is

> "*The act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party.*"

The effect of Novation and the liabilities of the Borrowers

Cheshire and Fifoot explaining the effect of novation states that "*novation comprises the annulment of one debt and then the creation of a substituted debt in its place*."

1 Law of Contacts Vol 2, 2nd Edition 1951 at page 658

According to Prof. Weeramantry, the term 'novation' is used in two senses. In its wider sense it means the creation of a fresh contract by the extinction of pre-existing one in whose room it stands. In its narrower sense it refers to one only of the varieties of novation comprised within the broader meaning of the term."[2]

Novation in the wider sense is of four varieties. Thus, the effect of novation may be in four forms.

(a) The substitution of a new debt for an existing debt (**novation proper**);

(b) The substitution of a new debtor for an existing debtor (**delegation**);

(c) The substitution of a new creditor for an existing creditor (**cession**);

(d) The substitution for one of the original parties of a third person who takes over both rights and obligations (**assignment**)

The striking feature to common in any form of novation is that the original contract would cease to exist and a new agreement would come in to force. Accordingly, "*where there is a novation of contract, there comes in to existence in the eye of the law a new and independent contract*"[3].

A contract once novated might immediately discharge a previous contractual duty. It will sometimes create a new contractual duty in place of an existing one. This situation is also termed as '*substituted agreement*'. In other words, novation in the context of a loan transaction is the emerging and transfer of a previous debt in to another obligation. That is, the constitution of a new obligation in such a way as to destroy the prior one. The only way in which it is possible to transfer contractual duties to a third party is by the process of novation, which requires the consent of the other party to the contract. In fact, novation really amounts to the extinction of the old obligation, and the creation of a new one, rather than transfer of the obligation from one person to another.

The '*novation proper*' is the type of novation commonly known in rescheduling loans.

"*A new obligation must be created which contains some element not found in the earlier obligation. Thus, an absolute obligation may succeed to a conditional one or a money debt to an obligation to transfer property. A mere variation of the terms of a document does not produce this effect, for there must be a new agreement superseding the terms and conditions of the old*[4]*. The grant by the creditor of an extended time to the debtor for payment thus does not constitute a novation, nor does the grant of an additional security*[5] *nor the mere confirmation of an original agreement*."

2 Law of Contracts by C.G.Weeramantry- Volume 2 at page 718

3 Supra at page 719

4 Attorney General v Perera 12 NLR 161

5 Mohommadally v Misso 58 NLR 457

Prof. C.G.Weeramantry further states that "*A novation discharges not only the original obligation but the obligations accessary to it. Interest, penal charges, suretyships and pledges, accessory to the original contract, are thus all discharged*"[6].

This situation had been equated to the concept of 'accord and satisfaction by substituted agreement, known to the English law. No matter what were the rights of the parties *inter se*, they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction take place, the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it.[7]

In ***Sri Lanka Co-operative Marketing Federation Ltd. Vs Ambewela Livestock Co. Ltd***[8] the Supreme Court extensively dealt with the circumstances under which the novation could take place.

In that case, the plaintiff company was incorporated to succeed to and carry out the business of Ambewela Farm managed by the National Livestock Development Board. At the request of the defendant company, the plaintiff's predecessor entered into a contract to supply 100 Metric Tons of potato seedlings to the defendant worth seven Million Rupees. The plaintiff sued the defendant to recover monies due in terms of the contract. The defendants denied the existence of the contract as being novated. In terms of the Memorandum of Association of the plaintiff company, one of the primary objects of the company was to take over all contracts and agreements entered in to by the National Livestock Development Board for the purpose of the business of Ambewela farm and succeed to the ownership of all contract assets identified by the books of the farm.

As was observed in the judgment, the evidence did not disclose that there has been any substitution in the place of the defendant or its interests in favour of another. There was no evidence to infer that the defendant's obligations were transmitted to or taken over by any other substituted party by way of a new agreement. For novation to take place the parties to the transaction should necessarily consent to the previous agreement being replaced or taken over by another, or another party being substituted. However, it was held that in this instance the defendant has failed to establish that the debt owed to the plaintiff has been transferred to another by the consent of parties. There was no mutual consent (express or implied), to waive the debt owed by the defendant to the plaintiff.

It was held that "*In order to prove novation the defendant had to establish in evidence the intention of the creditor to discharge the debtor from the obligation. The express and declared will of the creditor is required in order to constitute novation*."

6 Law of Contracts by C.G.Weeramantry- Volume 2 at page 719

7 Palaniappa vs Saminathan 1 NLR at 58

8 SC Appeal No. 54/2007 and dated 27.03.2014

It was further held that "*the defendant has failed to place any evidence with regard to the existing of meeting of minds of the creditor and the debtor in forming a new obligation arising out of an express agreement or by conduct or by tacit understanding in the place of the previous obligation*".

The importance of the intention of both, the obligor and the obligee to substitute a new debt in place for an older one was emphasised in ***Darmadasa v Sachchohamy***[9]

In the case of ***Karthikesu vs Ponnachchy***[10] Lascelles CJ observed that "……*Novation may take place, not only by express agreement, but also tacit or by implication, the consent of the parties to the novation being implied from the circumstances and the conduct of the parties. In the latter event, however, the inference must be so probable and conclusive as to make it quite clear that the parties intended to recede from the original obligation and to replace it by another fact, it must be a necessary inference, the new obligation being inconsistent and incompatible with the continued existence of the original obligation.*"

Proof of Novation

Legal Presumptions

The novation is never presumed. It is an accepted principle that once a creditor extends a facility/debt to a borrower, the creditor is entitled to fully recover the amount due until the debt is fully satisfied. The law presumes that once a contract is established, it retains its binding force and that a creditor does not intend to renounce rights which he has acquired. Where two parties to a contract makes a later agreement, the law will presume rather, that they intended both agreements to have equal force than that the latter should supercede the former. A mere change in the method of payment does not affect the substance of the contract, though it may affect the manner of its execution. Mere extension of time to the debtor does not affect the substance of the obligation and will therefore not be construed to be a novation having the effect of releasing the sureties[11].

Intention of the parties

In order to establish novation in a case where the loan agreement is rescheduled, firstly, the implied or express consent of the parties will have to be proved. The intention could only be ascertained by the conduct and dealings of the parties, both at the time of contracting as well as the time prior to entering in to the contract. In the determination of their intention, the court should be mindful not only of the main agreement, but the previous and subsequent correspondence between the contracting parties. The court should look for subsequent loan documents for any evidence of re-scheduling. The rescheduling documents should have a clear reference to the earlier contract.

9 46 NLR 568

10 14 NLR 486

11 Wessels -paragraphs 2396,2411 and 2415

According to Paget's Law of Banking, "*The Courts must consider the factual background known to the parties at or before the date of the contract and ascertain the objective of the transaction when interpreting the Guarantee Bond.*[12]"

This principle would apply in the case of interpreting the rescheduling agreement as well. Moreover, the pleadings of both parties tendered to court and the evidence led at the trial dealing with the intention will have to be considered.

The burden of proof

The burden to establish novation rests on the borrower, who asserts the same as a defence[13]. However, as seen in most of the banking transactions, the borrower is not fully equipped with the necessary documents relating to the transaction, which only the banker is privy to. Hence, the borrower may find it difficult to forward certain documents which may be favourable to him to establish novation. This could be averted to a certain extent, if the borrower prior to the pre-trial hearing, takes adequate steps under the provisions available in the Civil Procedure Code in relation to recovery of documents and interrogatories.

The question might arise whether any evidence could be permitted to contradict the original loan agreement from ancillary documents, as section 91 and 92 of the Evidence Ordinance prohibits adducing oral evidence to contradict a written contract. However, proviso (1) of section 92 permits any fact to be proved which would invalidate any document. Hence, any document which shows the novation of the original agreement could be led in evidence. In addition, provisos (2),(3) and (4) of section 92 could be made use of, to adduce oral evidence in explaining what actually the parties intended at the time of entering into the agreement. Accordingly, the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms may be proved. Similarly, the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract may be proved. Moreover, the existence of any distinct oral agreement to rescind or modify the loan agreement may be proved.

The decision in Ran Banda v The People's Bank

Ran Banda v The People's Bank[14] was a case where the liabilities of a borrower under a loan agreement was considered specifically, in the light of the concept of novation.

The 1st defendant obtained a loan from the bank. As the payments were not regular, the loan was rescheduled which was accepted by the 1st defendant. He failed to settle the loan in terms of the rescheduled arrangement and the bank filed action. It was contended

12 12th Edition page 713

13 Section 101 of the Evidence Ordinance

14 2004 2 SLR 31

that the bank had no right to seek to recover any sum of money upon the rescheduled agreement and the guarantors were not liable, as the original contract had become invalid by being novated. The basis upon which the defendants claimed that the original written contract had become invalid was that when the bank rescheduled the loan, the former debt was extinguished and a new debt created by the rescheduled agreement has come in to existence and that this new contract made the former written contract unenforceable.

The court held that "*Novation proper takes place if a new contract to take place of the old is established between the same parties without the intervention of a third party; when this happens, the latter obligation extinguishes the former*".

The court observed that "*the rescheduled agreement was made at the request of the debtor, the 1st defendant, it merely gives him extended time for payment and a concessionary rate of interest in respect of the balance of the loan remaining unpaid*".

The Court of Appeal further held as follows;

> "*The rescheduling agreement in the present case merely gave the 1st defendant extended time for payment, and a concessionary rate of interest in respect of the balance of the loan remaining unpaid as at the date of the reschedule agreement. It did not bring in to existence anything unfavourable to the guarantors. Condition 4 in the rescheduled agreement preserves the bank's rights to have recourse to the conditions of the original agreement in the event of the failure of the debtor to act in accordance with the conditions of the rescheduled arrangements. This will negate the intention of the bank to make the rescheduled agreement to take the place of a new contract-new obligation extinguishing the existing the contract.*
>
> *Further, the absence of the participation of the guarantors for the rescheduled agreement is significant. It is clear evidence that the bank considered that the rescheduled arrangement was an arrangement within the framework of the existing contract and not in substitution therefor".*

In this case, the bank when rescheduling had expressly reserved its right to recourse to the original agreement in the event the debtor fails to comply with the rescheduled terms. This was considered as clear evidence manifesting the intention on the part of the bank not to novate the original agreement.

Absence of participation of the Guarantors

Another yardstick in the determination of novation, is the absence of the participation of the guarantors. Whether the rescheduled arrangement had been beneficial to the debtors and the guarantors or not, could also be a decisive factor. If the rescheduling only benefits the borrower, the court could not interpret the contract as being novated.

Decision in Adrian Lakshman Perera v Union Bank

In ***Adrin Lakshman Perera v Union Bank of Colombo Ltd and 2 others***[15] the plaintiff bank extended certain credit facilities to the 1st defendant company of which the 2nd and 3rd defendants were the Directors. The facility was granted in 1998 to which the 2nd and 3rd defendants stood as personal guarantors. In the year 2000, the 1st defendant company defaulted in the repayment and applied for a suitable facility stating '*merely for its survival so that it could commence settling the dues*'. When this request was made the 2nd defendant was a Director of the Company. The bank in 2001 sent an offer letter which was accepted by the company. When the company defaulted again, the bank instituted an action to recover money due. The 2nd and 3rd defendants were sued by the bank on the strength of the guarantee bond executed in 1998.

At the trial, the 2nd defendant took up the position that the guarantee bond signed in 1998 only extends to the loan given in 1998 and the arrangement took place in 2001 between the bank and the 1st defendant company was a new loan and not a continuation of the former loan in 1998. As such he denied liability for the second loan in 2001. The 2nd defendant further contended that the second loan was not secured by a guarantee bond. The defendants further alleged that the bank has exploited the 1998 guarantee bond which was executed for a specific loan which was not meant to extend for future uncertain monies.

The Supreme Court having perused the documents, held that 'although the said letter refers to 'granting a facility', what the 1st defendant-company intended to seek was a series of 'concessions' to settle their dues. They do not disclose any intention to obtain a 'new loan'. Moreover, it is inconceivable that a company-which by their own admission-was '*not in a position to import the requisite materials as the bank has stopped granting any facilities, pending the settlement of this outstanding*' and '*has come to a grinding halt*', would venture to obtain further loans from the plaintiff bank."

The Court also observed that the letter sent by the bank referred to "*Please note that this is the second re-scheduled payments*". The court held the loan in 2001 was not a distinct loan, but was a continuation of the loan in 1998 and the reference to the guarantee bond in the subsequent documents was only a cross reference to the existing guarantee bond.

The bank argued that though the rescheduling referred to as 'Term loan I' and 'Term loan II' no cash was released with regard to such Term loans and such reference was made only for the accounting purposes. The Supreme Court observed that '*it would be difficult to believe that, in the circumstances where there had been default and delay in paying the monies that were due, the plaintiff bank would have even considered making the restructured banking facilities available without security of the existing bank guarantee*.'

15 SC Appeal CHC 22/2011 and dated 07.03.2019

Thus, it was held that the plaintiff bank has not used the guarantee bond in respect of any 'new' or 'future' debt. The guarantee bond remains valid and binding on the sureties since the original loan obtained by the 1st defendant company was never settled. Hence, the 2nd defendant was held liable under the guarantee bond executed in 1998 for the rescheduled facility in 2001.

This decision implies that the re-scheduling was not considered to be a novation of the earlier contract. (the loan agreement in 1998) It emphasises the need to consider the circumstances under which the rescheduling took place and the purpose for which it was done. The terms used in the correspondence is also important in the interpretation of the documents. Even though the rescheduling documents referred to as a 'Term Loan', the court noted the fact that no cash was actually released consequent to such rescheduling by the bank to the customer. This was one of the factors in deciding that the rescheduled agreement did not create a new agreement for a loan.

In a situation where further time is granted to the debtor to settle the payment would amount to material variations of the initial contract.[16] It must be noted that it is the general practice of commercial banks to preserve the guarantor's liability in the event of the bank giving time or any indulgence to the principal debtor.[17] This preservation, if intended, would be communicated clearly to the stake holders.

However, the Supreme Court in the above case held that "*the mere fact of granting further time does not at all times amount to a situation warranting the discharge of the guarantor. The material element is to see whether such extension/ variation of the contract was arrived at without the consent or the knowledge of the guarantor. Additionally, there must also be evidence demonstrating that such variations were substantial and caused prejudice to the rights of the guarantor.*"

Decision in K.A.S. Auto International (Pvt) Limited v Sampath Bank

In ***K.A.S. Auto International (Pvt) Limited v Sampath Bank PLC***.[18] the position of the bank was that the Petitioners did default on the payment and, therefore, at the request of the Petitioners, the Bank rescheduled the monies due from the Petitioners in September 2018, as seen from the offer letter, the conditions of which were accepted by the Petitioners. In addition, the Petitioners entered into two loan agreements. The Bank statement for the month of September 2018 showed monies being credited to the petitioners' account upon the rescheduling of the facilities. A secondary mortgage was signed consequent to the rescheduling.

The Court of Appeal observed that the rescheduling of the facilities had created a novation. It was held that "*The rescheduling of the facilities in September 2018 is a separate*

16 Paget's Law of Banking, 12th Edition page 705

17 Paget's Law of Banking, 12th Edition, page 722

18 CA Writ 205/2020 and dated 18.11.2020

transaction/agreement (in practical terms entered in to between the Petitioners and the present Manager on behalf of the Bank). This created a new contract in substitution of the former contract. In other words, by rescheduling the outstanding facilities, a new debt was created in place of the existing debt with new terms."

The existence of the original contract must be admitted

If a party is to successfully plead the novation of a contract, he is to first concede the existence of the original agreement. Unless he admits the agreement, he cannot be heard to say that it has been novated by a subsequent contract. In ***Sri Lanka Co-operative Marketing Federation Ltd Vs Ambewela Livestock Co. Ltd***[19], the defendant while denying that he entered into any contract with the plaintiff, took up the position that the contract is vitiated due to novation. The court held that it is a case of approbation and reprobation in respect of the contract. If a defendant is to gain the benefit of novation by taking it up as a defence, he is bound to concede the existence of the original agreement.

Very often, novation by delegation, cession and assignment are not formed in rescheduling loan agreements.

The effect of Novation on Restructuring a loan facility

Generally, in restructuring a loan facility, terms and conditions will change to a greater extent. If the nature of the facility itself is changed (i.e. from a term loan to an overdraft facility), one might be successful in his argument, that the agreement for former facility has been novated by the latter. However, whether the terms and conditions are varied materially depends of facts and circumstances of each case. In ***Bank of India v Trans Continental Commodity Merchants Ltd***.[20] it was held that an "'irregular' conduct will not *per se* amount to a material variation that discharges the guarantor from his bond."

Union Bank of Colombo PLC. v David Pedurupillai Dominique and others[21] is a case where material variations of the original agreement were apparent in the rescheduled agreement. The Supreme Court held that the rescheduling of the facility had resulted in a novation of the contract. In that case, Nu-Tech Engineering (Pvt) Ltd of which the defendants were the Directors, obtained an overdraft facility for Rs. 2,500,000/- at the rate of 20% p.a. On the request of the borrower company, the Bank rescheduled the existing outstanding overdraft facility. Thus, a term loan was granted for Rs.2,500,000/- at the same interest rate. The subsequent document indicated the purpose as 'To reschedule the current overdraft outstanding'. The defendants contended that the subsequent agreement was not a mere variation of the existing terms and conditions of repayment of the existing overdraft facility, but a completely different banking facility, which created new obligations and which amounts to novation of the original

19 supra

20 1983 2 Lloyd's Rep 298, CA

21 SC Appeal 98/2017 and dated 17.02.2023

agreement. The requirement to furnish a new personal guarantee in addition to the existing Mortgages were also raised by the defendants.

The Supreme Court while distinguishing the facts of *Ranbanda v People's Bank* case from the facts in the present case, held that the original agreement granting the overdraft facility is novated. The conversion of the original facility (overdraft) to another facility (term loan), the absence of any concession given in terms of the interest rate and the requirement to provide additional security seems to be the main grounds upon which the Court decided the initial agreement to be novated. The conditions in the later agreement providing the term loan seem to be a major deviation from the terms and conditions of the original agreement. This could be seen as a restructuring of the earlier facility than a mere rescheduling.

Practically, it is seen that both terms, 'rescheduling' and 'restructuring' are being simultaneously used in the contracts governing financial facilities. Thus, the usage of the two terms had been blurred to a certain extent. Hence, in ascertaining the modification introduced to the original loan agreement, it would be extremely necessary to identify the nature of the reforms introduced to the facility, rather than merely relying on how the parties had defined such reforms. The effect of an alleged novation of the contract would largely depend on how far the terms had been varied and the intention of the contracting parties at the time the facility was rescheduled or restructured.

Liabilities of the Guarantors

Liabilities of the guarantor are mainly governed by the terms and conditions of the guarantee bond. Additionally, the effect of the contract between the banker and the lender will also have a bearing on such liability. There are many instances where a guarantor will be released from the guarantee unless an express agreement to the contrary has been reached with the banker. Even if the guarantor is so released, his rights against the banker may remain. Generally, a guarantor is entitled to raise against the banker, any defence, right of set off or counter claim which is open to the principal debtor.[22]

Among several instances where the guarantor's liabilities will be terminated is the novation of the contract. In case of a novation of the contract between the borrower and the banker, there can be no effective reservation of rights against the guarantor[23]. This is so whatever express reservations there may be. The guarantor's liability intrinsically attaches the contract between the principal debtor and the banker. In novation, the principal contract will cease to be in force. As such the liabilities of the guarantor arising out of the guarantee too will come to an end. The only exception to this is a situation where the principal debtor has obtained the release by fraudulent means.

22 Bowyear v Pawson (1881) 6 Q.B.D. 540)

23 Commercial Bank of Tasmania v Jones (1893)AC 313

When a second security is secured

There may be situations where the banker has secured a second security. If the second security is obtained in discharge of the original security, it will discharge the guarantor from his liabilities under the first security/guarantee. However, the mere acceptance of additional security from the principal debtor will not have this effect, unless the intention of the parties is manifestly that the original security is not to remain in force[24].

When the principal debtor is given more time

It was held in ***Bolton v Buckenham***[25] that a binding agreement between the banker and the principal debtor to give more time to the principal debtor to repay his debt will discharge the guarantor from liability, if made without his consent, whether or not he is in fact prejudiced by the agreement. The reason is that, such an agreement necessarily prejudices the guarantor by preventing him from exercising his right to require the banker to call upon the principal debtor to pay off the debt or his right to pay off the debt himself, and then sue the debtor. However, in ***Ran Banda v People's Bank***[26], our courts have been flexible and considered granting time merely as a concession offered to the debtor.

It is needed to be emphasised that the above principle is not without exceptions. The guarantee will not be discharged, if when making the agreement to give time to the principal debtor, the banker expressly reserved his rights against the guarantor. Even if the guarantor did not consent, or even know that this was so, such reservation will be in force[27]. The guarantor will not be discharged by an agreement to give time to the debtor, if the guarantor agrees either in the guarantee or after the agreement giving time.

Continuing Guarantee

If the guarantee is a continuing guarantee, an agreement to give time may only partially discharge a guarantor from liability. The same rule will apply to any other principal debt which is severable. Liability for payments under a hire purchase agreement has been held not to be severable, so that the creditor's agreement to give time for payment of some instalments does not discharge the guarantor from all liability under the guarantee[28].

Whether a guarantee could be regarded as a continuing guarantee depends on facts and circumstances of each case. In ***Hatton National Bank Limited vs Rumeco Industries Limited and 2 others***[29], a loan facility which was given in 1992 was rescheduled in 1995

24 Munster & Leinster Bank v France (1889) 24 LR 82
25 1891 1 Q.B. 278
26 supra
27 Kearsley v Cole (1846) 16 M. & W.128
28 Midland Motor Showrooms v Newman (1929) 2 K.B. 256
29 SC Appeal 99A/2009 and dated 09.09.2010

by agreement marked P6. Original facility was secured by two Mortgage Bonds. The matter against the borrower (1st defendant) and one of the guarantors (2nd defendant) proceeded *ex parte* and concluded with a judgment. The matter against the 3rd defendant, guarantor was contested. The bank contended that the 3rd defendant was liable for default of the 1st defendant as he had personally guaranteed the loan given to the 1st defendant by document marked P5.

The plaintiff when leading evidence in respect of the *ex parte* trial against the 1st an 2nd defendants went on the basis in which the plaint was filed, which was starting with a term loan granted in 1995, the two mortgage bonds leading up to the default in payment. When the contested matter was taken up against the 3rd defendant for trial, the plaintiff started off on the basis of a facility given in 1992, that there was a rescheduling of that loan, that the said loan was covered by the security given in 1992 (P5), that the document referring to the term loan (P6) was a rescheduling of the loan given in 1992, and that the 3rd defendant was liable for the default of the 1st defendant as he had personally guaranteed the loan given to the 1st defendant in 1992 by the document marked P5.

The plaintiff sought to show that the guarantee given by the 3rd defendant in 1992 was a continuing guarantee which covered all facilities granted to the 1st defendant. But the term loan document in 1996 did not mention about personal guarantee given in 1992 which had been given regarding earlier transactions.

The plaintiff also tried to show that the term loan given in 1995 was a rescheduling of the loan given to the 1st defendant previously but a perusal of the document P5 does not state so and it states specifically that it is a term loan granted to the 1st defendant.

Commenting on the said position the Court held that "*on a consideration of the evidence, the documents and the proceedings and the judgments, it is clear that the action brought to court by the plaintiff specially against the 3rd defendant in 1992 cannot be considered as a continuing guarantee making him liable for the transactions in 1995.*"

When material variations are made to the principal contract

A guarantor will be discharged, if the banker makes any other material variation of the principal contract without obtaining the guarantor's consent and without reserving his rights against the guarantor[30]. Hence, in case of a restructuring the loan facility, if material alterations had been introduced, the guarantor might be considered as been discharged. The reason being the contract between the banker and the principal debtor will no longer be the contract which the guarantor agreed to guarantee. However, if a guarantor has guaranteed that the principal debtor will perform several obligations which are separate and distinct and if the principal contract is then varied in respect of one of the obligations,

30 Ward v National Bank of New Zealand

the guarantor will be discharged from liability in respect of that obligation, but will not be discharged from liability in respect of the other obligations[31].

Time and Indulgence Clause

The banker will sometimes insert in his contract with the principal debtor a "*time and indulgence clause*" which will enable the banker to vary the terms of his lending to the principal debtor, grant further time to pay when the advances become payable, take additional security, or release existing security, either from the principal debtor or co-guarantor, or even agree compositions with the principal debtor. Any of these will discharge the guarantor, unless the guarantor agrees otherwise, either in the guarantee or at the time of the action in question or even subsequently[32].

Conclusion

When loan agreements are rescheduled, it is always a matter for the court to decide whether the original agreement has been novated or not. Mere words used such as 'rescheduling' or 'restructuring' would not determine the nature and the effect of the transaction. As novation is not presumed, the party who asserts such novation is cast with the burden to establish novation. The conduct of the parties, both before and after entering the agreement, circumstances under which the rescheduling was affected, construction of all vital documents involved and the express or implied intention of the parties, would be crucial factors which ultimately decide whether the subsequent agreement had novated the original agreement or not. If the initial loan agreement is novated, both the borrower and the guarantor would be discharged from the liabilities thereunder. However, such discharge is not without exceptions. As such, both contracting parties should be mindful in perfecting clear and precise documents, resembling all necessary factors when entering into loan agreements.

31 Practice and Law of Banking by Sheldon at page 325

32 Supra at page 326

HOW TO PROVE MEDICAL NEGLIGENCE IN COURT OF LAW?

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The word "Negligence" was defined as "Doing something a reasonable man would not do, and not doing something a reasonable man would do" by Justice Baron Alderson, in the case of Blyth v Birmingham Waterworks Company in 1856[1]. Similarly, "Medical negligence" was defined as "Doing something a reasonable doctor would not do, and not doing something a reasonable doctor would do" by Judge McNair, in the case of Bolam v Friern Hospital Management in 1957[2].

There are two types of medical negligence: civil and criminal. The "Civil medical negligence" was defined as "Doctor owes a duty of care to the patient, and due to the breach of that duty, the patient receives damage (physical or mental) where the damage was caused due to the breach of that duty[3]". The standard of proof in civil medical negligence is "Balance of probability", that is more than 50% certainty[4]. "Criminal medical negligence" is considered when the "Negligent act is gross, ignorant, reckless and disregarded to the life and safety of the patient"[5] and the Standard of proof is "Beyond reasonable doubt" which is almost 100% of certainty[6].

There is a significant difference in the investigations on medical negligence in the "Court of law" and in the "Sri Lanka Medical Council (SLMC)". In the "Court of law", it is inquired "Whether the standard of care of a doctor is adequate or not". Further, for compensation purposes, the case should be filed in civil courts, namely the District Court. For punishment purposes, such as imprisonment or fine, the case should be filed in Magistrate Court or High Court and in deaths due to medical negligence, the case should be filed under section 298 of the Penal Code of Sri Lanka and when a patient survives with damages, the case should be filed under sections 327 to 329 of the Penal Code[7].

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1 Blyth v Birmingham Waterworks Company (1856) 11 ExCh781.

2 Bolam v Friern Hospital Management Committee (1957) 1 WLR 582.

3 *ibid*

4 Stewart WJ (2006) Balance of probabilities. Collins Dictionary of Law ©.

5 Hariharan Nair MR. Criminal liability for medical negligence: a drastic change? Indian J Medical Ethics 2004;(1):126-7.

6 Woolmingtonv DPP (1935) UKHL

7 Section 298 and sections 327-29. Penal code of Sri Lanka. Chapter 19.

Whereas, in SLMC, it inquires into professional misconduct and see "Whether the standard of the personal professional behaviour is below than an accepted standard of a doctor". The punishments include (a) warnings, (b) suspensions or (c) erase the registration of the doctor. Further, after conviction from judicial court also, the case is referred to SLMC for further inquiry and action.

Now will consider how to prove medical negligence in Court. In 1990, in the case of Caparo Industries PLC v Dickman introduced a 04-step process for a successful conviction of a civil medical negligence case. Therefore, to prove "Civil medical negligence", all 04 conditions must be proved: (a) firstly, that the doctor owes a duty of care to the patient, (b) secondly, the doctor has breached that duty of care, (c) thirdly, the patient has received physical or mental damage and (d) fourthly, it should be proved that the damage was caused due to the breach of that duty of care[8].

First will consider how to prove that "There was a duty of care towards the patient". The "Duty of care" exists only when the "Doctor-patient relationship" is established[9]. The doctor-patient relationship automatically starts if a doctor approaches a patient "With the intention of treating or healing". No bilateral agreement is needed. Even if a doctor approaches an injured unconscious person by the roadside, with the intention of treating, the doctor-patient relationship automatically starts. That is why there will be no establishment of doctor-patient relationship in circumstances such as (a) examination for fitness for employment, (b) examination by medical students etc.

When does the doctor-patient relationship end? It continues until the need for care is over or alternative arrangements have been willingly made. Especially, in the government sector, a doctor cannot end the "Institutional-patient relationship". Because even though the patient does not select a doctor, he/she selects the institution (hospital), therefore, the "Institution-patient relationship" is stronger than the "doctor-patient relationship". Therefore, the doctor cannot end the doctor-patient relationship without patient's consent. Therefore, even when doctors in the government sector go on transfer, the doctor-patient relationship automatically transfers to the doctor who takes over. Whereas, in the private sector, the doctor can end it by giving sufficient time and options to find another doctor because there is usually no institutional responsibility. However, in case of an admission to an emergency unit of a private hospital, patients cannot select the doctor but selects the hospital and an institutional-patient relationship is established and the doctors in such services of the private sector also cannot end this relationship without patients' consent. For example, a patient with heart attack rushes to his preferred cardiac emergency unit of the private hospital but not to a preferred doctor.

8 Roushan Zadeed, Medical negligence law and practice in Bangladesh

9 EC Annandale. The malpractice crisis and the doctor-patient relationship. Sociol Health Illn. 1989 Mar; 11(1):1-23

However, after establishing the doctor-patient relationship, the doctor must employ an "Accepted practice" and "Reasonable skill and care" appropriate to his/her "knowledge, experience and position" when exercising his duty of care[10]. Such accepted and reasonable duties of "care" include: (1) a **valid** consent must be given by the patent. (2) Life of the patient must be **respected** and attempt to **save the life** from the outset. (3) Should treat **without discriminations**. (4) Investigations should be performed **adequately**. (5) Referrals to **relevant experts** and the **correct** diagnosis of the condition should be done. (6) Bed head ticket (BHT) should be maintained **adequately**. (7) The fee should be **reasonable**. (8) **Uphold** the right of 'Right to know' of the patients or relatives. (9) Professional **confidentiality** should be maintained. (10) Education of the doctor should be **continued** to acquire new knowledge. (11) Alcohol should not be taken **while on duty**.

"Duty of Care" and "Breach of Duty" are not defined in law. "Case Law" based on judicial judgments is applicable in future cases and is called "Legal Precedents". Therefore, an old judgment may be a deciding factor in a court case. Usually, a decision of a higher court is binding on lower courts. In Sri Lanka and India, a decision of the Supreme Court is binding on all lower courts. Similarly, in England, a decision of the House of Lords is binding on all other courts.

Secondly, we will consider how to prove the "Breach of duty of care" in the court of law. According to the legal precedents, three approaches have been used in the court of law to prove the breach of duty of care. In 1955, assessed whether the doctor used an "Accepted medial practice". In 1957, the skills of a doctor were considered, and assessed whether an "Ordinary skill" was used. In 2004, the "Reasonable patient" approach was used.

For example, in 1955, Hunter v Hanley case of Scotland, introduced "Accepted medical practice" approach[11]. Due to breaking of a hypodermic needle while receiving an injections Hunter suffered injury. He sued the doctor and he had to prove that there was an "accepted practice", and the doctor failed to follow that practice while giving the injection. However, doctors are not expected to use an accepted medical practice always and are encouraged to find new practices in order to improve the medical science. Further, doctors are not always expected to follow the best practice. When assessing the accepted medical practice, the Court evaluates whether a "minimum acceptable standard of care" was provided. Ultimately, it is up to the court to decide whether the medical care is reasonable or not.

Regarding the skill of a doctor, in 1838, the Chief Justice Tindal, England, stated that every person who enters a learned profession should possess a fair, reasonable and competent degree of skill and the jury will decide whether the damage was caused by

10 What to expect from your doctor: a guide for patients". General Medical Council

11 Pollock AS, The "Hunter v Hanley" liability test and practical issues arising

the lack of such skill in the doctor[12]. This is a principle that survives to date. Further, it was established by case law that the duty of care depends on the grade of the doctor, for example, a young house officer is not expected to be as skilled as a medical registrar and a medical registrar is not expected to be competent as a consultant. If good history is taken, thorough clinical examination is performed, relevant investigations are ordered and accepted procedure in treatment is followed, and even a general practitioner or a doctor in a hospital misses the final diagnosis, the doctor cannot be found lacking in the duty of care. In 1957, Friern Hospital permitted a doctor to administer Electro convulsive therapy (ECT) for Bolam's depression. However, ECT was administered without prior administration of a relaxant, without using manual restraint to control convulsive movements, and without warning him of the risk of convulsive movements of ECT while requesting the consent. In the course of ECT, the pelvis was fractured on both sides. Therefore, Mr. Bolam sued the Friern Hospital managers for negligence[13].

In the case of Bolam V. Friern Hospital, Justice McNair introduced the approach of "Ordinary skill". He stated that "in case of an ordinary man, the conduct is judged by the conduct of an ordinary man in the street or a passenger in an omnibus". "In case of a competent man, some special skill or competence is involved and the test of the man in the street or omnibus cannot be used. It is sufficient if he exercised the "ordinary skill" of an ordinary man when performing that particular art. Therefore, in the case of a doctor, the court expects "the standard of an ordinary reasonable doctor at his or her level in the profession" but does not expect the highest expert skill. Therefore, Judge McNair expressed that "if a doctor acts in accordance with the practice accepted as proper by a 'responsible body of medical men' skilled in that particular art, he cannot be found to be negligent". This is called "Bolam Test"[14]. Similarly, the specialists are judged by the standard of care expected from peers in the same speciality.

In a workplace context, an employer is liable for the commissions or omissions of its employees, provided that it took place in the course of their employment and this is called "vicarious liability"[15]. For example, in Bolam case, he sued against Friern Hospital for an act committed by a doctor.

The Bolam test has also been used to judge "Non-disclosure of risks" when requesting consent from patients. For example in 1985, Ms. Sidaway underwent laminectomy of the 4th cervical vertebra, resulting paraplegia due to spinal cord injury at Bethlem Royal Hospital[16]. The hospital was sued by Ms. Sidaway for non-disclosure of the risk of damage to the spinal cord. She said that if she had been warned she would not have

12 Nicholas Conyngham Tindal

13 Bolam v Friern Hospital Management Committee

14 *ibid*

15 Bell, J. The Basis of Vicarious Liability. The Cambridge Law Journal. 2013; 72(01):17

16 Sidaway V (1985) Board of Governors of the Bethlem Royal Hospital AC 871.

consented for the surgery. The House of Lords rejected the claim, stating that the issue of non-disclosure constituting a breach in the duty of care, has to be decided by expert medical evidence according to the Bolam test.

In 1997, in Bolitho v City and Hackney Health Authority, UK, the court deviated from Bolam and the judge stated that the court must be satisfied that the body of opinion in question rests on a logical basis[17] and expert medical evidence was sharply challenged in this case.

Then, the "Patient-oriented approach" was introduced for cases of "Non-disclosure of risks". (a) In 2004, Chester v Afshar case, introduced "Reasonable patient approach" for failure to disclose a risk of treatment[18]. In 2015, in Montgomery v Lancashire Health Board case[19], overruled Bolam test and introduced the patient-oriented approach in UK. Therefore, "a doctor must disclose the risks that would be considered significant by a reasonable patient". (b) In Malaysia, in 2007, in Foo Fia Na v Dr Soo Fook Mun case[20], it was decided that the "Reasonable-patient test" should be used to assess all forms of medical negligence. (c) However, In Singapore, the Bolam or Bolitho approach is used for both negligent diagnosis or treatment and non-disclosure of risks. Therefore, now, in deciding medical negligence, the courts may not rely solely on evidence of the medical profession, like in the earlier era, but may listen to different expert views and apply its own "principles of logical reasoning with judicial perspective".

Thirdly, it is essential to prove that the patient has suffered "Damages". If there is no damage to the patient, the legal action of the patient cannot succeed. The patient must establish that there is more than a 50% chance that the damage sustained is the result of the doctor's negligence by an act of commission or omission causing a breach of duty owed to him. Although, the damage will be physical, mental or financial, it is up to court to assess the damage in terms of money. In the assessment at courts, two types of damages are considered; general and special damages[21]. Damages that can be assessed exactly in rupees are called "Specific damages" and such damages include; Death, disability, loss or reduced capacity to earn, expenses for hospital, nursing home, transport, investigations, cost of special equipment such as wheelchair, cost of special therapy and special schooling. Damages that cannot be assessed exactly in rupees are called "General damages", but the court assesses those losses also in rupees. Such general damages include; past, present and future pain and suffering, anxiety, mental anguish, embarrassment, effect on recreation,

17 Bolitho V (1996) City and Hackney Health Authority 4 All ER 771

18 Afshar CV (2004) UKHL 41

19 Clinical negligence Consent Duties of health care professionals to discuss treatment options Causation of harm to wrong. Montgomery v Lanarkshire Health Board.

20 Na VFF, Mun SF, Anor (2007) Demise of Bolam principle: Foo Fio Na v. Dr Soo Fook Mun 8t Assunta Hospital 2007 (FC). 1 MLJ 593

21 Pillai, Aneesh V. Determination of Damages in Medical Negligence Cases: An Overview. 2020. Available at SSRN: https://ssrn.com/abstract=3579272

sporting abilities and hobbies, loss of family life, sexual happiness, loss of life enjoyment, adverse effect on prospects of marriage, effects on life expectancy etc. However, in Sri Lanka, no damages may be given for anger and pain of mind.

Fourthly, it is needed to prove the "Causation of the damage". That means "the damage was caused by the breach of duty of care by the doctor". However, in civil suits, there are difficulties for the patient to prove the causation of the damage. Such difficulties include; (a) possession of little or no knowledge on medical managements and treatments by the patients or complainants lawyers, (b) multiple potential causes can cause the damage, (c) interference of a new act or Novus actus interveniens and break the chain of causation, and (d) at last the patient has to prove that the damage was not a result of a natural disease and also not an accepted complication of treatment.

The decision of the Court on the "causation of damage" depends on whether the damage is reasonably foreseeable or not. For example, (a) in one case, wife washed husband's work clothes and she developed mesothelioma due to asbestosis. The Supreme Court held that the foreseeable complication is the development of mesothelioma in husband, but not in wife. (b) In cases involving multiple causes too, the court inquires whether the alleged cause is foreseeable or not. It can be further illustrated by Kay v. Ayrshire Health Board, Scotland (1987) case. A 2-year-old boy who was seriously ill with meningitis caused by Streptococcus pneumoniae, was given a huge toxic overdose (30 times of normal) of penicillin intrathecally. Doctor realized his mistake immediately and gave intensive (ICU) care. Patient recovered from both meningitis and penicillin overdose because of intensive care. But the child was found to be deaf afterwards. His parents sued the Health Board. Two explanations for deafness were identified; meningitis and overdose of penicillin. The doctors admitted breach of the duty of care but denied that Kays damage (deafness) was the result of that. The Trial Court favoured the patient, but the Appeal Court favoured the defendant doctor. The House of Lords reconfirmed the appeal court judgment because deafness was a well-recognized complication of properly treated meningitis, but little or no evidence that large doses of penicillin cause deafness and it is not a foreseeable cause. (b) This concept can be further confirmed by Wilsher v Essex Area Health Authority[22]. In that case, the doctor administered excessive oxygen during the post-natal care of a premature child (Wilsher) who subsequently became blind. At the trial, the medical evidence showed that there were six possible causes for the blindness. It was held that the doctor's negligence had only been one of the foreseeable causes, and the doctor was not considered negligent.

However, in civil medical negligence suits, the burden of both filing as well as the burden of proving the case is also with the patient.

22 Wilsher v Essex Area Health Authority (1988) AC 1074

In the case of "Criminal medical negligence", the negligent act is gross, ignorant, reckless, and shows gross disregard for the life and safety of the patient[23] [24]. Here, the criminality is assessed in terms of gross negligence. Gross negligence shows beyond a matter of compensation and shows such a disregard for the life and safety of the patient who deserves punishment. For example, (a) Dr. Bateman gave chloroform to a pregnant woman and tried forceps delivery but failed. Then tried manual version, which ended up rupturing the uterus, bladder, rectum and killing the child. But the gross negligence was his failure to admit the patient to a hospital for 05 days and the mother died on day 07. (b) In Abrol case, both anaesthetizing and performing the dental surgery were done by the same doctor and the patient died. (c) In another criminal medical negligence case, a doctor disconnected oxygen while on anaesthesia, to 'drink' and the patient died[25].

In criminal medical negligence, anyone can complain to the police and the complainant is not necessarily the patient. Further, proof of negligence must be done by the state, not by the patient. Therefore, to prove criminal medical negligence in courts, first, prove that there is medical negligence by proving four classic criteria and then prove that the act is gross, ignorant, reckless and disregard to life and safety of the patient.

Failure to use reasonable knowledge, skill, and care in the diagnosis and treatment or allegations of incompetence of a doctor can be charged for civil medical negligence but not amount to criminal medical negligence. For criminal medical negligence, it should attract criminality by way of gross negligence or wrongdoing[26]. For example, (a) the nurse insists that a scalpel is less than the number of scalpels given, but the doctor ignores and the patient dies due to septicaemia. (b) In another instance, a nurse insists that a gauze pack is less than the number of gauzes given, but the doctor ignores and the patient dies due to septicaemia. (c) Sometimes, a surgery is performed while under the influence of alcohol and the patient dies. Those attract criminality by way of ignorance and recklessness.

When the damage to the patient is so obvious, a special doctrine called "*Res Ipsa Loquitur*" is applied[27] and it means "facts speak for themselves". The patient does not know anything about the circumstances and the doctor must explain what happened. For example, (a) when a healthy finger is amputated instead of the finger that is damaged, the patient has nothing to prove and the surgeon must show, if he has any reason, that the negligence

23 A. Arlidge. Criminal negligence in medical practice. Med Leg J. 1998:66 (1):3-14.. doi: 10.1177/002581729806600102

24 Pandit MS, Pandit S. Medical negligence: Coverage of the profession, duties, ethics, case law, and enlightened defense - A legal perspective. Indian I Urology. 2009;(25): 372-8

25 Abrol VKK (1983) The General Dental Council Privy Council, no 46 of 1983. The Criminal Justice System and Health Care

26 Pandit MS, Pandit S. Medical negligence: Coverage of the profession, duties, ethics, case law, and enlightened defense - A legal perspective. Indian I Urology. 2009;(25): 372-8.

27 L W Wiseman. Res ipsa loquitur. West J Med. 1975;123(1):71-5

as not due to him. Therefore, the burden of proof goes to the doctor. The court will ask the doctor, "This should not have happened if due care is given, explain it if you can". A few more such circumstances include; (b) a pair of forceps, scissors or swab is left in abdomen and the patient suffers damage or dies, (c) cutting the face of a baby during LSCS delivery, (d) amputation of the wrong limb, (e) quadriplegia following spinal anaesthesia and (f) permanent brain damage following anaesthesia. (g) The case of Devon Health Authority, UK, showed a delay of over one hour in getting a consultant or registrar for delivery and child suffered permanent brain damage during delivery[28]. The Court of Appeal in UK also applied this rule and asked the health authority to explain why. (h) In India, a patient died in a government hospital during laparoscopic uterine tubectomy[29]. High court of Rajasthan, requested the hospital to explain why. (i) Swabs, packs and instruments can rarely leave behind in body cavities in operations by surgeons. In 1939, in Mahon v. Osborne case[30], a patient died shortly after an abdominal operation and post-mortem examination found a swab in his body. The doctor said that the swab count was correct and all what had been given had been returned to the sister. The House of Lords decided that the surgeon should not rely on the count of the theatre sister and it was the responsibility of the surgeon to explain why he left something which he himself had put in, without taking it out. It is now accepted that in such situations the doctrine of res ipsa loquitur applies and the burden of proof goes to the doctor. However, *Res Ipsa Loquitur* is not necessarily negligent and could be an accident or misadventure.

There are several defences available to the doctor in a case of medical negligence. (a) One is the "Assumption of risk by the patient"[31]. When consent is obtained for an invasive procedure, the risks entailed in the procedure must be explained in a manner understandable to the patient. If this had been done, the patient who suffers damage due to that particular risk, has no right to blame the doctor. (b) Another defence is "Contributory negligence by the patient"[32]. When a patient suffers damage partly due to the doctor's fault and partly due to his own fault or the fault of another, the award of damages is divided by the court in a proportion the court think is fair and equitable. (c) Another defence is "Transferring the responsibility of the negligence to another member in the team" such as to another doctor, nurses, pharmacists or other ancillary staff but not himself. (d) Another method of defence could be "Denial of negligence" and proving of an accidental incident or misadventure because errors in clinical diagnosis may occur from the symptoms and signs elicited from the patient. It is accepted if errors in

28 NHS Hospital Medical Negligence Archives - UK Hospital Negligence.

29 The sterilization deaths in India: It's worse than you think

30 Mahon v Osborne (1939) 2 KB 14

31 C Stewart Lisa, E Dianne, N Jane Nielsen. Negligence and Health Innovation: Issues with the Standard of Care and the Need to Revisit the Voluntary Assumption of Risk. J Law Med. 2022 Jun;29(2):337-348

32 J Meek. Contributory negligence. Psychiatr Serv. 2000 Jun;51(6):817-8.

clinical judgment are consistent with due or reasonable exercise of professional skill. (e) Another method of defence is identifying multiple causes for the damage and qualifying it as an "unforeseeable risk"[33]. (f) Another type of defence is "Novus actus interveniens"[34], a new act interfere and may break the chain of causation.

Finally, how did the medical profession react to the award of heavy damages for negligence? In the 1880s there were two cases that annoyed the medical profession. (a) In one case, two doctors from Dulwich, south London, had to fight three trials to exonerate themselves of a criminal charge of manslaughter spending British £ 1000 which in today's valuation would be over British £ 200,000. (b) In another case, Dr. Bradley was convicted of criminal assault on a female patient and sentenced for two years hard labour. He spent 08 months in jail before he was pardoned as there was doubt about his guilt. In both these cases, the doctors paid generously to cover legal costs. But in 1885 the Medical Defense Union (MDU) was established in the UK[35]. Today, there are over 200,000 members from all over the world. The MDU insures its members, and in one case of Dr. Jordan, a Registrar in Obstetrics, it took 10 years and half a million British pounds (£) to exonerate him.

When paying off compensations for damages in clinical practice, there are two systems. In "Fault system", e.g. Sri Lanka or UK, liability rests on proof of fault. The judges will have to go on making decisions, which they would prefer not to make. In "No-fault system", e.g. in New Zealand, all reasonable allegations are paid off without a court case[36] . If they are not satisfied with the amount of compensation, they can file a case in courts. Once a Judge stated that "The victims of medical mishaps or negligence should be cared for by the community not by the hazards of litigations".

In conclusion, the expected standards of a doctor include use of at least a "minimum standard of accepted practice", use of "reasonable skill and care of an ordinary doctor", and disclosure of the risks that would be considered "significant to a reasonable patient". The burden of proof in cases of civil medical negligence is with the patient, in criminal medical negligence it is with the state and in cases of *res ipsa loquitur* it is with the doctor.

33 M Focardi, A Bonelli, V Pinchi, G Vittori, F De Luca, G Norelli. Hemidiaphragm Paralysis after Robotic Prostatectomy: Medical Malpractice or Unforeseeable Event? Urol Int. 2017;98(2):241-244

34 A B Dheeraj, S K Giri and B Sarma. Doctrine of Novus Actus Interveniens Not Always a Defense: Analysis of a Case. Indian J Crit Care Med. 2020 Oct; 24(10): 983–985.

35 A McNeill , B Mathewson. Negligence claims for treatment of neurological disease: cases from the Medical and Dental Defence Union of Scotland. Scott Med J. 2006 Aug;51(3):24-5.

36 No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety.

INTERNATIONAL RECOGNITION OF JUDICIAL SALES OF SHIPS

AN ANALYSIS OF THE EXISTING INTERNATIONAL REGIMES AND THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL EFFECTS OF JUDICIAL SALES OF SHIPS, (NEW YORK, 2022)

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Introduction

Ships are inherently mobile and travel across jurisdictions within a relatively short period of time. The ownership of ships changes due to the chartering of ships or due to genuine transfer of ownership. Disputes among ship owners and third parties are inevitable during the operation of the ship. Once a dispute arises, the parties tend to litigate matters in jurisdictions where the laws are in consonance with the international conventions governing judicial sales. If the ship-owner fails to satisfy the judgement by the admiralty court in such jurisdiction, the litigation continues until the sale of the ship.

The significant feature in a forced judicial sale by an admiralty court, unlike ship sales by other courts to satisfy a judgement of a creditor ,is that all previous liens and mortgages cease to exist and new purchaser becomes the owner of the ship without encumbrances. In the event of non-recognition of the judicial sale in other jurisdictions, the ship is exposed to further ship arrests for claims accrued prior to the judicial sale. As a result, the purchasers of the ship would be reluctant to pay the market price considering further liabilities of the ship. Therefore,, all interests connected to the ship are adversely affected since the proceeds of the sale is comparatively less for the distribution among claimants.

There have been various international efforts to have a unified international legal system to recognize judicial sales in third states but these have not been so far effective. The new Convention on United Nations Convention on the International Effects of Judicial Sales of Ships ("The Beijing Convention on the Judicial Sale of Ships") has been drafted to fill the lacuna in the international law on such judicial sales.

The purpose of this article is to outline briefly the admiralty law in Sri Lanka, existing international regimes in relation to forced judicial sales. The Article highlights the provisions in the newly introduced Convention on United Nations Convention on the International Effects of Judicial Sales of Ships and the advantages of being a party to the Convention.

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Admiralty Jurisdiction in Sri Lanka

In respect of all maritime matters, English law was introduced to Ceylon by Section 2 of the Civil Law Ordinance No 5 of 1852 as amended. The first court of admiralty, Vice Admiralty Court, was established in 1801. Thereafter, by Section 4 of the Charter of 1833, the jurisdiction was vested to the Supreme Court. By the Colonial Courts of Admiralty Act in 1890, Colonial Courts of Admiralty was given power to exercise admiralty jurisdiction, similar to that of the High Court in England. Thereafter, the Supreme Court was declared as a Colonial Court of Admiralty in terms of section 2 of the Courts of Admiralty ordinance, No. 2 of 1891.

The Ceylon Courts of Admiralty Ordinance was in force until it was repealed by the Administration of Justice Law in 1974. The Administration of Justice Law was repealed later by the Judicature Act of 1978[1]. Section 13(1) of the Judicature Act vests power to hear admiralty matters to the High Court.

The Admiralty Jurisdiction Act was enacted in 1983, consolidating the law relating to admiralty proceedings in connection with Ships and the Arrest of Ships and other Property.

Section 13(1) of the Judicature Act of 1978 read with the Admiralty Jurisdiction Act No 40 of 1983 confers the Admiralty Jurisdiction on the High Court sitting in the Judicial Zone of Colombo.

The High Court (Admiralty Jurisdiction) Rules 1991 have been promulgated in terms of Section 11(3) of the Admiralty Jurisdiction Act, to regulate the practice and the procedure of High Court in the exercise of its admiralty jurisdiction.

It is pertinent to note that in terms of Section 12 of the Act, it is not open to introduce the jurisdiction of the English law to enhance the jurisdiction of the Sri Lankan law on Admiralty. However, the procedure in English law is appliable when there is a lacuna in the existing procedure in Sri Lanka

Invocation of Admiralty Jurisdiction

The High Court exercises jurisdiction in respect of claims and liens in Sri Lanka in the following instances:

(a) in relation to all ships whether registered in Sri Lanka or any other country irrespective of the residence or domicile of their owners;

(b) in relation to all claims, irrespective of the jurisdiction where it arose and

1 The "*Trafalcon Logic*" (1978-79) 2 S.L.L.R 293, *Bawazir v. M.V "Ayesha" (*1986) 1 S.L.L.R 314, The "*Shantha Rohana*" (1994) 3 S.L.L.R 54, *Razak & Co. v. Lanka Walltiles Ltd.* (1998) 3 S.L.L.R MV "Kalyani"and Another v Mutiara Shipping Company 1998 2 SLR 103.

(c) all mortgages or charges, whether registered or not and whether legal or equitable, including mortgages and charges created under foreign law[2].

The law applicable in admiralty cases is the law of the forum[3]. The only requirement that should be satisfied by the claimant is that the ship is in one of the Sri Lankan ports and the said claim is a maritime lien or claim in Sri Lanka. A writ of summons is generally served when the ship is within the port limits[4]. According to later developments, the admiralty jurisdiction can be extended to a ship which has incurred liability in territorial waters, or a foreign ship lying in the territorial waters or passing through the territorial sea after leaving internal waters under the Law of the Sea Convention[5].

Maritime Claims and Maritime Liens in Sri Lanka

Article 1 of the 1952 Brussels Arrest Convention and Article 1 of International Convention of Arrest of Ships, 1999 describe all the claims in relation to which a ship may be arrested under the conventions in the member States. Sri Lanka is not a party to any of the above Conventions. However, the Admiralty Jurisdiction Act No 40 of 1983 defines maritime claims which are identical to the maritime claims in the United Kingdom, under the Senior Courts Act (formally Supreme Court Act) of 1981.

Some maritime claims are considered as privileged claims, which are called as maritime liens. A **maritime lien** is a claim on a ship by a creditor, who provided maritime services to the vessel, or claims of persons who suffered injury from the operation of the ship. Maritime liens can only be enforced by an admiralty claim *in rem*[6]. Maritime liens and ranking is not the same in jurisdictions. The law of Maritime liens in Sri Lanka is described in Chapter 5 of the Merchant Shipping Act of 1971. The types of Maritime Liens in Sri Lanka are set out in section 83 of the said Act. The important feature in maritime liens is that the maritime liens cease to exist only after the ship is sold to a third party[7]. Such claims are barred by prescription after a period of one year[8].

Action *in personam*

There are two processes of enforcing claims. The claims could be recovered against the owner of the ship: which is called *action in personam*. Instituting an *action in personam* is difficult as the claimant has to satisfy several pre-requisites to file an action against

2 Section 2(6) of the Admiralty Jurisdiction Act.

3 *Government of USA vs Valient Enterprises* 63 NLR 337.

4 The *"Berny"* [1977] 2Lloyd's Rep. 533; *The "Trade Resolve*" 1999 4 Singapore Law Reports 424.

5 Article 28 of the Law of the Sea Convention;; *Geetangali Woolen Pvt Ltd v M.V Express Annapurna and others* 2005 6BLR 31.

6 Meeson N ; *Admirlty Jurisdiction and Practice*, Third Edition, LLP, 2003, p. 12.

7 Section 87 of the Merchant Shipping Act.

8 Section 89 of the Merchant Shipping Act.

the owner. An action against the owner to recover a maritime claim or maritime lien can be maintained in Sri Lanka, only in the following instances.

(a) The defendant has his habitual residence or a place of business within Sri Lanka; or

(b) The cause of action arose within the territorial waters of Sri Lanka or within the limits of a port of Sri Lanka; or

(c) An action arising out of the same incident or series of incidents is proceeding in the Court or has been heard and determined by the Court[9].

The relevant date for applying the provisions of head (c) is the date of the issue of writ[10]. Furthermore, the admiralty court has no jurisdiction to entertain an *action in personam* until any proceedings previously brought by the plaintiff in any Court outside Sri Lanka against the same defendant in respect of the same incident or series of incidents have been discontinued or otherwise come to an end[11].

Action in rem

Ships are considered as an entity with legal personality quite independent from her owners. The only requirement to assume jurisdiction by court in an *action in rem* is that (a) the ship has to be within the jurisdiction of the Court and that (b) the particular claim should be a maritime claim /lien under the law of the country. Considering the difficulties in filing a claim *in personam,* recovery of claims against the ship is widely followed, all over the world.

The Mode of Exercising *in rem* Jurisdiction in respect of Different Maritime Claims

The admiralty jurisdiction of the High Court can be invoked in respect of a maritime claim under Section 2(1) of the Act or a maritime lien under Section 83 of the Merchant Shipping Act. The conditions applicable for ship arrests differ according to the nature of claims. The nature of claim and the procedure applicable are discussed below.

(A) Maritime Lien or other Charges

If the claim is a maritime lien or other charge on any ship, or other property for the amount claimed, an action *in rem* may be brought in the Court against that ship or property irrespective of the change of ownership[12]. The words "other charge" are intended to cover the types of charges mentioned in other laws[13].

9 Section 4(1) of the Admiralty Act ; section 22(2) of the Supreme Court Act of the UK 1981

10 *The World Harmony* [1965] 1 Lloyd's Rep. 244.

11 Section 4(2) of the Act; section 22(3) of the Supreme Court Act of the UK 1981

12 Section 3(3) of the Act.

13 Hill C ;Maritime Law , sixth Edition, LLP, 2003, p. 128.

Action *in rem* against the Relevant Ship

In the case of any claim falling within Sections **2(1)(a), (c) or (r)** or in respect of any question in Section **(2)(1)(b)** of the Act, an *action in rem* may be brought against the relevant ship or property.[14]

However, if the claims are falling within **Section 2(1) (e) to (q),** it is necessary to show a link between the ship (relevant ship) and the owner. Hence, the following criteria should be satisfied :

(a) The claim must arise in connection with the ship;

(b) The person who would be liable on the claim *in personam* (the relevant person) was when the cause of action arose must have been the owner or charterer or in possession or in control of the ship; and

(c) At the time of instituting the action that person (the relevant person) must either be the beneficial owner of that ship or the charterer of it under a charter by demise.

The word *charterer* is not restricted to demise charterer but includes a time and a voyage charterer[15]. If the ship is sold before the rem proceedings are instituted, the ship cannot be arrested, as the relevant person is no longer the beneficial owner of the ship[16].

Action in rem against the Alternative Ship

An alternative ship can be arrested for a claim under Section **2(1) (e) to (q),** whether or not it gives rise to maritime lien on that ship, if the following criteria is satisfied[17].

(a) the claim must arise in connection with a ship;

(b) the person who would be liable on the claim *in personam* (the relevant person) was when the cause of action arose must have been the owner or charterer possession or control of the ship; and

(c) At the time of the *action in rem* , the relevant person must be the beneficial owner of all the shares in the ship against which the action is brought[18] .

At the time the action is brought means at the time writ of summons is issued by court. The significant difference between arresting the offending ship and alternative ship is that the relevant person at the time of the alternative ship arrest should be the beneficial owner of the alternative ship. It is not sufficient that he is the demise charterer[19]. It is

14 Section 3(2) of the Act; section 21(2) of the Supreme Court Act of the UK 1981..

15 *The Tychy* [1999] 2 Lloyd's Rep.11; see comments in Hill C; Maritime Law, sixth Edition, LLP, 2003, p. 104.

16 *The Carmania II* [1963] 2 Lloyd's Rep.152.

17 Section 3(4) of the Act; section 21(4) of the Supreme Court Act of the UK 1981.

18 The beneficial owner is discussed in *The Kommunar* (No2)[1997] 1 Lloyd's Rep.8; *The Giuseppe Di Vittorior [1998]* 1 Lloyd's Rep.137.

19 Hill C; Maritime Law, sixth Edition, LLP, 2003, p. 107.; The *Garmania II* (1963) 2 Lioyd's Rep 152

important to note that there need not be common ownership link between the ships. What is necessary under the provision is that the ship has to be under the beneficial ownership of the person liable.[20]

Procedure in an Admiralty Claim in Sri Lanka

The procedure in prosecuting an admiralty claim is set out in the High Court (Admiralty Jurisdiction) Rules.1991, published in Gazette Notification No 672/7 dated July 24,1991. The admiralty procedure in the United Kingdom is set out in the Part 61 -Admiralty Claims (C.P.R) and Practice Direction (P.D). The section 12 of the Act, has express provision to recourse to the English Law procedure rules to whenever there is lacuna in the procedure[21].

Writ of Summons

Every action in the admiralty court, whether an *action in rem* or *personam,* shall commence with the issuance of a writ of summons. There is no requirement to provide prima facie evidence of the claim as there is no formal hearing. The writ of summons shall be endorsed with a statement setting out the nature of the claim and the relief[22]. Once the summons is issued *in rem* proceedings, the claimant's statutory right to claim is crystallised and cannot be defeated by subsequent change of ownership[23].

In an action in rem , the writ of summons shall be served by attaching the writ for a short time to the mast of the ship or cargo[24].

The writ of summons whether *in rem* or *in personam* shall be served within a period of twelve months of its issue[25]. Upon service of the writ of summons, the writ shall be filed in the registry with an endorsement thereon.

Appearance

A party appearing to a writ of summons must file a memorandum of appearance at the registry within the time specified in the writ or extended time period with the consent of the other parties or with permission of court[26]. If the party appearing has a counter claim, against the plaintiff may endorse on his appearance a statement of the nature of the claim. Such counter claim shall be struck off if the judge is of the view that it cannot be disposed with the plaintiff's claim[27].

20 Hill C; Maritime Law, sixth Edition, LLP, 2003, p. 108.

21 *MV "Kalyani"and Another v Mutiara Shipping Company* 1998 2 SLR 103

22 *Rule 4 and form 3,4,5, and 6.*

23 *The" Monica S" [1976] 2 Lloyd's Rep.113.*

24 Rule 9.*Key Marine Industries v The* "*Ship Glencoe*" L.M.L. 404(Can.F.C) 1995 92 F.T.R.313.-Claim form was affixed to the hull of the ship in dry-dock was invalid service.

25 *Rule 14;.C.P.R Part 61.3(5)(B).*

26 *Rules 16 and 17.*

27 *Rule 18.*

Parties and Consolidation of Actions

Any person, having the interest on the ship, cargo or freight may be joined as parties to the action. An application for this purpose must be filed along with an affidavit showing the interest of the applicant in the property[28]. Rules also provide for the consolidation of two more actions where the question at issue is substantially the same[29].

Warrant of Arrest and Release of Property

The Admiralty court has the power to order the arrest of ships and or property in an action in rem, if the judge is satisfied that the ship or property to which the action relates will be removed out of the jurisdiction of the Court before the Plaintiff's claim is satisfied[30]. A warrant for the arrest of property may be issued by the judge at any time after the issue of the writ of summons. An affidavit shall be filed for this purpose[31]. The warrant shall be served by the Marshal of the High Court on any day not withstanding such day is a public holiday. However, the procedure in the UK requires the claimant to pay on demand the fees of the Admiralty Marshal and all expenses incurred by him, in respect of the arrest and subsequent care of the property whilst under arrest[32]. The rules in Sri Lanka are silent on this aspect. Upon service of the warrant, the property shall be deemed arrested[33].

The arrest enables the court to keep the property as security to satisfy the judgement and unaffected by the changes which may happen between the arrest and the judgement[34]. The same rule applies to a defendant who is seeking to arrest in support of counter – claim.[35]

The Judge may on the application of the person, who made appearance in court, may order releasing of such ship upon the payment of money, or guarantee or other security in lieu of the aforesaid payment, to the satisfaction of the plaintiff's claim / the appraised value of the property[36]. A letter of undertaking issued by a Protection & Indemnity club (P & I Club) is a widely accepted alternative security analogous to a bank guarantee[37].

Where any property arrested is subject to speedy decay, the Judge, may on the application made by the Marshal, shall direct that the property be sold and the property be deposited in court, pending the determination of the action[38].

28 Rules 21 and 22.
29 Rule 23 and 24.
30 Section 7 of the Act and Admiralty Rules.
31 Rule 25 . The matters contain in the affidavit is set out in Rule 26 and 27. P.D 61.5.3.
32 P.D 61.14.1
33 Rule 31 and 32.
34 *The" Cella""* (1888) 13 P.D 82 (C.A).
35 *The " Gniezno"* [1968] p. 418.
36 Section 7(2) of the Act. and Rule 37(1).
37 The "Oakwell" [1999] 1 Lloyd's Rep. 249; The "Rays" [2005] 2 Lloyd's Rep 479.
38 Section 7(3) of the Act and Rule 35(3).

Caveats / Caution against the Arrest

A person who wishes to prevent the arrest of property may file a notice undertaking to furnish security within three days after being required to do so. Upon that undertaking, the Registrar shall enter a caveat in the Caveat Warrant book[39].

Pleadings and Pre-Trial Steps

An admiralty action shall be heard without pleadings unless the judge otherwise directs[40]. In the event the judge directs to file pleadings, the Plaintiff shall file a petition; the Defendant thereafter shall file answer with or without a counter-claim. As far as possible, the pleadings shall be filed according to Form 16 of the Gazette[41]. The pleadings may be amended either by consent of parties or by order of court.

The Rules provide for interrogatories[42], discovery, inspection of documents[43], admission of documents and facts[44]. The procedure is provided for the parties to file motions with affidavits and seek appropriate relief from court[45].

The rules provide for examination of witnesses who cannot attend at the trial of the action. If the witness cannot be conveniently examined before the judge, or beyond territorial limits of Sri Lanka, he may appoint a commissioner for that purpose[46].

Trial

An action shall be set down for trial, by filing a notice of trial as in Form No 33 of the Schedule to the Gazette, if there has been no appearance, the case shall proceed *exparte*. The trial provisions are similar to section 150-153 of the Civil Procedure Code[47].

Appraisement and Sale of Property under Arrest

The Court has power before (*pendente lite*) or after final judgment to order the appraisement of the value of the property under arrest and the sale of such property either by private treaty or by public auction[48].

Appraisement is the official valuation of the property by a court appointed valuer in order to prevent the property from being sold at a price which is too low. Upon the sale, all claims and demands against the ship can only be enforced against the proceeds of sale[49].

39 Rule 144. C.P.R Part 61.7.
40 Rule 44.
41 Rule 45-50.
42 Rules 51 and 52.
43 Rules 53-56.
44 Rules 57 and 58.
45 Rules 63-67.
46 Rules 84-90.
47 Rules 98-101.
48 Rules 124 to 132.
49 the "*Acrux*" (1962) 1 Lloyd's Reports 405, the "*Cerro Colorado*" 1993 1 Lloyd"s Reports 58.

Expenses incurred by Admiralty Marshal

Sri Lankan law is silent as to the disbursements incurred by the admiralty Marshal. However, section 12 of the Admiralty Jurisdiction Act makes provisions to apply the English Law procedure**.** The Marshal's account shall be settled first out of the proceeds.[50] This would include expenses, the Marshall has incurred in effecting the arrest, port dues[51], cost of a ship keeper, and supplies required to maintain the ship whilst under arrest, and other expenses authorised by the court to enable the ship to be sold for best possible price[52].

The priority of settling claims after a forced sale will be given according to the following order:

(a) claims for maritime liens,

(b) claims of mortgages, and

(c) other claims.

International Effect of the Judicial Sale

As said above, the Judicial sale of ships in Admiralty is fundamentally different from the other sale of ships. Other sale of ships is carried out by court for the execution of a judgement, under the Civil Procedure Code. In other sales, the ship is transfer to the new purchaser with liabilities[53]. Which is the main difference between other sales and judicial sales by Admiralty Court.

The sale of ships by Admiralty Court takes place consequent to the proceedings under the Admiralty law in the respective jurisdictions. As stated in the introduction, the judicial sale of a ship by the Admiralty Court generally extinguishes all claims against the ship and grants the new purchaser, a title free of all maritime claims, liens, and other charges[54]. The fundamental theory behind this concept has been that, the ship should not be a target after the judicial sale, for the enforcement of any prior maritime liens or statutory rights of action.

Recognition of Judicial Sales by States

Judicial sales have traditionally been recognized as a matter of comity. The comity is not a rule of international law but the rule of domestic law of the forum. In order to give effect to foreign judicial sales, the municipal law of the third State must provide for the

50 *The Russland* [1924] p55.

51 *The "Felicie"* (1992) L.M.L.N 327.

52 Meeson N ; *Admirlty Jurisdiction and Practice*, Third Edition, LLP, 2003, p. 198.

53 Eg:Section 246 of the CPC

54 Eg Section 92 of the Merchant Shipping Act.

recognition of such sales. The following paragraph of "**The Tremont**[55] , demonstrates the need to recognize foreign judicial sales internationally :

> "The jurisdiction of the court in these matters is confirmed by the municipal law and by the general principles of maritime law : and the title conferred by the court in the exercise of this authority is a valid title against the whole world and is recognized by the courts of this country and by the courts of other countries."[56]

Since the recognition of a judicial sale has been based on comity, there are inconsistent practices which have completely undermined the core principles recognized in rem actions.

The Consequences of Non- recognition of Judicial Sales by States

There are several glaring consequences of non-recognition of judicial sales as recognized in landmark authorities. In the case of ***Castrique v William Imrie***[57] which was a case filed consequent to a sale of a British ship by the French Court *in rem* proceedings. It was the contention of the Plaintiff that the French Court did not properly apply the English law and therefore, the sale should not be recognized. Whilst rejecting the argument, the Court held that a judicial sale in a country must be respected if the sale had been effected within the lawful control of the State of judicial sale and, that the sovereign authority of the State had conferred clean title acting within the powers conferred. The question of fraud was identified by the Court as the only ground for non-recognition of a judicial sale.

A similar view was expressed in the case of Acrux[58], where, the purchaser was unable to secure a permanent registration of the ship in a desired country because the Italian registry refused to issue a certificate of deletion. Mr. Justice Hewson commented in his Order on the far reaching effects if the clean title given by a court of sovereign jurisdiction be challenged. He further stated,

> "Were it to become established, contrary to general maritime law, that a proper sale of a ship by a competent Court did not give clean title, those whose business it is to make advances of money in their various ways to enable ships to pursue their lawful occasions would be prejudiced in all cases where it became necessary to sell the ship under proper process of any competent Court.
>
> It would be prejudiced for this reason, that no innocent purchaser would be prepared to pay the full market price for the ship, and the resultant fund, if the ship were sold, would be minimized and not represent a true value"[59].

55 *(1841) 1 Wm. Rob. 163*
56 (1841) 1 Wm. Rob. 164
57 *(1869)* L.R.4.H.L. 41
58 (1962) 1 Lloyds Rep 405
59 (1962) 1 Lloyds Rep 405

In the case of *Cerro Colorado*[60], the court held that Admiralty Marshall selling the ship by an order of the Court had given the purchaser a title free of all liens and encumbrances. Sheen J. further stated that,

> "from time to time almost every ship owner wants to borrow money from his bank and to give as security a mortgage on a ship. The value of that security would be drastically reduced if, when it came to be sold by the Court there was any doubt as to whether the purchaser from the court would get a title free of encumbrances and debts."[61]

In the case of the *Phoenix*[62], the ship was mortgaged in St Vincent and Grenadines and Paris Commercial court delivered a judgement against the ship owner. The ship was subsequently sold in Judicial Sales in North Korea and China and then sold to a Russian company. When the new owner sough to de-register the ship, the request was refused, and in the legal proceedings, the bank contended that maritime lien in the ship subsisted as the Judicial sale in North Korea should not be recognized because the sale was not in accordance with settled procedures for forced sale in the United Kingdom or St Vincent and the Grenadines.

Justice Baptiste applying the test stipulated in the case of ***Castrique v William Imrie*** stated that the vessel was so clearly under the lawful control of the North Korean Court and the Court of North Korea had jurisdiction to decide as to the disposition of the vessel. Therefore, there was nothing to suggest that it acted beyond its jurisdiction. He further stated that,

> "the process by which the vessel was sold clearly operated in rem, flowing as it did from the initial arrest of the vessel. The sale of the vessel in North Korea conferred-as it would in Saint Vincent and the Grenadines-clean title to the purchaser, with all claims against the vessel being extinguished and transferred to the proceeds of sale".

There are far too many cases where judicial sales in countries have not been recognized under the principle of comity.

The International Efforts made for the Unification of judicial sales

There had been several initiatives to unify the recognition of judicial sales. The International Convention on the Arrest of Ships in 1952, recognizes that the court of the Country in which the arrest was made, shall have jurisdiction to hear and determine claims upon merits in terms of the municipal law. The 1999 Arrest Convention was ratified to replace the 1952 Convention. However, both 1952 and 1999 Conventions have not addressed on the recognition of judicial sales in member States.

60 [1993] 1 Lloyd's Rep 58
61 [1993] 1 Lloyd's Rep 61
62 [2014] 1Lloyd's Rep 449

The first significant international initiative was made with the drafting of Iinternational Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1967. Thereafter, International Conventions on Maritime Liens and Mortgages 1993 (MLMC) came into force on September 5, 2004 Both Conventions deal with the recognition of the legal effects of judicial sale of ships. Article 12.5 of the 1993 MLMC regulates the form and contents of a notice of forced sale, which is a condition precedent for recognition of the effects of judicial sale.

Need for a New International Convention

Therefore, it could be argued that there is no need for a new convention in view of the existing legal regimes. Answer to the said argument is that 1967 Convention has ratified only 6 countries and so far, has not come into force. On the other hand 1993 Convention has failed to receive overwhelming international acceptance. The lack of acceptance for both Conventions could probably be due to significant differences among legal systems with regard to the recognition of maritime liens. Moreover, the Conventions are also silent on many aspects such as jurisdiction for legal proceedings challenging the judicial sale and the circumstances under which recognition may be refused in a third State.

United Nations Convention on the International Effects of Judicial Sales of Ships "Beijing Convention on the Judicial Sale of Ships"

The Convention was drafted after several rounds of discussions under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). After several rounds of deliberations, the Convention was adopted by the United Nations General Assembly on December 7, 2022. The "Beijing Convention on the Judicial Sale of Ships" was opened for signature at a ceremony held in Beijing on September 5, 2023. The Convention has been signed by 17 States to date[63]. The Convention will come into force 180 days after the deposit of the third instrument of ratification, acceptance, approval or accession[64].

According to the preamble of the Convention, the purpose of introducing the Convention is to establish a harmonized regime for judicial sales by ensuring legal certainty as to the title that the purchaser acquires in the ship.

In order to achieve the said objectives, the new Convention aims to introduce an uniform international regime in respect of (a) the legal effects of a judicial sale, (b) the deregistration or registration of a ship and (c) challenges to Judicial sale.

63 Burkina Faso, China, Comoros, Ecuador, El Salvador, Grenada, Honduras, Kiribati, Liberia, Sao Tome and Principe, Saudi Arabia, Senegal, Sierra Leone, Singapore, Switzerland , Syria, and United Republic of Tanzania.

64 Article 21 of the Convention.

Salient Features of the Convention

It is important to highlight that the Convention is not designed to harmonize the procedure for judicial sales in jurisdictions. The Convention is concerned only with the "***international effects***" ***of a judicial sale which confers clean title*** to the ship and not with the ***recognition of the judgement*** of the judicial sale.

The Convention establishes a closed regime for Judicial sales. However, this does not preclude State parties from giving effect to judicial sales conducted by non-state parties under the domestic law.

This Convention governs the international effects of a judicial sale of a ship that confers clean title on the purchaser. It is clear from Article 1 that the Convention is concerned only with the "***effects"*** of a judicial sale and does not regulate the conduct of the judicial sale . This position is further buttressed by Article 4.1 which stipulates that judicial sale shall be conducted in accordance with the State of the judicial sale. It is also clear from Article 5 that the Convention does not deal with judgements in respect of judicial sales.

The Convention applies only to a judicial sale of a ship if, the judicial sale is conducted in a State Party and the ship is physically within the territory of the State of judicial sale at the time of that sale[65]. This is similar to the prerequisite for the recognition of judicial sales under the principle of comity.

The notice of judicial sale shall be given in accordance with the law of the State of judicial sale, and shall contain, the minimum information stated in annex I. A *certificate of judicial sale* under Article 5 shall only be issued if a notice of the sale is given prior to the judicial sale of the ship in accordance with the requirements of paragraphs 3 - 7 of Article 4.

Article 5 of the Convention introduces a certificate of judicial sale and a model certificate of judicial sale is in Annex II of the Convention. The Certificate of Judicial Sale shall contain a statement that the ship was sold in accordance with the requirements of the law of the State of judicial sale and the judicial sale has conferred clean title to the ship on the purchaser.

Article 6 of the Convention contains the core purpose of introducing the Convention. Once a judicial sale is conducted in one State Party and the said State Party has issued a certificate under Article 5 of the Convention, conferring clean title on the new purchaser, the said sale has the same effect in every other State Party.

Upon the production of the certificate, State Parties shall act on the certificate issued under Article 5 and delete from the registry, any mortgage or de-register the ship from the registry, if the new purchaser so requested.

65 Article 3 of the Convention.

In terms of Article 8, no ship shall be arrested for a prior claim subject to the provision of the Convention.

Challenges in Courts under the Convention

There are three instances where parties can seek the intervention of the Court under the Convention.

(a) **Challenge prior to the Order of Judicial Sale**

The Convention recognizes a challenge prior to the order of the judicial sale. The procedure for a challenge prior to completion of the judicial sale is a matter for the municipal law of the State of judicial sale. The non-issuance of notice and fraud could be the common grounds for such challenge[66].

(b) **Challenge to avoid the Judicial Sale**

After a judicial sale, an application could be made to the court of the judicial sale in terms of Article 9 of the Convention to avoid the judicial sale. The court of the judicial sale is conferred with exclusive jurisdiction to avoid a judicial sale. The grounds for avoidance are not stipulated in the Convention. It is left to the member States to regulate such grounds. However, the common ground for avoidance may include, failure to comply with the notice requirement under the domestic law and fraud on the part of the bidders.

(c) **Challenge to the effect of the Judicial Sale in a third State**

As stated above, the Convention is concerned only with the "international effects" of a judicial sale and not the sale per se. There had been much discussions on this matter at the working group sessions to identify the exact grounds for challenge. Finally, it was agreed that Judicial sale will not have an effect if a court in the member State determines that the effect would be manifestly contrary to the public policy in that Country[67]. The words *manifestly contrary to public policy* is an emerging trend in new treaty making. The word *manifestly* has been added to discourage the abuse of public policy exception. The egregious denial of due process and fundamental right of notice are some instances recognized in the Explanatory Notes prepared by the UNCITRAL Secretariat as grounds which fall within the term *manifestly contrary to public policy*[68].

66 Article 4.1 of the Convention.

67 Article 10 of the Convention.

68 ncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/united_nations_convention_on_the_international_efffects_of_judicial_sales_of_ships.pdf, [accessed on 20.11.2023]

Judicial sale of ships in Sri Lanka

As stated above, Sri Lanka is not a party to the both Arrest Conventions. The Admiralty Jurisdiction Act No 40 of 1983 of Sri Lanka, defines maritime claims in Sri Lanka. There is a *casus omissus* clause in the Act recognizing the Admiralty jurisdiction in the United Kingdom when there is a lacuna in the law[69].

The maritime liens[70], notice of forced sale[71] , effect of sale on mortgages[72] , disposition of the proceed of sale among creditors[73], certificate of judicial sale[74] and de-registration of ships[75] are identical to 1967 MLMC. The procedure for appraisement and judicial sale is contained in the Admiralty Rules.

Concluding Remarks

The Beijing Convention expands the existing international legal regimes in order to fill identified gaps. It contains the widely accepted state practice in respect of judicial sales. As far as Sri Lanka is concerned, Sri Lanka does not recognize the sale of ships by forced sale as a matter of comity as our law does not provide for the same. At the same time, Sri Lanka has drafted Chapter 5 of the Merchant Shipping Act on the basis the 1967 Maritime Liens and Mortgages Convention but it has not come into effect. The chances of said Convention coming into effect is very slim. Denmark, Morrocco, Norway, Sweeden, Syrian Arabic Republic and Vanuatu are the parties to the Convention to date[76].

The options available at the moment is for Sri Lanka to be a party to the 1993 Liens and Mortgages Convention or to the Beijing Convention on the Judicial Sale of Ships. The first draft of the convention was prepared in consultation with national maritime law associations and consultative members of the CMI after many years of surveys on the law and practice in a number of jurisdictions. Therefore, the Beijing Convention on the Judicial Sale of Ships has been able to fill the gaps in the regime of judicial sale of Ships.

In conclusion, it is observed that is imperative to have the necessary legal infrastructure in the area of admiralty to resolve dispute efficiently and give effect to judicial sales of Sri Lanka in other jurisdictions and *vice-versa*. A comprehensive legal system without delay would undoubtedly help Sri Lanka reaching her goal of being the pioneer shipping hub port in South-East Asia.

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69 Section 12 of the Admiralty Act.
70 Section 83 of the Merchant Shipping Act.
71 Section 91 of the Merchant Shipping Act.
72 Section 92 of the Merchant Shipping Act.
73 Section 93 of the Merchant Shipping Act.
74 Section 94 of the Merchant Shipping Act.
75 Section 95 of the Merchant Shipping Act.
76 https://comitemaritime.org/wp-content/uploads/2018/05/Status-of-the-Ratifications-of-and-Accessions-to-the-Brussels-International-Maritime-Law-Conventions.pdf, [accessed on 20.11.2023]

Admiralty jurisdictions Act No. 40 of 1983

2. (1) The admiralty jurisdiction of the High Court of the Republic of Sri Lanka shall, notwithstanding anything to the contrary in any other law, be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:

(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;

(b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;

(c) any claim in respect of a mortgage of or charge on a ship or any share therein ;

(d) any claim for damage received by a ship ;

(e) any claim for damage done by a ship ;

(f) any claim for loss of life or personal injury sustained in consequence of

(i) any defect in a ship or in her apparel or equipment; or

(ii) the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglect or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of good on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

(g) any claim for loss of or damage to goods carried in a ship;

(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or, hire of a ship;

(i) any claim in the nature of salvage;

(j) any claim in the nature of towage in respect of a ship;

(k) any claim in the nature of pilotage in respect of a ship;

(l) any claim in respect of -

(i) goods or materials supplied, or

(ii) services rendered,

to a ship for her operation or maintenance;

(m) any claim in respect of the construction, repair or equipment of a ship or dock charges or dues;

(n) any claim by a master or member of the crew of a ship for wages and any claim by or in respect of a master or member of the crew of a ship for any money or property which under any law in force for the time being is recoverable as wages ;

(o) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

(p) any claim arising out of an act which is or is claimed to be a general average act;

(q) any claim arising out of bottomry;

(r) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for jetsam, flotsam, lagan and derelict found in or on the sea, the shores of the sea or any tidal water or for property found in the possession of convicted pirates,

Together with any other jurisdiction connected with ships which may be vested by any other written law.

Maritime liens

83. Maritime liens of a ship shall arise out of,

(a) wages and other sums due to the master, officers and other members of the ship's complement, in respect of their employment on the ship ;

(b) port, canal and other waterway dues and pilotage dues;

(c) claims against the owner (which term shall for the purposes of this section also include the charterer, manager or operator of the ship) in respect of loss of life or personal injury occurring, whether on land or water, in direct connexion with the operation of the ship ;

(d) claims against the owner, based on a wrongful act and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water, in direct connexion with the operation of the ship ;

(e) claims for salvage, wreck removal and contribution in general average.

FEAR OF REVERSAL SHOULD NOT BE A CONCERN IN JUDICIAL DECISION MAKING

Seevali Amitirigala*
President's Counsel.

A judge has a duty to dispose of matters promptly, but in doing so the judge must and shall act within the framework established by law. It is important that judges act under a statute or common law in making decisions. One exception to this principle is when a judge has a discretion, yet such discretion must be exercised under the principle of reasonableness and not arbitrarily and capriciously. Walter Bagehot commented "the worst judge, they say, is a deaf judge.[1]" At the heart of a fair trail is the right to be heard. The judge is expected, not only to arrive at an accurate decision, but also to ensure that it has been fairly reached.[2] Although judicial decision making is the final process of a fair trial it is no doubt a very important function.

The right to appeal is a statutory right, further despite this right a party that is dissatisfied with a trial court order/judgment or decree can tender a revision application to an appellate court.[3] However, there is no right to a revision application, as it is based entirely on the discretion of the court which would be exercised it there are exceptional circumstances warranting the exercise of that discretion.[4]

The provincial high court[5], civil appellate court[6], court of appeal[7] and also the supreme court[8] will exercise appellate jurisdiction aimed at the correction of errors of laws and errors of facts. Thus, the legal and factual correctness of every order and every judgment of a lower court could be subject to an appeal or revision.

Judges should not be hasty in delivering judgments and orders. In the Dhammapada it is stated that "one is not thereby righteous because one arbitrates hastily. He who is wise investigates both right and wrong. The wise man who guides others with due deliberation with righteous and just judgment is called a true guardian of the law, wise and righteous"[9]. Efficient case management is important but not at the cost of hast.

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1 The English constitution (1867 Ch iv)

2 Judicial conduct and ethics and responsibility Hon. Justice Dr A.R.B.Amerasinghe Page 782.

3 Article 138 of the 1978 2nd Republican constitution of Sri Lanka. Further section 753 of the Civil Procedure Code.

4 Hotel Galaxy (Pvt) Ltd vs Mercantile hotels Management Ltd 1987 1 SLR page 5.

5 Article 154(3)

6 Section 5 of Act No 54 of 2006

7 Article 139 of the 2nd Republican constitution of Sri Lanka.

8 Article 127 2nd Republican constitution of Sri Lanka.

9 Dammapada verses 256 and 257.

In terms of the Civil Procedure Code "a judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision, and the opinion of the assessors (if any) shall be prefixed to the judgment and signed by the assessors respectively[10]". As far as adjudication of a case by a judge is concerned, the reasons for the decisions should be given. In fact, giving reasons for an order or judgment is inherent in the very nature of judicial determination.

While the trial judge must be conscious to read the pleadings, issues and admissions recorded, evidence oral and documentary led, he or she should also be concerned with the application of statute law as well as common law. Upon the analysis of the above should the court make an order or judgment. The fear of reversal of an order or judgment by the superior court should be a matter that needs to be considered in decision making. Yet it must be emphasized that even in an appeal or a revision application there are limitations. This limitation essentially would prevent frivolous and vexatious appeals and revisions from seeking to set aside orders, judgment and decree of the original court.

Errors, defects, irregularities in an order, judgment or decree which does not cause prejudice to the substantial rights of the party or cause a failure of justice shall not be set aside by the superior courts.

When it comes to any revision application it is important to mention the proviso to article 138 of the constitution[11]. In terms of the said proviso, it is stated "provided that no judgment, decree, or order of any court shall be reversed or varied on account of any error, defect, or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice"[12].

It is also important to note that even under the proviso to section 5(2) of the High Court of the provinces (special provisions) act, No 54 of 2006 states "provided that no judgment or decree of a District Court or a family court as the case may be, shall be reversed or varied by the High Court on account of any error, defect, or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice"

From the above it is clear that every error defect or irregularity will not result in the superior courts setting aside of orders, judgments or decrees of the original court. The guiding principle is that the appellant or the petitioner must establish before the appellate courts that their substantial rights have been prejudiced or that there has been a failure of justice. An error defect or irregularity that is not substantial or trivial will certainly not attract the setting aside of it by the appellate court.

10 Section 187 of the Civil Procedure Code.

11 2nd Republican Constitution of Sri Lanka

12 Proviso to Article 138 of the 2nd Republican constitution of Sri Lanka. Sanjeewani Vs Podimanike SC Appeal 180/2011 decided on 21/10/2022.

The Appellant cannot make out a different case at the appeal, from the one made at the trial court.

In terms of explanation 2 to section 150 of the Civil Procedure Code[13]

> "The case enunciated must reasonably accord with the party's pleadings, i.e. plaint, answer as the case may be and no party can be allowed to make at the trial a case materially different from that which he has placed before on record, and which his opponents is prepared to meet and the facts proposed to be established must be in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings"

This principle is not something confined to the trail court. Its application most certainly can be observed in the appellate court as well. An appellant cannot set up an appeal which is materially different, and diverse to what he, she or it presented before the trial court.

In the case of **Lillian Karunaratne vs Kotalawala**[14] Hon. Justice Samayawardane held that an appellant cannot present on appeal a case materially different to what was presented before the trail court.

In the case of **Somadasa Vs Surin Wickramasinghe and others**[15] Hon. Justice Murdu Fernando held "a party cannot be permitted to present in appeal a case different from that presented before the trial court, where matters of facts are involved which were not in issue at the trail.

In the case of **Candappa Nee Bastian Vs Poonambalampillai**[16] "a fortiori a party cannot be permitted to present in appeal a case different from the case presented before the trial court"

From the above-mentioned case decisions, it is clear that an appellant cannot make a different case at the appeal from which he has presented at the trail court. This principle has been created by the common law judgments of the superior courts. If a different case was to be made before the appellate court from that what was presented at the trail court it would be unfair by the judge who decided the trial as he or she was not presented with a case that is now made before the appellate court.

Pure questions of law and mixed questions of law.

Even though a different case cannot be made in the appeal from that made out at the trial, the appellant is able to raise a "pure question of law" in appeal even if that was not raised at the trial stage.

13 Section 150 of the Civil Procedure Code.

14 SC APPEAL 17/2015 decided 30/04/2021.

15 2021/22 vol XXVI The Bar Association Law Journal 400.

16 1993 1 SLR page 184 at page 189.

In the case of **Talagala Vs Gangodawila Corporative Store Society Ltd** [17] it was held "where a question which is raised for the first time in appeal is a pure question of law and is not a mixed question of law and facts, it can be dealt with. The construction of an ordinance is a pure question of law".

In the case of **Simon Fernando Vs Bernadette Fernando**[18] "it is settled law that a pure question of law which is not a mixed question of law and facts can be taken up for the first time in appeal but if it is a mixed question of fact and law it cannot be taken up".

In the case of **Piyadasa and Another Vs Babanis and another**[19] on a question of fact the appellant cannot agitate for the first time in appeal without first having contested the matter in the original court.

In the case of **Setha vs Weerakoon**[20] it was held that a new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the court of appeal has before it all the requisite material for deciding the point or the question is one of law and nothing more.

In the case **Jayawickrama vs Silva** [21] it was held that a pure question of law can be raised in appeal for the first time, but it is a mixed question of fact and law it cannot be done.

In the case of **Leslin Jayasinge Vs Illangaratne**[22] it is only a pure question of law that can be raised in appeal for the first time, but if it is a mixed question of fact and law it cannot be done.

In the case of **Hameed alias Abdul Rahman vs Weerasinghe and others**[23] . In this case Hon. Justice G.P.S. De Silva held that "even assuming that the issue whether the plaint discloses a cause of action is a pure question of law. I am of the opinion that in the facts and circumstances of this case, it is not a question that could properly have been raised at the stage of appeal and answered in favour of the defendants. In doing so, the court of appeal was in error". This case demonstrates that even if there is a pure question of law raised, whether it would be decided on the appeal would actually depend upon the facts and circumstances of the case.

17 76 NLR PAGE 472
18 2003 2 SLR page 158
19 2006 2 SLR page 17 at
20 49 NLR page 225
21 76 NLR page 427
22 2006 2 SLR page 39
23 1989 1 SLR page 217

It is pertinent to note that in the case of **Henri Edama Vs Somasiri**[24] Hon. Justice Samayawardane held "the question of identification of the land cannot be raised for the first time in appeal. It is not a pure question of law but a mixed question of fact and law".

In **De Silva Vs Reginet Anthony**[25] it was held by the Hon. Justice Sisira De Abrew "the most important question that should be considered is whether the defendant respondent is entitled to raise the point of that the corpus has not been identified when the defendant respondent has claimed prescription of the corpus. In my view, when the defendant respondent claims the disputed land (the corpus) on the basis of prescription he is not entitled to raise the question of non-identification of the disputed land (the corpus) on the basis of prescription he has therefore impliedly admitted the corpus. Therefore, the question that the corpus has not been properly identified cannot be raised in this appeal**"**

Jayasinghe Arachchige Thilakaratne Vs Jayasinghe Arachchige Wijesena and Others[26] "concluding a partition case is a costly and time-consuming process. The law makes provision for a defendant who raises concerns about the identification of the corpus to do so before the case is taken up for trial and during the course of the trail. Without taking such steps, a defendant in a partition action cannot scuttle the whole process, which has run into several decades, by taking up the position that the corpus has not been properly identified for the first time on appeal. Merely raising an open-ended issue on the identification of the corpus is insufficient. A partition case is not a criminal case to create doubt about the plaintiff's case and remain silent"

Conclusion

Judicial decision making is a serious as well as a noble duty. In the exercise of this duty the court must not be hindered by the fear that its decision would be reversed. The superior court of Sri Lanka has time and again laid down stringent principle of law applicable to determination of appeals and revisions. In the case of **Kumara and Another Vs Kanthi and Others**[27] it was held "the system of justice practice in Sri Lanka is adversarial as opposed to inquisitorial and therefore the judges shall decide the case as it is presented before him or her by the two contesting parties not in the way the judge prefers it to have been presented before him or her". It is in the above-mentioned circumstances that a judge will do justice according to law. Certainty in the law is an important matter. It is because of this reason that the superior courts will apply stringent rule to see if there is an error of law or fact. The superior court would set aside judgment, order and decree under those established rules of law. Today mere technicalities would hardly lead to the

24 SC Appeal 189/17 decided on 16th of December 2022.

25 SC Appeal 203/16 decided on 27th of February 2019.

26 Sc Appeal 82/2020 decided on 08th March 2022.

27 2021 1 SLR page 398

setting aside judgments, order and decree of the original court. In the case of **Kumara and Another Vs Kanthi and Others**[28] it was held that "unless the matter goes to the root of the case, cases need not be dismissed on flimsy technical grounds".

All what the judge should do in judicial decision-making is as Socrates stated[29] "four things belong to a judge, to hear courteously, to answer wisely, to consider soberly and to decide impartially."

28 2021 1 SLR page 398

29 Judicial conduct and ethics and responsibility Hon. Justice Dr A.R.B.Amerasinghe Page 853

READING A SURVEY PLAN

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1. Introduction

As far as the courts are concerned, the role, playing by Survey Plans in dispute resolution has two folds. Once it provides historical evidence to settle land disputes while at another time it helps to represent the court decisions on different shares of ownerships in schematic view for future evidence. Therefore, understanding about the details providing by Survey Plan is very important for the Judges and Attorneys to handle cases at courts professionally. In this article, having understood the limited space in the magazine, I will try my level best to make you aware with all necessary information to read and extract all important details containing in a survey plan. I wish that the knowledge that you gain through this article would empower the members of your association in bringing justice to the peoples of this country.

2. Difference Between Map and a Plan

This terminologies depend on the scale of the drawing. The Sri Lankan practice is that the drawing scale is in between 1 : 250,000 to 1 : 10,000 then it is called ***"Map"*** while the scale is greater than 1 : 10,000 then it is called ***"Plan".***

3. Who has Authority to Prepare Maps or Plans

The Survey Department of Sri Lanka has the sole Authority to prepare Maps by its mandate whereas the plans could be prepared either by Registered Licensed Surveyor (RLS) or Government Surveyor (GS). This registration has to be taken from the Land Survey Council and the RLSs will have to obtain an annual ***practicing license*** too from Land Survey Council in addition to the registration in order to engage in private practices. All the RGSs are employees of the Survey Department and engage in surveys as per the directions of the Surveyor General.

4. Survey Plan

Surveys are important because they provide an up-to-date, accurate depiction of the features and boundaries of the land. A Survey Plan represent the ground and acts as a legal document that determines and delineates the boundaries of a property. The information contain in a Survey Plan could be identified as shown in the following table.

S/N	Description	Remarks
1	Legendary information	Plan No.
		Scale of the Plan drawn
		Reference for the survey request
		Reference to field notes used to record the survey
		Details description of abbreviations used in the drawing
		Location Details such as name of *"Village, GN Division, DS Division, Local Authority, Korale, Pattu"* etc.
		Details of the person who engaged in survey & preparation of Plan
		Time period spent for the work
		Date signing the plan
		Details of the parties who pointed out boundaries for the survey and the parties to whom the boundaries were pointed out to after the survey
2	Drawing	Boundary lines of the property to represent the shape of land
		Boundary descriptions in short forms
		Boundary post descriptions in short forms
		Landmark descriptions in short forms
		North line
		Abutting Land Descriptions
		Special notes for the different colors used for boundary lines
3	Tenement Information (Could be provided on the same page of the drawing if space available or in a separate page)	Lot No.
		Name of Land
		Land Use
		Claimant's Details
		Extent
		Reference to old survey plans if any
		Reference to acts or ordinance if any
		Purpose of the survey
		Schedule of Boundaries
		Plan No., Reference to survey request, Location Details, Details of the person who engaged in survey, period of survey, date signing the plan, details of parties involved in pointing out boundaries and the details of the parties to whom the boundaries were pointed out to to be given if tenement list is prepared on a separate sheet of paper

Surveyors use older authoritative plans and surveys from prior property surveys, along with information on adjoining plots, to determine the property boundaries. The survey plan is the final output when a land survey has been completed. It is important to remember that the details of the plan is confined to the time of survey.

5. Type of Survey Plan Prepared by Survey Department

As the officers in the judicial service, it is important to have general understanding about the type of Survey Plan available in Sri Lanka. The following table will illustrate type of important Survey Plans prepared by the Survey Department from its inception on August 02, 1800.

S/N	Plan Type	Short form	Period	Plan No.
1	Title Plan (hQmQkm| pQBEr#)	T.P. (hQ.pQ.)	1800 - 1934	Number only – From 1 to 432299
			1934 - 1942	With prefix "T" –from T **1** to T 29259
2	Temple Title Plan (vQh`r hQmQkm| pQBEr#)	Temple T.P. (vQh`r hQ.pQ.)	1856 - 1932	From number only 2300 plans have been prepared for Vihara & Dewalagam between numbers 52398 to 103499 of above item 1
3	Lease Plan (b< pQBEr#)	L.P. (b.pQ.)	1881-1941	From L.P. 1 to L.P. 6439
4	Preliminary Plan (mRlQk pQBEr#)	PP (mE.pQ.)	1859 -1932	Number only – From 1 to 82250 (Province wise from 1 onwards …..)
			1932 - 1965	With prefix "A" –from P.P.A. 1 to P.P.A. 18376 (Province wise from 1 onwards …..)
			For short period from 1950	With prefix "S" –from P.P. S. 1 to P.P. S. 4998 island wide
			From 1965 up to now	With district prefix in Sinhala (District wise from 1 onwards …..) Eg:- PP hm| 1 …. onwards for Hambantota district
5	Chena Preliminary Plan (@h~n~ mRlQk pQBEr#)	Chena P.P. (@h~.mE. pQ.)	1874 - 1887	From Chena P.P. 16 to Chena P.P. 300
6	Town Survey Preliminary Plan (ngr m#nEm| mRlQk pQBEr#)	T.S.P.P. (n.m#. mE.pQ.)	1935 - 1985	
7	Irrigation Survey Preliminary Plan (v`rQm`\g m#nEm| mRlQk pQBEr#)	I.S.P.P. (v`.m#. mE.pQ.)	1916-1984	From I.S.P.P. 1 to I.S.P.P. 135 (Province wise from 1 onwards …..)
8	Forest Survey Preliminary Plan (k#l$ m#nEm| mRlQk pQBEr#)	F.S.P.P. (k#.m#. mE.pQ.)	1915 – 1980	From F.S.P.P. 1 to F.S.P.P. 141

9	Miscellaneous Survey Preliminary Plan (vQvQ{ m#nEm| mRlQk pQBEr#)	M.S.P.P. (vQ.m#. mE.pQ.)	Before 1968	From M.S.P.P. 1 to M.S.P.P. 246
10	Topographical Preliminary Plan (xO l]N`w~mk mRlQk pQBEr#)	Topo P.P. (xO. mE.pQ.)	1917 - 1954	From TOPO P.P. 1 … onwards (Province wise from 1 …onwards)
11	Final Settled Plans (avsn~ nQrvEl~ pQBEr#)	F.S.P. (a.nQ.pQ.)		F.S.P. has been prepared after settlement of some PPs
12	Final Topographical Plan (avsn~ xO l] N`w~mk mRlQk pQBEr#)	F.T.P. (a.xO.pQ.)	From 1922 up to now	From F.T.P. 1 ….. (Province wise from 1 …onwards)
13	Town Survey Plan (ngr m#nEm| pQBEr#)	T.S.P. (n.m#.)	1935 - 1985	
14	Final Urban Plan (avsn~ ngr m#nEm|)	F.U.P. (a.n.m#.)		
15	Village Plan (gm| pQBEr#)	V.P. (g.pQ.)	1859 - 1958	From V.P. 1 …. (Province wise from 1 …onwards)
16	Final Village Plan (avs`n gm| pQBEr#)	F.V.P. (a.g.pQ.)	From 1914 up to now	From F.V.P. 1 ….. (Province wise from 1 …onwards)
17	Colony Plan (jnpq pQBEr#)	C.P. (j.pQ.)	From 1965 up to now	From C.P. 1 ….. (Province wise from 1 …onwards)
18	Final Colony Plan (avs`n jnpq pQBEr#)	F.C.P. (a.j.pQ.)	From 1965 up to now	From F.C.P. 1 ….. (Province wise from 1 …onwards)
19	Cadastral Plan (kdim| sQwQym|)	C.M. (k.sQ.)	From 1998 up to now	C.M., Province No, District No., GN No, Eg: for Hambantota District 12th GN division then, The cadaster plan no is CM 830012

It is important to remember that above mentioned plans have been prepared to cater different land administration requirements in Sri Lanka from year 1800. Therefore, those Survey Plans always have been prepared according to the power so vested by different Ordinance and Acts. Accordingly Department's Survey Instructions (DSI) has been prepared to guide proceedings to be followed by Government Surveyors from their field survey to the production of Survey Plan. Since Ordinance and Acts pave the path to the

law of the country, the Survey Plan so prepared becomes a legal document suitable to produce for any evidence in Sri Lanka.

The Registered Licensed Surveyor's Survey Plans not much focused in this article but the work of Licensed Surveyors are also being guided by the Survey Manual prepared by the Land Survey Council.

6. Subsequent Surveys

In dealing with above plans, one need to have the knowledge on how numbers are given to the subsequent surveys inside or outside of the areas where a Survey Plan is already available. See following table for the type of subsequent survey plan prepared under different situations.

S/N	Plan type of the area where the new survey falls	P.P.	Inset	Supplement	Sheet
1	Inside or outside of old P.P.	√	*	*	*
2	Inside a C.M.	*	*	*	√
3	Inside V.P. /F.V.P.	*	*	√	√
4	Outside of insets within TOPO P.P./F.T.P.	*	√	*	√
5	Inside of inset within TOPO P.P./F.T.P.	*	*	√	√

- When a fresh survey to be done for an area where no previous Survey Plan available or when the new survey falls on fully or partly within old PP area then a new P.P. will be prepared.
- When a new survey is done inside V.P. /F.V.P. then a supplementary plan will be prepared. For that a new Sup No. and Sheet No. will be issued in serial order.
- "INSET" Plan will be prepared only when the new survey is falling inside the unsurveyed area of Topo P.P./F.T.P.
- When a new survey is done inside a INSET of Topo P.P./F.T.P. then a supplementary plan will be prepared. For that a new Sup No. and Sheet No. will be issued in serial order.
- When a subsequent surveys is done inside a C.M. then a new Sheet No. will be issued in serial order. In the preparation of a C.M. a GN Division is taken as unit. Then that unit will be further divided into several blocks for the convenient of the survey.
- Lot No. given for land parcel always start from 1 in P.P.s where as in V.P.s /F.V.P.s & Topo P.P.s/F.T.P.s next serial number after last used will be issued.
- From May 2023 onwards, the plan prepared for all new survey will be a C.M. irrespective of whether the new survey is falling inside or outside a previous Survey Plan.

7. Type of Landmarks Used in above Plans

Types of landmarks used by the survey department with their conventional signs will be given in the following table for your easy reference.

S/N	Types of landmarks	Conventional Sign on Plan	Conventional Sign in Field Book
1	Landmarks of cut stone or of concrete	L	L
2	Live Rock Landmark	RL	RL
3	1500 m Climatic Contour Landmark	CCL	CCL
4	Old Landmark of previous plan	L	OL
5	Old Rock Landmark of previous plan	RL	ORL
6	Iron Rail on railway reservation boundaries	IR	IR
7	Cement or stone block positioned by the Road Development Authority	RDA	RDA
8	Cement or stone block positioned by the Archaeological Department	AL	AL
9	Cement or stone block positioned by any other Department	BP	BP

8. Court Commission Surveys

8.1 Court Commission under Partition Act No. 21 of 1977 (P.- Cases)

- No Court Commissions could be issued to Survey Department for preliminary surveys under Section 16 of Partition Act. (see section 73 of Partition Act also for the term "Surveyor" described by the Act).
- District Court can issue orders in accordance with Section 18 (3)(a) of the Partition Act .

8.2 Court Commission under Civil Procedure Code Act. No. 79 of 1988 (L.-Cases)

- Court Commissions can be issued to Survey Department under L-cases for Preliminary Surveys under Civil Procedure Code Act.
- District Court can issue orders in accordance with Section 18 (3)(a) of the Partition Act .

8.3 Occasion of Issuing Court Commissions by the District Courts

The District Courts could issue Court Commissions according to situations described in above 8.1 & 8.2 to the District Senior Superintend of Surveys to whom the power of the Surveyor General has been delegated to act on behalf of him to carry out a fresh survey and prepare a plan, field records, Tenement list and report as the case may be; as follows.

(a) on request from any party of a Court Commissions relating to land in a District Court or by the Court of its own for the submission of plan and survey report.

(b) Whenever state lands are involved or suspected to be involved, Attorney General also will become a party to the case in order to safeguard the interest of the state. In such instances a court commission will be issued by the Courts to the Surveyor General on the request of the Attorney General.

(c) to certify that the accuracy of Registered Licensed Surveyor's plans and related field records prior to the acceptance of them by the courts,

(d) when the survey has been carried out by two or more Registered Licensed surveyors,

8.4 Executing a Court Commission Survey under Section 18(3)(a) of the Partition Act

When executing a court commission survey under section 18(3)(a) of the Partition Act, the portions of adjacent lands fall inside subject land, after fixation done by the Licensed Surveyors specified in the Court Commission should be numbered separately. In the case of those claimants are not mentioned in the court commission, the Surveyor should handover the notice according to 16 (3) paragraph of the Partition Act No.32 to enable such claimants to appear before courts on the next calling date of the commission, as new parties if they so desire. Claimants who are not partners, their addresses and the nature of the claims should be mentioned in the report prepared by the surveyor section vii of 18(1) (a).

8.5 Potential Courts to issue Court Commissions

In addition to the District Court the Magistrate Courts, the High Courts, the Court of Appeal and the Supreme Courts could also make orders to the Surveyor General for the submission of plan and survey report on a request made by any party or by the courts of its own. However, a Court Commissions will not be issued and merely a court order is issued.

8.6 Few Important Points to Remember

- The Surveyor should give notice of survey to all parties and the Grama Niladhari for state lands at least two weeks before the survey prior to the commencement of survey work.
- All State lands falling within the corpus of a Registered Licensed Surveyor's plan should be surveyed and lotted separately.

- The lots formed after the fixation of plans of each and every Registered Licensed Surveyor should be lotted and scheduled according to the requirements of the commission. The Licensed Surveyor will use alphabetic letters when assigning lot numbers of the plan. Those numbers should not be reused in the new tracing.
- It is the responsibility of the District Senior Superintendent of Surveys to submit the tracing, schedule of tenement list and the report to the courts before the date given in the commission. In case if the work gets delay due to the reason unavoidable and justifiable, the District Senior Superintendent of Surveys should submit a brief report with regard to the delay to the Registrar of the courts, well before the due date given in the commission, and get an extension.

8.7 Island Wide Summery of Court Commissions with Survey Department as at Today

- District wise summery of Court Commission referred to the Survey Department by November 30th 2023 is given below. There you can identify that in certain districts, the number of cases are very high. **One of the major problem that the Survey Department is facing in finishing Court Commotions is that the non-availability of previous original survey plans in files to take tracings at courts.** Therefore, if this type of issues could be sorted out before sending the Court Commissions to the Survey Department, it would help speedy completion of work. Number of cases in below table couldn't be completed due to that reason. Unfortunately, at the moment of writing this article, I am not in a position to figure out district wise break up of that type.

District	Balance C/F on November 01st, 2023	Received in November 2023	Completed in November 2023	Balance B/F at the end of November 30th, 2023	Cannot proceed due to problems
Anuradhapura	24	1	2	23	
Polonnaruwa	31	6	1	36	
Trincomalee	10	1	2	9	
Batticaloa	0	0	0	0	
Ampara	3	0	0	3	
Matale	4	0	0	4	0
Kandy	24	3	4	23	6
Nuwaraeliya	8	2	1	9	
Puttalam	16	2	0	18	6
Kurunegala	42	2	5	39	8
Gampaha	54	3	4	53	15
Colombo	99	5	7	97	19
Kalutara	66	5	7	64	
Kegalle	36	16	2	50	
Ratnapura	74	4	4	74	
Badulla	26	3	5	24	
Monaragala	42	2	5	39	
Galle	190	7	12	185	25
Matara	71	4	7	68	8
Hambantota	29	2	1	30	0
Jaffna	2	3	1	4	
Kilinochchi	2	0	0	2	0
Mullathivu	2	0	0	2	
Mannar	1	3	0	4	
Vavuniya	4	0	1	3	
Total	**860**	**74**	**71**	**863**	**87**

- The total work force of Survey Department is 620 Surveyors and the volume of survey work on land alienation programmes, land acquisitions and different urgent development projects are very high. As a result potentiality of allocating enough surveyors for Court Commissions are always a challenging task.
- No Landmarked Plan will be prepared to submit courts but a tracing will be prepared.

9. Plan Vs Tracing

A Plan is prepared on a statutory purpose where as a tracing will be prepared to take decisions in a short period of time.

S/N	Plan	Tracing
1	Boundaries are Landmarked	Boundaries are not Landmarked
2	Prepared according to an Ordinance or Act	No Ordinance or Act applicable always
3	Permanent document	Temporary Document prepared to take a decision in short period & dispose after some period
4	Can be used to point out old boundaries	Can be used to point out old boundaries if available
5	Can be used to issue O, L, R & V diagrams & public tracings	Cannot be used to issue Outright, Lease, Restriction & Vesting diagrams & public tracings
6	Can be used to issue Land Grants	Cannot be used to issue Land Grants

10. Identifying Different Scale

To read a plan, the knowledge of scale is very important to extract plan information. It helps to calculate ground distance from plan. The examples given in the below table will help you to understand the relationship between plan distances to the ground length.

S/N	Scale	Meaning	Example
1	1 : 1000	One unit of any unit equals to 1000 same units on ground	1mm in plan = 1000 mm on ground (ie: 1mm in plan = 1 meter on ground)
2	1 : 4000	One unit of any unit equals to 4000 same units on ground	1mm in plan = 4000 mm on ground (ie: 1mm in plan = 4 meters on ground)
3	One inch to one chain	One inch in plan equals to one chain on ground Ie:- 1 : 792 scale	1mm in plan = 792 mm on ground (ie: 1mm in plan = 0.792 meters on ground)
4	One inch to 2 chains	One inch in plan equals to two chains on ground ie:- 1 : 1584 scale	1mm in plan = 1584 mm on ground (ie: 1mm in plan = 1.584 meters on ground)
5	One inch to 4 chains	One inch in plan equals to four chains on ground ie:- 1 : 3168 scale	1mm in plan = 3168 mm on ground (ie: 1mm in plan = 3.168 meters on ground)

11. Relationship between Different Measuring Units

When extracting details of extent from the Tenement List, the knowledge of the relationship between different measuring units will be very important get converted it to desired unit. Until about the year 1980 the extent has mentioned in imperial unit and thereafter with the introduction of Metrication Act now the extent is given in SI units.

- 1 chain = 20.1168 meter
- 1 meter = 3.2808 feet
- 40 perches = 1 rood
- 4 roods = 1 acre
- 1 hectare = 2.4711 acres
- 1 acre = 0.40468560 hectares
- 1 perches = 25.2928 square meters
- 1 perches = 272.2494 Square feets

12. Statutory Laws Governing Surveying

Some important Acts and Ordinances being followed in the preparation of survey plans in additions to the survey instructions stipulated in DSI are mentioned below.

i. Crown Land Encroachment Ordinance No. 12 of 1840
ii. Definition of Boundaries Ordinance No. 1 of 1844
iii. Thoroughfares Ordinance No. 10 of 1861
iv. Partition Ordinance No. 10 of 1863
v. Land Surveys Ordinance No. 4 of 1866
vi. Land Acquisition Ordinance of 1876
vii. Registration of Title Ordinance No. 5 of 1877
viii. Waste Lands Ordinance No. 1 of 1887
ix. Surveyors Ordinance No. 15 of 1889
x. Evidence Ordinance No. 14 of 1895
xi. Crown Landmarks Ordinance No. 7 of 1909
xii. Land Settlements Ordinance No. 20 of 1931
xiii. Land Development Ordinance No. 19 of 1935
xiv. Town and Country Planning Ordinance No. 13 of 1946
xv. State Land Ordinance No. 8 of 1947
xvi. Land Acquisition Act No. 9 of 1950
xvii. Land Reform Law No. 1 of 1972
xviii. Apartment Ownership Law No 11 of 1973
xix. Partition Law No. 21 0f 1977
xx. Urban Development Authority Law No. 41 of 1978
xxi. Land Grants Special Provision Act No. 43 of 1979
xxii. Registration of Title Act No. 21 of 1998

Part - II

SRI LANKA'S CONSTITUTION MAKING PROCESS: A CRITIQUE

Anandhi Kanagaratnam*
Magistrate.

Introduction

The term Constitution refers to a set of basic laws and principles that a country is governed by and defines the scope of governmental sovereign powers.[1] It deals with the extent of authority of the legislature as well as the Executive and the Judiciary. It is the basic document from which all governmental authorities derive power. The Constitution is an organic instrument and captures the hopes and aspirations of the people and is meant to protect the self in its dignity and worth. Constitution is also about the people's passions. It is the supreme law of the land and which drives the rulers towards democratic governance within the legal framework. The Government at any time can change a law, but a Constitution must be durable so that people can act upon it.[2] In the Supreme Court's Judgment in ***R. Sampanthan and Others Vs Attorney General***[3] there is a stated understanding that Sri Lankan legal and political order rests on the supremacy of the Constitution. The Constitution needs to thus be grounded in a culture of reverence for the rule of law and the forms and tradition of democracy. In ***Wijeyratne Vs Warnapala***[4] Sripavan J, as he then was, stated "It has been firmly stated in several judgments[5] of this Court that the 'Rule of Law' is the basis of our Constitution." Though it may be believed by some that the provisions of Constitutions are not of any great relevance to the people of a country, and that they are of limited interest, only to political scientists, constitutional lawyers, political philosophers and a few other intellectuals, is to underestimate the impact the Constitutions have on the lives of nations. The political forces at work in a given society play a considerable part in fashioning the nature and provisions of a Constitution of that country on the lives of the people who are required to live by the provisions contained in Constitutions.

When one looks at the question of the Constitution one should take a broad approach and not believe that the Constitution is a particular document or that it is confined to a particular document. It is also the case that there is another unseen and unwritten

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1 Black Law Dictionary (11th ed.)

2 Hon. Justice P.N. Bhagwati, speech delivered on 12.01.2003 in Colombo on "Constitutional Experience of India"

3 SC FR Application No. 351/2018, SCM 13.12.2018

4 SC FR 305/2008, decided on 22nd September 2009

5 Vishvalingam Vs. Liyanage (1983) 1SLR 236; Premachandra Vs. Jayawickrema (1994) 2SLR 90

Constitution in every country, which sets out the basic structure and the basic manner in which the political process is conducted. In other words every State has a "political constitution" which sits alongside the "legal constitution". The 'political constitution' thus refers to how the majority of a country thinks, conceive and relate to, the State.

We live in an era of constitution making and approximately 188[6] national Constitutions are in existence today, out of which more than half have been written or re-written in the past quarter century. Constitution making has also lately become a part of many peace processes. As such, new nations and radical new regimes seeking democratic credentials often on conditions of recognition by other nations and by international political, financial aid and trade organizations make writing of a Constitution a top priority. Constitution making must be approached with an awareness and recognition of the evil effects of power. Therefore, a Constitution must be created based upon the premise that an individual's rights are paramount even against the instruments of the state and against politicians. The state exists for the individuals who inhabit it than the other way round. While some of the great democratic Constitutions of the world have lasted centuries, particularly the Constitution of the United States which has lasted for more than two hundred years with only twenty seven amendments[7] our present Constitution that came into effect in 1978 was amended twenty one times during this very short period. Sri Lanka has a history of changing Constitutions at the whim of the ruling elite and making amendments to strengthen their political power as and when required. "It is the basic and cardinal principle of interpretation of a democratic Constitution that it is to be interpreted to foster, develop and enrich democratic institutions. To interpret a democratic Constitution so as to squeeze the democratic institutions off their life is to deny the people or a section thereof the full benefit of the institutions which they have established for their benefit."[8] One of the main reasons why Sri Lanka's three post-independent Constitutions failed to fashion a united nation was due to failure on the part of constitutional makers and political and legal elites of the time, to fully appreciate the importance of basic principles of constitutionalism. The principle of constitutionalism is the most basic and important concept for the limitation of power and the protection of individual autonomy.

"A Constitution should express the dreams and aspirations of the people." However, neither of the two indigenous Constitutions[9] of this country, represent in their fullest diversity the dreams and aspirations of the people of this country. Unfortunately, both in 1972 and 1978 we have seen a very short term attitude to the making of Constitutions. They have been seen as instruments to achieve particular political objectives. Both these

6 https://en.wikipedia.org/wiki/Constitution accessed on 08.08.2023

7 The 27th Amendment was ratified on May 7, 1992

8 Prof Manubhai D Shah v Life Insurance Corpn (1981) 22 Guj LR 206

9 Constitution of the First Republic of 1972 and the Constitution of the Second Republic of 1978

documents were drafted to suit the convenience of those who drafted them and based upon a limitation of vision and sought to represent a narrow area of political thinking that had at that time dominated the Parliament. This should not be the way in which a Constitution should be adopted. The Constitution should be the legacy of the entire people. It should be something people could feel in their numerous diversities the dreams and aspirations of the people. As such, this article will take a step backwards and appraise the process of Constitution making in Ceylon/Sri Lanka since independence.

Adoption of the Soulbury Constitution

The British made a Declaration in 1943 promising Ceylon "full internal self-government" under a new Constitution and also gave the Board of Ministers an undertaking that there will be a new Constitution which would be examined by a suitable Commission. The Secretary of State for the Colonies announced[10] the appointment of the Soulbury Commission and also declared that the Commission shall be mandated not only to examine the draft Constitution prepared by the Ministers but also seek views of minority groups.[11] Though the Ministers completed their draft Constitutional Scheme in February 1944, they withdrew it in August, owing to a difference of opinion with the British Government with regard to the scope of the terms of the Commission.[12] The Soulbury Commission visited throughout the Island between 22 December 1944 and 9 April 1945, but none of the Ministers gave evidence before the Commission. The Ministers argued that the Commission should be limited to the examination of the draft Constitution made by them, and the rights of the minority groups will be protected by the requirement that the passage of any Constitution that may result shall require a vote of three-fourths of the total membership of the State Council. In its report, the Commission basically agreed with the Minister's Scheme. A White Paper embodying the decisions of the British Government was published on 31 October 1945, and the proposals contained therein were accepted by the State Council, and on 15 May 1946, the Ceylon (Constitution) Order in Council 1946 gave effect to the recommendations of the Soulbury Commission.[13] The unique feature of this Constitution was the fact that the question of citizenship was kept out of the Constitution to be dealt in the first Independent Parliament of Ceylon, because all Constitutions under which the British Government at that period undertook the de-colonization process settled the issue of citizenship for each newly independent nations of the British Commonwealth.

The 1946 Constitution was the first in a series of Westminster-Whitehall Model Constitutions which the British provided its colonies on the eve of independence.[14] It had

10 in July 1944

11 Lakshman Marasinghe, The Evolution of Constitutional Governance in Sri Lanka

12 J.A.L Cooray, Constitutional and Administrative Law of Sri Lanka

13 Nihal Jayawickrama, Constitutional Legitimacy: The Sri Lankan Conundrum

14 Supra Note 11

no ideological basis, and professed no economic or social objectives.[15] It established the essential framework for government by creating the principal institutions and defining their powers.[16] The principle aim of the Soulbury Constitution was to preserve the existing economic base and as such the Commissioners intended to provide a constitutional framework within which an Independent Ceylon could evolve its own economic growth utilizing the 'free-market' economy as her guiding principle.[17] Some positive features of the Soulbury Constitution are as follows:

- The Legislature consisted of the Governor General and two Houses, namely the Senate and the House of Representatives. The Senate consisted of 30 members, 15 of whom were elected by the House of Representatives and 15 nominated by the Governor General. The House of Representatives consisted of 95 members elected on universal adult suffrage, with 6 members nominated by the Governor General. However, during its 25 years of existence the Senate confronted the wishes of the House of Representatives only twice. "But the contributions made by its members in the legislative process through the detachment, experience and knowledge they brought to bear in the debates were significant."[18]
- Creation of an independent Public Service Commission vested with the power of appointment, promotion, transfer, dismissal and disciplinary control of public officers.
- Provision for an independent Judiciary. Chief Justice and Puisne Judges of the Supreme Court were appointed by the Governor General and held office during good behaviour. They could not be removed except by the Governor General on an address of the Senate and the House of Representatives. It is also significant that there was an express provisions that every Judge of Supreme Court appointed and in office before the Constitution came into operation was to continue in office.
- Implied provision for judicial review of constitutionality of legislation.
- Provisions for the independence of all judicial officers through the establishment of an independent Judicial Service Commission. In ***Liyanage v The Queen***[19] the Privy Council stated that "the provisions of the 1946-47 Constitution relating to Judicature manifested an intention to secure to the judiciary a freedom from political, legislative and executive control." However, there was one section that militated against judicial independence i.e. Section 52(3) of the Constitution.[20]

15 Ibid

16 Ibid

17 Supra Note 12

18 Rohan Edirisinha, Sri Lanka: Constitutions Without Constitutionalism a Tale of Three and a Half Constitutions

19 (1965) 68 N.L.R. 265

20 Section 52(3) Provides that the age of retirement of Supreme Court Judges was 62 years but the Governor General could permit a Judge who had reached that age to continue in office for a period not exceeding 12 months

- Inclusion of Section 29(2) as the main constitutional protection for minority interest. Though Section 29(1) provided that Parliament could make law for the "peace, order and good government" of the island. Section 29(2) provided that Parliament could not confer upon any community or religion, a benefit which was not rendered on other communities or religions and the Constitution also provided that any law made in contravention of 29 (2) would be void. Section 29(4) enabled constitutional provisions to be amended by a two-thirds majority of the legislature. It must be noted that this limitation on parliamentary sovereignty was not an attempt by the British to retain foothold in Ceylon, but an attempt to create a constitutional dispensation to suit the multi ethnic and multi religious context in the country.

Subsequently, the Ceylon Independent Act of 1947 severed the legal links which bound Ceylon to the British. After the enactment of the Independence Act and the Independence Order in Council the Courts recognized the Constitution which was contained in the Ceylon Order in Council as the supreme law in Ceylon and the Courts took the view that the Independence Act did not enlarge the area of the powers of the Ceylon Parliament under the Constitution to include the power to amend the Constitution notwithstanding the requirements of Section 29. A centerpiece of the Soulbury Constitution, Section 29, provided guarantees to equal protection and non-discrimination. As the social and political efforts of the impugned citizenship legislation or the motives for its enactment was not examined by the Supreme Court and the Privy Council at that time they were unable to reach a determination on the constitutional issues within a broader concern of the objects and purposes of the Constitution.[21] Similarly, when the Official Language legislation was challenged in 1950s, the case was disposed by the Supreme Court on the ground that a public servant did not have a legally enforceable contract.[22] In ***the Bribery Commissioner v. Ranasinghe***[23] The Privy Council laid down the view that the provisions of Section 29(2): "represents the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the constitution; and these are therefore unalterable under the constitution." Following this, a process to replace the Soulbury Constitution with an autochthonous model produced out of a unique constitutional exercise, commenced in 1972.

21 G.S.N. Kodakan Pillai Vs P.B. Mudanayake (1953) 54 N.L.R. 350 (Supreme Court); G.S.N. Kodakan Pillai Vs P.B. Mudanayake (1953) 54 N.L.R. 433 (Privy Council)

22 C. Kodeeswaran Vs The Attorney General (1970) 72 NLR 337. The Supreme Court judgment was reversed on the question relating to the rights of a public servant to sue in contract, and the constitutional issues were referred back to the Supreme Court. The case was not proceeded with, as it had been overtaken by the adoption of the First Republican Constitution in 1972

23 (1964) 66 N.L.R. 73

Autochthonous Constitution

First Republican Constitution of 1972

The framers of the 1972 Constitution, while providing for a republic, wanted an "autochthonous" or "home grown" Constitution. The makers of the Constitution intended to owe its force of law entirely to the people of Sri Lanka and not to be derived from the previous Constitution which was enacted by the King in Council, or from the Ceylon Independence Act enacted by the British Parliament. The method thus adopted for the establishment of such an autochthonous Constitution was its enactment by a Constituent Assembly deriving its powers from the people. Although this Assembly was composed of the members of the House of Representatives, it did not function as a House of Representatives of the previous Constitution. Following a resolution adopted at a meeting of members, it functioned solely as the Constituent Assembly of the people of Sri Lanka for the purpose of adopting a Constitution for this country.

The 1972 Constitution did not only abolish many of the minority safeguards including Section 29 of the Soulbury Constitution, but also entrenched majoritarianism in the Constitution, gave Buddhism the foremost place, made Sinhalese the sole official language, provided explicitly the nature of the State as a unitary state,[24] introduced a strong centralized political structure with few checks and balances and repudiated the concept of an independent public service commission and public service. As such, the introduction of the 1972 Constitution was a major landmark in the process of national disintegration.[25] Despite the "nationalist" rhetoric of its framers, the 1972 Constitution introduced the British doctrine of Parliamentary supremacy, which was rejected by the Soulbury Constitution.[26] The new Constitution was opposed by Tamil parties and the main opposition party, the United National Party, the Soulbury Constitution on the other hand was accepted with varying degrees of enthusiasm across the ethnic and political divide. As such, probably at the time of adoption, the new Constitution commended less popular acceptance and support compared to Soulbury Constitution at the time of its adoption.

The new Constitution was designed to facilitate the introduction of the then United Front Government's radical economic agenda and initiated a trend in Sri Lankan constitution making – "an instrumental use of Constitutions."[27] "Traditional view of the judiciary as upholders of the status quo and generally conservative in political orientation prompted the framers of the 1972 Constitution to whittle down the powers of the judiciary and declare in no uncertain terms that the power resided in the elected

24 Similar to most Constitutions in the democratic world the Soulbury Constitution did not prescribe the nature of the State in the Constitution.

25 Supra Note 18

26 Ibid

27 Neelan tiruchelvam

representatives of the people."[28] The doctrine of separation of power was rejected and judicial review of legislation was repudiated. In the 1972 Constitution there were several provisions undermining the independence and autonomy of the judiciary, while providing the executive and legislative arms of governments with excessive influence in the judicial domain.[29] Though a Chapter setting out a list of fundamental rights and freedoms was incorporated into the Constitution for the first time,[30] it had little impact on the lives of citizens because Section 18(2) contained a blanket limitation on these rights and freedoms if the executive or legislature thought it fit to do so. Section 18(2) "provided that the exercise and operation of the fundamental rights and freedoms shall be subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of the rights and freedoms of others or giving effect to the principles of State Policy." In addition to the barring of judicial review of legislation, Article 18 of the Constitution protected laws which were inconsistent with the chapter on fundamental rights.[31] The 1972 Constitution was therefore, not only fundamentally flawed from the perspective of constitutionalism, but also undermined the principle of supremacy of Constitution and sought to laud the status of the legislature.

Second Republican Constitution of 1978

Having obtained 5/6ths of the number of seats (140) at the General Elections the UNP[32] that came into power in 1977 opted to pursue a different political and economic agenda to that of the previous regime through the adaptation of a new Constitution that provided for a strong and stable Executive President. Stability for rapid economic development seemed to have been the dominant consideration of the framers of the Constitution. Soon after the General Elections it was declared by a then prominent minister that the country needed "a Constitution that will be an accelerator, not a brake on progressive development." An amendment was brought to the First Republican Constitution[33] by which an Executive Presidential form of government was established and carried on into the Second Republican Constitution. Subsequently, the 1978 Constitution was enacted under Article 51 of the 1972 Constitution and thus, the 1978 Constitution draws its legality from the 1972 Constitution. One could say that the constitutional culture was

28 Supra Note 18

29 Sections 125, 126, 127, 129 and 130

30 Chapter VI, Section 18

31 Section 18 (3) –" All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the provisions of subsection (1) of this section." Muslim Marriage and Divorce Act of 1951; under Thesavalamai, a married woman is required to obtain the consent of her husband to sell her property. See section 6 of the Matrimonial Rights and Inheritance ordinance (Jaffna) No. 1 of 1911 where the wife should obtain the written consent of her husband to dispose her separate property.

32 United National Party

33 2nd Amendment to the 1972 Constitution

charted while drafting and adopting the 1978 Constitution, as the process was non-consultative, non-participatory and was the unilateral endeavor of the then ruling party.

The 1978 Constitution like the previous 1972 Constitution is not only autonomous; it is also autochthonous and home grown. The Preamble of the 1978 Constitution states: "The people of Sri Lanka having by their mandate freely expressed and granted … entrusted to and empowered their Representatives elected on that day to draft, adopt and operate a new Republican Constitution……, We, the freely elected Representatives of the people, in pursuance of such mandate …. Do hereby adopt and enact this Constitution as the Supreme Law ……" As stated in the preceding paragraph in the enactment of the 1972 Constitution there had been a break with the previous legal order, namely, the British Crown and Parliament. The 1978 Constitution confirmed that break and the adoption of the new Constitutional and legal order established by the 1972 Constitution.

The Constitution of 1978 was much more creative than the 1972 Constitution and adopted several features from the French and British Constitutions while retaining several features from the British Constitution. The two significant reforms introduced by the 1978 Constitution were the replacement of the 'first past the post' electoral system with 'proportional representation'[34] and an inclusion of a more comprehensive statement of fundamental rights.[35]

Most radical change introduced by the 1978 Constitution was the introduction of Executive Presidency, which undermined the notion of parliamentary supremacy by conferring considerable power in one persons who combined the ceremonial functions of the former Governor General or President, with substantive powers of the Prime Minister. The President is elected by the people for a six year term and cannot serve more than two terms.[36] Though the Constitution originally contemplated a fix term of office for the new President, following the Third Amendment to the Constitution a President who has completed the first four years of his term can seek re-election. The President has the power to preside over the Cabinet, decide the number of ministries, appoint members of Parliament, Cabinet Ministers and other Ministers and is not bound to consult the Prime Minister regarding these appointments.[37] Under the 1978 Constitution the Prime Minister and Cabinet Ministers hold office at the will and pleasure of the President and the President can assign himself any portfolio.[38] The Constitution further provides that while any person holds office as President that no proceeding shall be instituted against him

34 Proportional representation system helps to achieve a greater balance between the popular vote and the strength of Parliamentary representation, and ensures that a wider spectrum of political opinion would secure representation in the legislature.

35 Rights and freedoms are set out in greater detail with enforcement mechanisms spelled out and restrictions more narrowly tailored (Article 16)

36 Article 31

37 Article 44

38 Ibid

in respect of anything done or omitted by him either in his official or private capacity,[39] and this immunity permits the President to make highly defamatory statements about political opponents during election campaigns which if made by any other person would constitute a violation of election laws or defamation laws. Under the 1978 Constitution the President also enjoys limited powers over financial supply which vitiates the principle that the legislature has complete control over finance. Article 150(3)[40] enables a President facing a hostile legislature to use powers to dissolve Parliament and rule the country without Parliament for several months. There had been instances when some Presidents opted to hold the finance portfolio thereby reducing parliamentary control on finance. "The supremacy of Presidential power over Parliament can been seen in relation to the Public Security Ordinance where the President is entitled to introduce regulations which have the effect of over-riding, amending or suspending the operation of any law enacted by Parliament."

Another device that confers considerable power in the Executive President is the referendum which enables the President to place a particular proposal before people for approval and the referendum can be used to grant extra protection to certain fundamental constitutional provisions. These provisions can be amended only if the proposed change enjoys two-thirds majority in Parliament, but also if it receives the endorsement of the people at a referendum.[41]

Though many feel that the 1978 Constitution is fundamentally flawed, there is some attempt to engage the people and Article 4 reposes sovereignty in the people rather than in the legislature or organs of governance. The Supreme Court in the 19th Amendment determination emphasized this point and said "unlike under the 1972 Constitution, sovereignty vests in the people." A directive principle[42] imposes an obligation on the state to strengthen the democratic structure of governance among other things by "affording all possible opportunities to the people to participate at every level in national life and in governance." The fact that sovereignty is in the people and not in the legislature is emphasized by the fact that the legislative power of the people includes the power to make law through a process of a referendum. But there is a vast gap between what ought to be the process of law making and the actual practice, because of the culture of authority and secrecy in respect to law making and policy making in our country.

Ours is one of the few constitutions of the word that does not allow for judicial review of legislation. Basic principle of constitutionalism is that the legislature should try

39 Article 35

40 Provides that where President dissolves Parliament before the Appropriation Bill for the financial year has been passed, he may authorize the issue from the Consolidated Fund, and the expenditure of such sums as he may consider necessary for a period of item until the new Parliament is summoned to meet.

41 Article 83

42 Article 27(4)

to enact legislation which is consistent with the supreme law of the land. Since 1972 however, we have the practice of pre-enactment review which is ineffective since there is inadequate opportunity for conflicting views to be openly and adequately discussed before determinations are made and thus no in-built incentive to draft legislations that are consistent with the Constitution. Over the years we have witnessed dramatic pieces of legislation which have an enormous bearing on the political life, the individual rights and social life being rammed through without discussion. The tendency of the Sri Lankan Constitution has been to concentrate power at the apex of the political system.

Provisions relating to the judiciary are an improvement compared to the previous Constitution. Judges appointed by the President to the Supreme Court and Court of Appeal hold office during good behaviour and shall not be removed except by an Order of the President made after an address to parliament supported by majority Members of Parliament has been presented to the president for removal on the ground of proved misbehaviour or incapacity.[43] While rights and freedoms are set out in greater detail with enforcement mechanisms spelled out and restrictions more narrowly tailored.[44] The 1978 Constitution too opted to reject the idea of an independent public service. Though a Public Service Commission was reintroduced since it is dependent for its power on Cabinet delegation, its powers are limited.[45]

Following pressure from the Indian government a system of devolution of power was incorporated into a Constitution designed to centralize power, through the Thirteenth Amendment to the Constitution. However, this Amendment failed to introduce substantial and secure devolution of power. "It provided for a veneer of devolution while retaining vast powers with the center and the Amendment failed to grant complete control over any subject to a Provincial Council."

Of the twenty one amendments made to the Constitution, the initial 16 amendments were made within the first decade of the enactment of the Constitution and many amendments were largely enacted to smooth political outcomes for the party in power. As such, the amendment processes were viewed as instrumental to the ruling party's agenda. 3rd Amendment enabled the President to seek re-election after four years, which gave the incumbent the power to choose a politically opportune moment to hold the presidential elections. It is notable that during the time of adaptation one of the arguments put forward by the drafters of the Constitution in its favours was that it provided for fixed and limited term of office for the President. The 4th Amendment was passed to extend the term of the first Parliament and maintain its composition. The 6th Amendment prohibited persons from supporting, espousing, promoting, financing, encouraging or advocate for the establishment of a separate state within the territory of Sri Lanka. Furthermore, it

43 Article 107
44 Article 16
45 Article 57

prevented any political party or other association or organization from having as one of its aims or objects the establishment of a separate state within the territory of Sri Lanka. The 10th Amendment repealed the constitutional protection requiring two thirds majority in Parliament for the Proclamation of Emergency under Public Security Ordinance. The 13th Amendment was introduced in 1987 under pressure from government of India, to provide for a decree of provincial autonomy. The passage of this Amendment tore at the unity of the government, leading to defection by senior members of the governing party and resort to an unprecedented corralling of members to ensure that they arrived in Parliament to vote on the bill. The 14th Amendment extended the immunity of the President: increased the number of members of Parliament to 225 of which 196 are elected while 29 seats are distributed among the political parties in proportion to the votes they received, to fill as National List members; clarified the validity of referendum; appointed a delimitation commission for the division of electoral districts into zones and clarified proportional representation. The 15th Amendment clarified the cut-off point to be one twentieth of the total votes polled; further recommended that the political parties appoint members from communities, ethnic or otherwise, who are insufficiently represented in Parliament under the National List they are not mandated to do so. The practice however has been for political parties to appoint more often than not the members who have been defeated in the election, making a mockery of people's franchise. The 16th Amendment made provisions for Sinhala and Tamil to be languages of administration and legislation. The 17th Amendment which was viewed enthusiastically and secured bi-partisan support for its enactment was introduced to establish the Constitutional Council and independent commissions to improve democratic governance. However, it was never implemented. The 18th Amendment removed the limitation on re-election of the President and proposed the appointment of a Parliamentary Council to decide the appointment of independent posts such as commissioners of election, human rights and judges of the superior courts. The 19th Amendment was passed to annul key elements of the 18th Amendment that removed term limits for the President, while reinstalling the key elements of the defunct 17th Amendment that established independent commissions. The 19th Amendment also introduced the right to information, established a Constitutional Council that included civil society representation to provide oversight for appointments to independent commissions, removed the president's powers to unilaterally dissolve Parliament at will and defined the context when Parliament could be dissolved. The political tragedy of October 2018 ended with constitutional order being restored demonstrated that the 19th Amendment introduced in 2015 was in deed effective. The 20th Amendment repealed the limitation on the President's power to dissolve Parliament placed by the 19th Amendment, removed the disqualification for dual citizens from being elected as a Member of Parliament, reintroduced provisions which allows the government to pass legislation as 'Urgent Bills' and abolished the Constitutional Council and replaced

with the Parliamentary Council. The 21st Amendment was enacted in response to large-scale public protests at a time when Sri Lanka was reeling from massive economic crisis and political chaos. This amendment re-introduced, the Constitutional Council and the appointments to the independent commissions depended upon the recommendation and approval of the Constitutional Council, and disqualification for dual citizens being elected as a Member of Parliament; the composition of the cabinet of ministers was reduced to 30 and non-cabinet and deputy ministers to 40 and these limits can be bypassed if a national government is formed; Under the 19th Amendment the Presidential power was reduced as the President had to act on the advice of the Prime Minister when appointing or removing ministers in comparison under the 21st Amendment the President should consult the Prime Minister and the powers are limited but not as much as the 19th Amendment. Thus, the history of constitutional amendments in Sri Lanka is quite uninspiring and has not always amounted to reform.

Conclusion

Sri Lanka is still experiencing the ill effects of the 'engineered" Constitutions even after 75 years since independence, especially a severe crisis with regard to the rule of law. The whole problem is that the Constitution called the supreme law, the basic law, the embodiment of the democratic mandate of the people is treated as just another law to be amended and added to as the wielders of power think it necessary, for their advantage having no regard to accepted human rights. Today, the Constitution is being treated often in the daily administration as a mere scrap of paper. On many an occasion constitutional fundamentals have been inadequately appreciated or deliberately ignored by the constitution makers. It is a sacred trust not to be quibbled away by clever arguments. It embodies certain principles which must never be disrespected. It is a trust in which if you undermine the principals and ignore the trust you break all the tendons and cords that bind society together.

Our present political, economic crisis and more than two decades of armed ethnic conflict which ravaged this country are very much related to the constitution making and amending from 1948 to 2023. The people of Sri Lanka are demanding transparency, accountability and rights; and are aspiring to define their identities, set precedents for inclusive political processes, and create a Constitution that caters to their aspirations. As such, this necessitates a Constitution which will conform to constitutional first principles and modern trends in constitution making, with the ultimate objective of creating a democratic system of governance that redress social inequality, addresses ethnic conflicts, and that accommodates universally accepted values and norms.

AN OVERVIEW OF THE LAW RELATING TO STATE LANDS – RECOVERY OF POSSESSION

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The State Lands (Recovery of Possession) Act No.7 of 1979 as amended by Acts No.58 of 1981, 29 of 1983, 45 of 1992 and 29 of 1987 was intended to provide the State with an expeditious process to recover possession of state land from persons in unauthorized or unlawful occupation thereof. The original Act had not define the phrase "unauthorized possession or occupation". A new definition has been introduced to the term "unauthorized possession or occupation" by amendment Act No: 29 of 1983 which reads as "except upon a valid permit or other written authority of the State granted in accordance with any written law and includes possession or occupation by encroachment upon state land"

Recovery Procedure under the Act

Under section 3 of the Act, the competent authority can issue a quit notice only if he is of the opinion that the person to be evicted is in unauthorized occupation.[1] When a quit notice has been served or exhibit under section 3, the person in possession or occupation of the land to whom such notice relates or any dependents of such person shall not be entitled to possess or occupy the land after the date specified in such notice except as provided in section 9.[2] Further such person together with his dependents should vacate such land and deliver vacant possession to the competent authority or to whom he is required to do so by such notice.[3]

Where any person fails to comply with Section 4(b) in respect of any quit notice issued or exhibited under this Act, any competent authority (whether he is or not the competent authority who issued or exhibited such notice) may make an application in writing in the Form 'B' set out in the Schedule to this Act to the Magistrate's Court within whose local jurisdiction such land or any part thereof is situated. Such an application should set forth that, (i) he is a competent authority for the purpose of the Act, (ii) the land described in the schedule to the application is in his opinion a State Land, (iii) a quit notice was issued on the person in possession or occupation of such land or was exhibited in a conspicuous place in or upon such land and (iv) such person named in the application is in his opinion in unauthorized possession or occupation of such land and has failed to comply with

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1 The section reads thus;

2 Section 4[a]

3 Section 4[b]

the provisions of paragraph (b) of Section 4 in respect of such notice relating to such land. In addition, the application should be filied praying for the recovery of possession of such land and an order of ejectment of such person in possession or occupation and his dependents, if any, from such land.[4]

Every such application under section 5(1) shall be supported by an affidavit in the Form 'C set out in the Schedule to the Act verifying the matters set forth in such application and shall be accompanied by a copy of the quit notice.[5]

When one considers the structure of the Act, all which is required is for the Competent Authority to form the opinion that the person is in unauthorized possession or occupation of any State land and the Competent Authority can serve "quit notice" under the Act. In considering the provisions of the Act, "where the competent authority had formed the opinion that any land is a State land, even the Magistrate is not empowered to question his opinion.[6]

Upon receipt of the application made under Section 5, the Magistrate shall forthwith issue summons on the person named in the application to appear and show cause on the date specified in such summons (being a date not later than two weeks from the date of issue of such summons) why such person and his dependents, if any, should not be ejected from the land as prayed for in the application for ejectment.[7] Every application made under section 5 shall be finally disposed of within a period of two calendar months from the date of such application and where a court; makes, in pursuance of any such application, an order under section 7 or section 10, directing that any person be ejected from the land referred to in that order, the court shall make all such orders as are necessary to ensure that such persons are ejected from that land within a period of three months from the date of the application for ejectment.[8]

If on the summons returnable date, the person on whom such summons was issued fails to appear or informs the Court that he has no cause to show against the order for ejectment, the Court shall forthwith issue an order directing such person and his dependents, if any, to be ejected forthwith from the land.[9] If a person on whom summons has been served under section 6 appears on the date specified in such summons and states that he has cause to show against the issue of an order for ejectment the Magistrate's Court may proceed forthwith to hear and determine the matter or may set the case for inquiry on a later date.[10]

4 Section 5[1] [a] & [b]
5 Section 5[2]
6 Farook v. Goonewardena Government Agent Amparai 1980 2 S.L.R 243
7 Section 6
8 Section 6A
9 Section 7
10 Section 8[1]

Scope of the inquiry

Under section 9 of the State Land (Recovery of Possession) Act, the only defense available to a person summoned is to establish that he/she is in occupation of the said land upon a valid permit or other written authority of the state granted in accordance with any written law and such permit or written authority is in force and not revoked or rendered invalid.

Section 9 of the Act, which specifies the scope of the inquiry, states that the person on whom summons under section 6 has been served shall not be entitled to contest any of the matters stated in the application under section 5 except that such person may establish that he is in possession or occupation of the said premises upon a valid permit or other written authority of the State granted in accordance with any written law and that such permit or authority is in force and not revoked or otherwise rendered invalid. Accordingly, the only permissible basis that such a person could use to possess or occupy such land is to have a valid permit or other written authority granted by the State. Additionally, such permit or authority should be avail in force at the time of serving summons under section 6 and should not revoked or otherwise rendered invalid.

In the case of Muhandiram V. Chairman, No. 111, Janatha Estate Development Board[11], it was held that "In an inquiry under the State Lands (Recovery of Possession) Act, the onus is on the person summoned to establish his possession or occupation that it is possessed or occupied upon a valid permit or other written authority of the State granted according to any written law. If this burden is not discharged, the only option open to the Magistrate is to order ejectment."

It was held in Farook v Gunewardene, Government Agent, Amparai[12] that Section 9(2) is to the effect that the Magistrate cannot call for any evidence from the Competent Authority in support of the application under Section 5. It means the Magistrate cannot compel the Competent Authority to prove that the land described in the schedule to the application is State land.

In the case of Aravindakumar V Alwis and others,[13] it was held that "According to the scheme provided in the Act a person who is in possession or occupation of any state land and has been served with quit notice under Section 3 of the Act can continue to be in possession or occupation of the land only upon a valid permit or other written authority of the State described in Section 9 of the Act".

In the recent judgment of Thalduwa Lekam Gamaralalage Seelawathi and others v. J. C. M. Priyadarshani,[14] the Court of Appeal held that it is evident from the plain reading of the provisions contained in Section 9(1), the legislature did not envisage a situation where

11 [1992] 1 Sri L R 110
12 (1980) 2 Sri L.R. 243
13 (2007) 1 Sri L R 316
14 CA [PHC] Appeal 79/2012 decided on 22/02/2019

legal competency or the standing of a Competent Authority to make an application under Section 5, should be allowed to contest by a Respondent, after such an application for ejectment has been filed before the Magistrate's Court in view of the statutory provisions contained therein. Therefore, once an application is made to the Magistrate's Court by a Competent Authority in compliance with the relevant statutory provisions of the State Lands (Recovery of Possession) Act No.7 of 1979, it has no jurisdiction to inquire into the question of whether the land in dispute is in fact a State land or not.

Ihalapathirana v. Bulankulame, Director-General, U.D.A.[15] is a case where the Petitioner was appointed as Manager of the Chilaw Rest House by the U.D.A. under section 5 of the Rest House Act. The Petitioner had to make a monthly payment to the U.D.A. as agreed but failed to continue the payments regularly. Even after several reminders, he could not make the payments as agreed. The U.D.A. cancelled the agreement and resorted to the provisions of the State Land (Recovery of Possession) Act and issued a quit notice. The Court held that;

> *"Land vested in the UDA is state land. A Rest House is state property. Possession of it 'without a permit or other written authority' is unauthorized possession. The State Lands (Recovery of Possession) Act can be used to secure eviction without recourse to a civil action".*

Procedure after the inquiry

After the inquiry, if the Magistrate is not satisfied that the person showing cause is entitled to the possession or occupation of the land he shall make an order directing such person and his dependents, if any, in occupation of such land to be ejected forthwith from such land.[16] No appeal shall lie against any order of ejectment made by a Magistrate.[17] It is clear from a plain reading of Section 10(2) of the State Lands (Recovery of Possession) Act No. 7 of 1979 that the Legislature intended that the ouster clause should effectively remove the right of appeal in respect of Orders of Ejectment made under Section 10(1) of the State Lands (Recovery of Possession) Act. It was held in SC Appeal 31/2009 and SC Appeals 35/2009 – 78/2009[18] that Section 10(2) specifically removes the right of appeal against the Orders of Ejectment by the Magistrates' Courts.

Miscellaneous provisions

While providing the State with an expeditious method to recover possession of State land, the Act also provides a safeguard to the person in possession as per Sections 12 and 13 of the Act. It states that nothing in the Act contained shall preclude any person who

15 [1988]1 Sri L R 416
16 Section 10[1]
17 Section 10[2]
18 Decided on 06/07/2018

has been ejected from a land under the provisions of this Act or any person claiming to be the owner thereof from instituting an action against the State for the vindication of his title thereto within six months from the date of the order of ejectment.[19] Further, where an action instituted under Section 12 by any person against the State for the vindication of title to any land from which he has been ejected under this Act has been decided in favour of such person, such person shall be entitled to recover reasonable compensation for the damage sustained because of him being compelled to deliver the possession of the land.[20] In Jayawardana Mudiyanselage Sumanawathie v. Hon. Attorney General and others[21] it was held that in an action filed under Section 12 of the Act, the owner of the land in dispute can get a declaration that he is the owner of the said land.

Section 14(1) of the Act allows the Minister in charge of State lands to control and give directions to a competent authority in the exercise, performance and discharge of his powers, duties and functions under the Act. It does not require a competent authority to obtain the sanction of the Minister in charge of State lands prior to exercising, performing and discharging his powers, duties and functions under the Act. If the Minister in charge of State lands gives lawful directions to a competent authority, he is bound to follow them. On the other hand, section 14(2) of the Act prohibits a competent authority from exercising any power conferred on him by section 3 of the Act in relation to any land vested in, owned by, or under the control of institutions referred to therein without the prior approval of the respective Minister.

In Alwis v. Wedamulla, Additional Director General of U.D.A.[22] it was held that proceedings in ejectment could be instituted by the Urban Development Authority against a person who is in occupation of land vested in the Urban Development Authority provided such application to eject is authorized and have had the written approval of the Minister of Housing. He held that the proof of grant of such approval is a condition precedent to the institution of proceedings in ejectment. However, Amerasinghe J. in Wedamulla v. Abeysinghe[23] did not uphold the position of the Court of Appeal that proof of grant of such approval is a condition precedent to the institution of proceedings for ejectment. Justice Janak De Silva in H. K. Amarasiri Gunaratne v. Disanayake Mudiyanselage Senarath Bandara[24] held that the correct legal position is that even where section 14(2) of the Act applies, the competent authority need not produce the relevant approval with the application made to the Magistrates Court.

19 Section 12
20 Section 13
21 CA 994/2000[F], decided on 05/09/2019
22 [(1997) 3 Sri L.R. 417]
23 [(1999) 3 Sri L.R. 26]
24 CA [PHC] 212/2006, decided on 24/07/2018

The court held in some cases that the papers constituting the application for ejectment should be in the statutorily prescribed form.[25] Prior to the amendment in 1983, the application and the affidavit had to provide that the land had to be 'state land'. However, by the amendment, it was imperative for the competent authority to submit his opinion that the land was 'state land'.[26] Justice A.H.M.D. Nawaz in Velu Velanantha Devi v. J. M. Chandrika Priyadarshani[27] held as follows;

> *"The affidavit affords evidence before the Magistrate, and the evidence has to be in accordance with the legislative language. It is this evidence that affords the Magistrate material that the individual is sought to be ejected from the state land. If this requirement is missing from the affidavit, the Magistrate is not invested with jurisdiction to embark on an inquiry to deprive the individual of his proprietary right. It is strict compliance that has to be insisted upon when the legislature itself has prescribed the form of the affidavit and the question of substantial compliance would not arise in these circumstances"*

In Namunukula Plantations Ltd v. Nimal Punchihewa, Chairman, Land Reforms Commission[28] it was held that the procedure in the Act can be invoked even where a person is in "unauthorized possession or occupation" of state land which was acquired under the Land Acquisition Act.

Conclusion

It is clear that provisions relating to recovery process under this act is an extraordinary remedy introduced to expedite the recovery process of state lands in order to utilize those lands according to the state land policy. On the other hand, it can be considered as a draconian piece of legislation which deprives the property rights of an individual. Therefore, such an order should be issued with due care and consideration. Further, a Court has to be vigilant to ensure that the plaintiff is seeking the recovery order with strict compliance of procedural rules and forms of the act, since such an order will affect the state land policy as well as the peoples' property rights.

25 Kandiah v. Abeykoon (1986) (3) CALR 41

26 The phrase 'is in my opinion' was introduced by the amendment Act No.29 of 1983 to the State Lands (Recovery of Possession) Act-the principal enactment

27 CA 06/15[Rev], decided on 05/08/2019

28 CA [PHC] 29/2016, Decided on 09/07/2018

AI AS A "CREATOR" AND "INVENTOR" PROTECTION OF WORKS CREATED AND INVENTED BY ARTIFICIAL INTELLIGENCE

Keerthi Kumburuhena*
Magistrate/ Additional District Judge Ratnapaura.

Abstract

The advent of inventive Artificial Intelligence (AI) has prompted a dispute over Intellectual Property (IP) laws, as ideas generated by them bring into question the patent system's inventorship requirements, which do not recognize nonhuman entities as inventors. The purpose of this research is to determine whether and to what extent IP laws may be used to protect AI-inspired inventions and creations. With this purpose in mind, the study examines the disparity between Sri Lankan and developed countries' IP laws in terms of protecting AI inspired inventions and creations. The study strongly encourages innovators, investors, and the general public to invent and use such applications. This, in turn, would contribute to the country's scientific and technological advancement. The research has evolved into an urgent necessity as it will bolster Sri Lanka's competitive edge in the artificial intelligence business and enables Sri Lanka to advance toward other national priorities and the Sustainable Development Goals. The findings of this study would also serve as a significant resource for researchers, scholars, legislators, policymakers, and general readers interested in AI and IP domain.

Keywords: Artificial Intelligence, Intellectual Property, Creation, Invention

1. What is Artificial Intelligence?

AI is a new digital frontier that will have a profound impact on the world.[1] Globally and in Europe, artificial intelligence is one of the strategic technologies of the 21st century[2], enabling innovation, efficiency, competitiveness, and well-being.[3] AI revolutionizes the

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1 WIPO, 'Artificial Intelligence and Intellectual Property: an interview with Francis Gurry' (WIPO September 2008) <https://www.wipo.int/wipo_magazine/en/2018/05/article_0001.html> accessed 25 October 2023.

2 WIPO Secretariat, 'WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence (AI): Summary of Second and Third Sessions' (Held in Geneva on 4th November 2020) (WIPO Publication 2021) 2.

3 European Parliament, Resolution of 12 February 2019 on a Comprehensive European Industrial Policy on Artificial Intelligence and Robotics, paragraph D.

production and delivery of products and services, as well as the ways in which people live, work[4], discover, and connect.[5] AI could be utilized to solve complex problems and perform the necessary actions.[6]

Machine learning, deep learning and artificial neural network are used in developing AI.[7] In the previous two decades, AI development has accelerated significantly.[8] This expansion has led to the development of several products and applications, ranging from automation, algorithms, and limited artificial intelligence to broad artificial intelligence.[9] Popular AI applications include self-driving cars and drones[10] (like the Google driverless car), natural language processing[11] (like Siri, Alexa, and Grammarly), weather forecasting and disaster warning[12], crop detection[13], DART[14] in the military[15], science and game applications[16], health sector applications like imaging and diagnostics, workflow optimization in hospitals, assessing a person's symptoms[17], care robots, medical robots,

4 WIPO, 'Artificial Intelligence and Intellectual Property: An Interview with Francis Gurry', (WIPO September 2008) <https://www.wipo.int/wipo_magazine/en/2018/05/article_0001.html> accessed 25 October 2023.

5 Chijoke Ukomadu, 'An Appraisal of the Relationship between Artificial Intelligence and Intellectual Property Rights', (2019-2020) 5 (1) (ABUAD Law Review) 2-3.

6 ibid 1, 2.

7 Neil Mehta, Murthy V Devarakonda , 'Machine Learning, Natural Language Programming, and Electronic Health Records: The Next Step in the Artificial Intelligence Journey?' (2018) 141(6) The Journal of Allergy Clin Immunol 2019-2021.

8 Chijoke Ukomadu, 'An Appraisal of the Relationship between Artificial Intelligence and Intellectual Property Rights', (2019-2020) 5 (1) (ABUAD Law Review) 1, 2 < https://djetlawyer.com/artificial-intelligence-and-intellectual-property-rights/> accessed 25 October 2023.; And also in Ramathi Bandaranayake, Viren Dias, 'Towards a Realistic AI Policy for Sri Lanka', (LirnEasia 2022) < https://lirneasia.net/wp-content/uploads/2022/01/LIRNEasia-Towards-a-Realistic-AI-Policy-for-Sri-Lanka.pdf> accessed 25 October 2023.

9 European Parliament, Resolution of 12 February 2019 on a Comprehensive European Industrial Policy on Artificial Intelligence and Robotics, reg 116.

10 European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics, principle 24-30.

11 Ramathi Bandaranayake, Viren Dias, 'Towards a Realistic AI Policy for Sri Lanka', (LirnEasia 2022) < https://lirneasia.net/wp-content/uploads/2022/01/LIRNEasia-Towards-a-Realistic-AI-Policy-for-Sri-Lanka.pdf> accessed 25 October 2023.

12 ibid

13 ibid

14 S. Cross and R. Estrada, 'Dynamic Analysis and Replanning Tool (DART): An Example of Accelerated Evolutionary Development' (1994) Proceedings of IEEE 5th International Workshop on Rapid System Prototyping 177-183.

15 PPG Dinesh Asanka, Harindra R. Fernando, A.M. Tharindu B. Adhikari, I.P.V Vithana Pathirage, Asoka S. Karunananda, 'State of Artificial Intelligence in Sri Lankan Software Industry' (2014) 1 (8) IJIRT 9, 10.;

And also, in; Sara Reese Hedberg, 'DART: Revolutionizing Logistics Planning', Edited by Scott L. Andresen, Histories and Futures (IEEE 2002) 81 < https://www.gwern.net/docs/ai/2002-hedberg.pdf> accessed 05 October 2023.

16 Hallevy, Gabriel 'The Criminal Liability of Artificial Intelligence Entities - from Science Fiction to Legal Social Control' (2010) 4(2) Akron Intellectual Property Journal 177.

17 Sara Gerke, Timo Minssen, and Glenn Cohen, Ethical and Legal Challenges of Artificial Intelligence-Driven Healthcare, (Elsevier 2020) 295.

human repair and enhancement[18], and drug discovery. (i.e., DABUS[19]), treatment of chronic diseases[20], disease mapping[21], and IP administration (i.e., WIPO's 'Brand Image'[22] and 'Translate'[23])

World Intellectual Property Organization (WIPO) categorized artificial intelligence into three areas; (1) AI techniques, (2) AI functional applications, and (3) AI application fields.[24] AI techniques are different core algorithmic approaches used to implement AI functions. AI functional applications cover the functions performed by AI techniques, independent of the field of application. AI technologies can be applied to multiple fields. Some examples under these categories are explained below.[25]

AI techniques are bio-inspired approaches, classification and regression trees, deep learning, expert system, fuzzy logic, instance-based learning, latent representation, machine learning, multi-task learning, neural network, ontology engineering, probabilistic graphical models, probabilistic reasoning, reinforcement learning, rule learning, supervised learning, support vector machine and unsupervised learning.

AI functional applications are, augmented reality, biometric, character recognition, computer vision, distributed AI, image and video segmentation, information extraction, knowledge representation and reasoning, natural language processing, object tracking, planning/scheduling, predictive analytics, robotics, scene understanding, semantics, sentiment analysis, speech processing, speech recognition, speech synthesis, speech-to-speech application.

Examples for AI application fields are banking and finance, business, document management and publishing, industry and manufacturing, life and medical sciences, security, telecommunications, transportation.

The WIPO classifies artificial intelligence as the branch of computer science that focuses on creating robots and systems that can perform jobs deemed to need human intellect.[26]

18 European Parliament, Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics, principle 31-40.

19 Jackie O'Brien Isobel Taylor, 'The year that was for DABUS, the World's First AI 'Inventor" (Inside Tech Law 2021) <https://www.insidetechlaw.com/blog/the-year-that-was-for-dabus-the-worlds-first-ai-inventor> accessed 08 October 2023.

20 European Parliament, Resolution of 12 February 2019 on a Comprehensive European Industrial Policy on Artificial Intelligence and Robotics, para-AF.

21 Ramathi Bandaranayake, Viren Dias, 'Towards a Realistic AI Policy for Sri Lanka', (LirnEasia 2022) < https://lirneasia.net/wp-content/uploads/2022/01/LIRNEasia-Towards-a-Realistic-AI-Policy-for-Sri-Lanka.pdf> accessed 25 October 2023.

22 WIPO, 'Artificial Intelligence and Intellectual Property: an interview with Francis Gurry', (WIPO September 2008) <https://www.wipo.int/wipo_magazine/en/2018/05/article_0001.html> accessed 25 October 2023.

23 WIPO, 'Artificial Intelligence in Intellectual Property Administration' (WIPO 2020) <https://www.wipo.int/about-ip/en/artificial_intelligence/ip_administration.html> accessed 08 October 2023.

24 WIPO, Technology Trends 2019: Artificial Intelligence (WIPO 2019) 146-149.

25 ibid 146-149.

26 WIPO, 'Artificial Intelligence and Intellectual Property' (WIPO 2021) <https://www.wipo.int/about-ip/en/frontier_technologies/ai_and_ip.html> accessed 08 October 2023.

The European Commission's high-level expert group on artificial intelligence describes AI as systems that exhibit intelligent behaviour by analysing their environment and acting autonomously to attain particular goals.[27]

European Commission proposal for a regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts (2021), defines AI system as, for a given set of human-defined objectives, software produced with one or more of the methodologies and approaches specified in Annex I can generate outputs such as content, forecasts, suggestions, or conclusions that influence the environments they engage with.[28] The Annex I of the said proposal included AI techniques and approaches as (a) Machine learning approaches including deep learning; (b) Logic- and knowledge-based approaches; and (c) Statistical approaches.[29]

Thus, machine learning and deep learning are two subsets of artificial intelligence. As a result of the growth of machine learning applications, human-intensive industrial processes are becoming less prevalent and less expensive.[30]

Sara Reese Hedberg[31] describes the history of artificial intelligence using the Dynamic Analysis and Replanning Tool (DART) as an illustration. DART is an AI-based decision support system that assists humans in planning the movement of equipment and personnel from Europe to Saudi Arabia. The article goes on to examine the new generation of artificial intelligence, in which military agencies around the world are discovering that knowledge systems provide potent, effective tools for tackling the increasing difficulties they encounter.

Harry Surden[32] outlines AI and how it is utilized by lawyers, individuals, businesses, judges, and government officials in the practice and administration of law. Shiranee

27 The European Commission's High-level Expert Group on Artificial Intelligence, 'A definition of AI: Main capabilities and scientific disciplines' (Brussels, 18 December 2018) <https://ec.europa.eu/futurium/en/system/files/ged/ai_hleg_definition_of_ai_18_december_1.pdf> 08 July 2002.; And also cited in Communication from the Commission on 25 April 2018 to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Artificial Intelligence for Europe, (Brussels, 25.4.2018) COM (2018) 237 final.

28 European Commission Proposal of 2021 for a Regulation of the European Parliament and of the Council Laying down Harmonised, Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending certain Union Legislative Acts, art 3 (1).

29 ibid, annex I.

30 Max Planck Institute for Innovation and Competition 'Intellectual Property Justification for Artificial Intelligence' (2020) 20-02 SSRN < https://ssrn.com/abstract=3539406> accessed 25 October 2023; and also, in Reto M. Hilty, Jörg Hoffmann, Stefan Scheuerer, Artificial Intelligence and Intellectual Property (OUP 2020).

31 Sara Reese Hedberg 'DART: Revolutionizing Logistics Planning', Edited by Scott L. Andresen, Histories and Futures (IEEE 2002) 81-83 < https://www.gwern.net/docs/ai/2002-hedberg.pdf> accessed 05 October 2023.

32 Harry Surden, 'Artificial Intelligence and Law: An Overview' (2019) 35(4) Georgia State University Law Review, 1304-1337.

Tilakawardane[33] discusses the advantages and disadvantages of employing artificial intelligence in the legal system. AI is a phrase used to characterize intelligent automation processes, such as machine learning, natural language processing, cognitive computing, and deep learning, as defined by the author. The author discusses the role of AI-based systems in the justice sector, categorizing them as (1) Legal retrieval systems and (2) legal analysis systems. The author elaborates on the ethical difficulties associated with artificial intelligence, including: (1) The persistence of bias in algorithms; (2) Issues of secrecy and proprietary knowledge; and (3) Unreliability.

This research is limited to the junction of AI and IP law and focuses primarily on the sufficiency of the current IP regimes, including copyrights, patents, industrial designs, database rights, and trade secrets (confidential information), in safeguarding AI-inspired ideas.

2. How AI is protected by IP?

Intellectual property is a set of rights that can't be seen or touched[34], like copyright, patents, trade secrets, and industrial designs. IP law protects and enforces the rights of inventors when those rights are violated or likely to be violated by unapproved actions of others. This protection is like a reward that encourages people to come up with new ideas[35] while giving them a way to make money off of them[36] through a government-sanctioned monopoly[37].

Copyright is usually enforced for works of literature, art and science.[38] Since AI can be used to make such works now, studying copyright in light of AI is important. A copyright is granted to the author of an original work[39], providing him with exclusive rights for its use and distribution. The requirement of originality in copyright was discussed in *Wijesinghe Mahanamahewa v. Austin Canter,*[40] *University of London Press Ltd. v. University Tutorial*

33 Justice Shiranee Tilakawardane, 'Artificial Intelligence in the Legal System: Opportunities and Concerns' (2019) 5 Judges Journal of Sri Lanka Judges' Institute 1.

34 University of New Hampshire Innovation (UNH Innovation), 'Innovation: Intellectual Property', <https://www.unh.edu/research/office-research-partnerships-and-commercialization-orpc/intellectual-property> accessed 08 October 2023.

35 Charlotte Waelde, Graema Laurie, Abbe Brown, Smita Kheria, Jane Cornwell, Contemporary Intellectual Property Law and Policy (3rd edn, OUP 2013) 9, para1.31.

36 ibid 1096.

37 Ryan Abbott, 'I Think, Therefore I Invent: Creative Computers and the Future of Patent Law' (2016) 57 B.C. L. Rev. 1079, 1096. <https://lawdigitalcommons.bc.edu/bclr/vol57/iss4/2> accessed 08 October 2023.

38 IP Act No.36 of 2003 of Sri Lanka s 6 (1).

39 ibid s 9.; And also in Charlotte Waelde, Graema Laurie, Abbe Brown, Smita Kheria, Jane Cornwell, *Contemporary Intellectual Property Law and Policy* (3rd edn, OUP 2013) *11-12, para 1.37-1.38.; And also in* Leenheer Zimmerman, 'It's an Original! (?): In Pursuit of Copyright's Elusive Essence' (2005) 28 COLM.J.L. and ARTS 187, 194 (2005); Swapni Tripathi and Chnadani Ghatak, 'Artificial Intelligence and Intellectual Property law' (2018) 7 (1) Christ University law Journal 83, 84.; And also in case law *Wijesinghe Mahanamahewa v. Austin Canter* (1986) 1 SLR 620; *University of London Press Ltd. v. University Tutorial Press Ltd* (1916) 2 Ch. 601- 608 – 609.; *L.B (Plastics) Ltd. v. Swish Products Ltd* [1979] R.P.C. 551 and *Interlego A.G. v. Tyco Industries Inc* (1988) RPC 343.

40 (1986) 1 SLR 620.

Press Ltd[41]*, L.B (Plastics) Ltd. v. Swish Products Ltd*[42] and *Interlego A.G. v. Tyco Industries Inc.*[43] Since current intellectual property law requires a right holder to be a legal person, which an AI is not, the question of who gets that copyright remains unanswered.[44] If creative works made by AI were not protected by copyright law, companies that have spent a fortune on AI platforms would be less likely to use them.

AI can even create software which is protected by copyright. In some jurisdictions, computer programs are eligible for patent protection when they produce technical effect.[45] In the EU, mathematical methods and computer programs could be protected by patents under Article 52(3) of the EPC when they are used a part of an AI system that helps make another technical effect; however, the effects of this kind of possible patent protection should be carefully looked at.[46] In other words, AI computational models can't get patents unless they have technical effects that go beyond the normal interaction between the program and the computer.[47] However, in certain countries including Sri Lanka, computer programs are ineligible for patent protection[48] in both statutory law and in case law[49] if there is no technical effect produced by a mathematical method used in the invention. This was discussed in United Kingdom in *In the Matter of Fujitsu Limited,*[50] *In Merrill Lynch's Application*,[51] *In Gale's Application*[52], *Aerotel Ltd v. Telco Holdings Ltd,*[53]*AT and T Knowledge Ventures LP and CVON Innovations Limited v. Comptroller General of*

41 (1916) 2 Ch. 601- 608 – 609.

42 [1979] R.P.C. 551.

43 (1988) RPC 343.

44 James Boyle, *Constitution 3.0: Freedom and Technological Change*: *Endowed by Their Creator? The Future of Constitutional Personhood* (Duke 2011) 194-213.

45 In United States- in *WMS Gaming, Inc. v. Int'l Game Tech* 184 F.3d 1339, 1348-49 (Fed. Cir. 1999); and *Diamond v. Diehr* 450 U.S. 175, 187 (1981); and *In re Alappat* 33 F.3d 1526, 1545 (Fed. Cir. 1994); and *Arrhythmia Research Technology v. Corazonix Corporation* 958 F.2d 1053, 22 USPQ2d 1033.; and In Australia- *RPL Central Pty Ltd v. Commissioner of Patents* [2013] FCA 871; and In *IBM v Commissioner of Patents* (1991) 33 FCR 218; and in Europe- *In the Matter of Vicom* 1987 2 EPOR 74.; And also in In *Re Freeman* (1978) 573 f. 2d 1237.; and *In re Walter* (1980) 618 F.2d 758.; and *In re Abele* (1982) 684 F.2d 902.

46 European Parliament Resolution of 20 October 2020 on Intellectual Property Rights for the Development of Artificial Intelligence Technologies, para-G.

47 Finology Ventures, 'Artificial Intelligence and Intellectual Property Rights' (Finology 2021) <https://blog.finology.in/Legal-news/artificial-intelligence-intellectual-property-rights> accessed 08 October 2023.

48 National Commission on New Technological Uses of Copyrighted Works USA (CONTU), 'Final Report on New Technological Uses of Copyrighted Works' (1981) 3 Computer L.J. 53, 69.

49 In United Kingdom-*In the Matter of Fujitsu Limited* [1997] EWCA Civ 1174, (1996) RPC 511 (Aldous LJ); and *In Merrill Lynch's Application* [1989] RPC 561; and *In Gale's Application* [1991] RPC 305.; and *Aerotel Ltd v. Telco Holdings Ltd* [2007] R.P.C. 7 [8] [31] (Jacob LJ).; and *AT and T Knowledge Ventures LP and CVON Innovations Limited v. Comptroller General of Patents* [2009] EWHC 343.; and in Australia- *Apple Computer Inc v. Computer Edge Pty Ltd* 1984 FSR 481.; and *Research Affiliates LLC v Commissioner of Patents* [2013] FCA 71; and in Canada- *Apple Computer, Inc. v. Mackintosh Computer Ltd* [1990] 2 S.C.R. 209 at 215.; and In Europe *In the Matter of Vicom* 1987 2 EPOR 74.

50 [1997] EWCA Civ 1174, (1996) RPC 511 (Aldous LJ).

51 [1989] RPC 561.

52 [1991] RPC 305.

53 [2007] R.P.C. 7 [8] [31] (Jacob LJ).

Patents.[54] The view of Australian Court could be seen in *Apple Computer Inc v. Computer Edge Pty Ltd*[55] and *Research Affiliates LLC v Commissioner of Patents.* The issue was discussed in Canada in *Apple Computer, Inc. v. Mackintosh Computer Ltd*,[56] and also in Europe in *In the Matter of Vicom*.[57]

Industrial design is more about how something looks than how it works.[58] AIs can now come up with designs on their own, which means they need to be protected. AI could even design the layouts of ICs that are meant to do something electronic.[59] IP rights for integrated circuits are needed to protect these designs.[60]

A patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem.[61] An invention is patentable if it is new, involves an inventive step, and is industrially applicable.[62] It is clear that we are going through a renaissance of AI and this is also reflected in the increasing numbers of scientific publications and patent applications.[63] Most patent applications have a commercial application focus, as they refer to an AI functional application.[64] As per WEF's Kay Firth-Butterfield, artificial intelligence could have a substantial impact on the patent system. Consequently, four areas should be studied in this regard, including

(1) Patent-eligible subject matter for artificial intelligence, including the legal foundation for patentability of "software patents."

(2) Concerns regarding the patentability and inventorship of AI-generated inventions.

(3) Questions of liability for patent infringement by AI. (4) AI non-obviousness criteria.[65]

54 [2009] EWHC 343.

55 1984 FSR 481.

56 [1990] 2 S.C.R. 209 at 215.

57 1987 2 EPOR 74.

58 World Trade Organisation, 'Industrial Designs, Layout-Designs of Integrated Circuits, Undisclosed Information, Anti-Competitive Practices' <https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules6_e.pdf> accessed 08 October 2023.

59 ibid s159.

60 ibid s159.

61 European Parliament resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies, para 12. And also in WIPO, 'Patents: What is a patent?' <https://www.wipo.int/patents/en> accessed 08 October 2023.

62 Intellectual Property Act No.36 of 2003 of Sri Lanka, s 63 and s 65; And also in The Patent Act 1977 UK, s 3.; And also in TRIPS, art 27 (1).; And also, in European Parliament Resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies, para 12.; And also in WIPO, 'Patents: What is a patent?' (WIPO 2021) <https://www.wipo.int/patents/en> accessed 08 October 2023

63 WIPO, *Technology Trends 2019: Artificial Intelligence* (WIPO 2019) 139.
< https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1055.pdf> accessed 08 October 2023.

64 ibid page 139.

65 ibid 143.
< https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1055.pdf> accessed 08 October 2023.

IP law protects trade secrets as non-disclosed knowledge with commercial value.[66] In addition to the IP Act, Common Law (case law) also protects trade secrets as confidential information.[67] This was discussed in *Kerry Ingredients (UK) Ltd v. Bakkavor Group Ltd,*[68] *Faccenda Chicken v. Fowler,*[69] *Coco v. A.N. Clar (Engineers) Ltd*,[70] *Finlay Rentokil (Ceylon) Ltd. V. A. Vivekananthan,*[71] *Coats Threads Lanka (Pvt) Limited v. Samarasundara,*[72] and *Hentley Garments Ltd. V. J.S.A. Fernando.*[73]

The EU Directive of 2016 on the Protection of Undisclosed Know-how and Business Information (Trade Secret) Against their Unlawful Acquisition, Use, and Disclosure qualifies data generated by artificial intelligence as trade secrets. Such data produced by AI are currently not protected under copyright law.[74]

Generally, AI systems analyse vast training data sets to do the designated tasks with or without supervision.[75] Numerous AI system components, including neural networks, including their modular network structure and individual modules, training sets, data output, and other data, software, including underlying AI code and AI-generated code, as well as learning, backpropagation, and other algorithms, are suitable for trade secret protection.[76]

Some AI systems are trained to collect data and prepare databases (i.e., Farm Beats[77]). The 'European Database Directives' presently cover the infringement of the 'selection' and the 'arrangement' of the data.[78] Accordingly, if the AI is based on a database, then the structure of that database is protected by the EU Database Directive.[79] Databases are protected under the derivative works in the IP Act of Sri Lanka based on selection, coordination, or arrangement of their contents.[80] The copyright owner of a database has

66 Punchihewa N.S., 'Exploring the Use of Intellectual Property Tools to Promote Tourism Industry in Sri Lanka: A Legal Perspective' (2020) 3 (2) Journal of Management and Tourism Research 27, 28.

67 Kerry Ingredients (UK) Ltd v. Bakkavor Group Ltd [2006] EWHC 2448 (Ch).; Faccenda chicken v. Fowler (1985) [1986] IRLR 69, CA; Coco v. A.N. Clar (Engineers) Ltd. (1968) [1969] RPC 41; Finlay Rentokil (Ceylon) Ltd. V. A. Vivekananthan (1995) [1995] 2 SLR 346; Coats Threads Lanka (Pvt) Limited v. Samarasundara (2010) [2010] 2 SLR 1; Hentley Garments Ltd. V. J.S.A. Fernando (1980) [1980] 2 SLR 145.

68 [2006] EWHC 2448 (Ch).

69 (1985) [1986] IRLR 69, CA.

70 (1968) [1969] RPC 41.

71 (1995) [1995] 2 SLR 346.

72 (2010) [2010] 2 SLR 1.

73 (1980) [1980] 2 SLR 145.

74 Spindler G., 'Copyright Law and Artificial Intelligence' (2019) 50 IIC 1049-1051.

75 Sweta Mishra, 'Role of Intellectual Property in Artificial Intelligence' (Enhelion 2020) < <https://enhelion.com/blogs/2020/11/24/role-of-intellectual-property-in-artificial-intelligence/> accessed 08 October 2023.

76 Jones Day, 'Protecting Artificial Intelligence IP: Patents, Trade Secrets or Copyrights?' (2018) < https://www.jonesday.com/en/insights/2018/01/protecting-artificial-intelligence-ip-patents-trad#:~:text=Innovation%20is%20outpacing%20the%20law,IP%22)%20rights%20in%20AI. > accessed 08 October 2023.

77 WIPO, *Technology Trends 2019: Artificial Intelligence* (WIPO 2019) 81

78 Council Directive (EC) 96/9 of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20, art 1 (2).

79 Gerald Spindler, 'Copyright Law and Artificial Intelligence' (2019) 50 IIC 1049-1051.

80 IP Act No. 36 of 2003 of Sri Lanka ibid s 7 (1) (b).

the right to rent the original or a copy of the database. Any compilations or databases contained within a piece of software are protected under copyright law.[81]

Patrick Thomas and Dewey Murdick[82] present a summary of the history of patents, AI patentability, AI patent protection, definition of AI patents and their characteristics. This study determine how specialized audiences of policymakers may use patent data to plan for the quickly advancing consequences of AI. However, the paper does not address the question of IPR for inventions created solely by AI.

Swapnil Tripathi and Chandni Ghatak[83] provide a global perspective on the rising reach of IP laws and artificial intelligence, as well as the unavoidable issues it presents. In addition to addressing questions of criminal culpability for work created by AI, the paper offers recommendations that transcend IPR. The paper outlines the concept of AI and its link to copyright and patents throughout the discussion.

3. AI inspired Creations and Inventions

In recent years, there have been a lot of big steps forward in AI technology. As technology develops quickly, machines that can learn on their own will sometimes be smarter and better at what they do than humans. Smart robots can now learn to be self-sufficient by changing their actions and behaviours to fit their surroundings.[84] Hence, the overlap between intellectual property laws and AI is also growing faster than it used to, and both IP and AI are important parts of the modern economy.[85]

Today, AI enabled systems are equipped to perform functions based on their own learnings. As a result of that, those machines are now capable of inventing things on its own (i.e., 'The First Thinking Sculpture'). In other words, AI is now thought to be able to make, design, and invent things on its own without help from humans.[86] This reflects that AI systems could surpass human intelligence[87] in terms of performing tasks without human involvement.

AI is used for many things today, like making paintings and other artwork, designing jewellery, fashion models, and clothing, making digital copies of organs and other physical

81 *Waterlow Publishers Ltd v. Rose* [1995] F.S.R. 207.

82 Patrick Thomas and Dewey Murdick, 'Patents and Artificial Intelligence: A Primer: CSET Data Brief' (CSET September 2020) 1-20.

83 Swapnil Tripathi and Chandni Ghatak, 'Artificial Intelligence and Intellectual Property law' (2018) 7 (1) Christ University law Journal 83-97.

84 European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics, Principle 1.

85 Rutweek Jawalekar, 'Artificial Intelligence and Intellectual Property Rights' (Indian Law Portal 2020) < https://indianlawportal.co.in/artificial-intelligence-and-intellectual-property-rights/> accessed 08 October 2023.

86 Swayamsiddha Das, 'Role of Intellectual Property in Artificial Intelligence' (iPleaders 2021) <https://blog.ipleaders.in/role-intellectual-property-artificial-intelligence/ accessed> 08 October 2023.

87 European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics, introduction, para-P.

objects, making recipes, finding new drugs, making fragrance formulas, designing sculptures, composing music tracks, etc. Because of this, intellectual property laws are very important when it comes to artificial intelligence.[88] Below are a few short examples of what AI can do without much or any human help.

- AI-created artwork

  The AI robot '*Ai-Da*' exhibits her own works of art at the University of Oxford. The robot is equipped with an integrated camera and a mechanical arm. These components function flawlessly and enable the robot to create AI art.[89]

  Another example is the portrait named '*The Next Rembrandt*' which was generated in 2016 by an artificially intelligent machine after a large-scale investigation of the Dutch painter Rembrandt's extant works.[90]

- AI-created digital twins

  A digital twin is a digital clone of an asset's physical counterpart. A digital twin can be defined as one or more computer models that give a dynamic digital representation of a real-world biological target ("artifact") or some feature of a person's physical state when applied to a patient in healthcare. Siemens Healthineers company has digitally mimicked the heart on the right.[91]

- AI-made jewellery collections

  This collection pushes the frontiers of what is possible to build and generate with artificial intelligence using deep learning and generative models. The company's AI algorithm produces a design for an object that has never been seen before.[92]

- AI-generated fashion models

  AI firm DataGrid introduced AI-Generated Fashion Models. Each model's appearance is entirely unique and produced from scratch.[93]

88 Sweta Mishra, 'Role of Intellectual Property in Artificial Intelligence' (Enhelion 2020) < <https://enhelion.com/blogs/2020/11/24/role-of-intellectual-property-in-artificial-intelligence/> accessed 08 October 2023.

89 Kalina Nedelcheva, 'AI Robot-Produced Artwork: AI Art is Gaining Traction and It is Evident from Ai-Aa's Exhibition' (Trendhunter 2019) <https://www.trendhunter.com/trends/ai-arts> accessed 08 October 2023.

90 Nina Fitzgerald, Eoin Martyn, Caroline Christian, and Jasmin Collins 'An In-Depth Analysis of Copyright and the Challenges Presented by Artificial Intelligence' (Ashurst 2020)? <https://www.ashurst.com/en/news-and-insights/insights/an-indepth-analysis-of-copyright-and-the-challenges-presented-by-artificial-intelligence/ >accessed 08 July 2022.; and also, in Nicole Pickett-Groen, 'The Next Rembrandt: Bringing the Old Master Back to Life' (Dutch Digital Design 2018) <https://medium.com/@DutchDigital/the-next-rembrandt-bringing-the-old-master-back-to-life-35dfb1653597> accessed 08 October 2023.

91 Siemens Healthineers, 'The value of Digital Twin Technology' (Siemens Healthineers 2019) < https://www.siemens-healthineers.com/services/value-partnerships/asset-center/white-papers-articles/value-of-digital-twin-technology> accessed 08 October 2023.

92 Savas Caliskan, 'Made by AI Necklaces were Designed by Artificial Intelligence' (Trendhunter 2019) < https://www.trendhunter.com/trends/made-by-ai> accessed 08 October 2023.

93 Laura McQuarrie, 'DataGrid Creates High-Res, Full-Body Fashion Models with Unique Poses' (Trendhunter 2019) <https://www.trendhunter.com/trends/fashion-models> accesed 05 April 2022; And also in Mikelle Leow, 'AI's Fascinatingly Realistic Fashion Models Mean Human Talents May Soon Be Passé' (designtaxi 2019) <https://www.wikitrend.org/robots-taking-our-jobs-ai-generated-fashion-models> accessed 08 October 2023.

- AI-made perfumer

  Based on IBM Research's AI for product composition, '*Philyra*' employs cutting-edge machine learning algorithms to generate novel and unique perfumes. The technology is capable of sifting through hundreds of thousands of formulas and thousands of raw materials to identify patterns and novel ways of assembling things.[94]

- AI-designed sculptures

  This "*First Thinking Sculpture*" chose its own materials, shapes, and colours. A sculpture that is literally sculpted by the present feelings.[95]

- AI-composed music tracks

  The song "*Drowned in the Sun*" was developed by feeding MIDI files into Google Magenta's artificial intelligence program, which understands how to write in a particular artist's style by analysing their prior work.[96]

- AI-created poems

  Huge, based in Brooklyn, has released a sonnet-writing AI known as "*V*AI*lentine*", created by a team of developers and designers. This one-of-a-kind AI bot was created during a one-day hackathon and mixes the heart of William Shakespeare with artificial intelligence.[97]

- AI-created fairy tales

  Calm, makers of an app designed to help users meditate and sleep, collaborated with Botnik, a machine-learning firm, to create a new Grimm fairy tale based on existing tales. The new tale, titled "*The Princess and The Fox*", is the product of a predictive text algorithm that was fed the tales of the Grimm Brothers and trained to imitate their writing style.[98]

94 IBM Research Editorial Staff, 'Using AI to Create New Fragrances' (IBM 2018) <https://www.ibm.com/blogs/research/2018/10/ai-fragrances/> accessed 08 October 2023.; And also, in The Economic Times 'Meet Philyra, An AI System that Concocts New Fragrances' (The Economic Times: Panache 2018) <https://economictimes.indiatimes.com/magazines/panache/meet-philyra-an-ai-system-that-concocts-new-fragrances/articleshow/66511203.cms> accessed 08 October 2023.

95 Karen Lewis 'The First Thinking Sculpture: Inspired by Gaudi, created with Watson' (IBM 2017) <https://www.ibm.com/blogs/internet-of-things/first-thinking-sculpture/> accessed 08 October 2023.

96 Riki Noviana, 'AI Technology Turns Kurt Cobain on and Revives Nirvana, 'New' Song Drowned in The Sun Released' (VOI 2021) < https://voi.id/en/lifestyle/42826/ai-technology-turns-kurt-cobain-on-and-revives-nirvana-new-song-drowned-in-the-sun-released> accessed 08 October 2023.

97 Justin Lam, 'V*AI*lentine is an Interesting AI That Can Help Project Users Feelings' (Trendhunter 2018) <https://www.trendhunter.com/trends/vailentine> accessed 08 October 2023.

98 Emily Tan, 'Sleep app Calm uses AI to 'write' the Lost Grimm Fairy Tale' (campaign 2018) <https://www.campaignlive.co.uk/article/sleep-app-calm-uses-ai-write-lost-grimm-fairy-tale/1461768> accessed 08 October 2023.

- DABUS

  This stands for 'Device for the Autonomous Bootstrapping of Unified Sentience,' is an artificial intelligence system designed by Dr. Stephen Thaler and programmed to mimic human brain function.[99]

- AI-generated auto ads

  Using machine learning, natural language processing, and integrated dialogue tools, IBM's Watson (AI) developed advertisements for Toyota. These advertisements provide consumers with a tailored experience.[100]

- AI-generated food recipes

  Fazenda Futuro is a Brazilian startup that is offering the "*Futuro Burger*" to the world. With the use of artificial intelligence, Fazenda Futuro was able to determine a composition of soy, pea protein, and chickpeas that closely resembles beef.[101]

- AI-generated whisky spirits

  Microsoft collaborated with the Finnish technology company Fourkind and the Swedish distillery Mackmyra Whisky to produce the world's first computer-generated blend. Using the Microsoft Azure platform, they analysed over 70 million distinct whisky combinations based on Mackmyra's original 75 recipes.[102]

- AI-scripted films

  The reputation of Lexus for pushing the boundaries of technology and innovation has prompted the production of a new cinematic advertising written entirely by artificial intelligence. Driven by Intuition is a 60-second short film made by Oscar winner Kevin Macdonald. It celebrates the bold, original, and imaginative attributes that distinguish the Lexus brand in both its creative concept and content.[103]

4. Who is the Author and Inventor of AI generated works?

AI is a computer system which process training data and produce results that ordinarily require human intelligence. However, there is an issue about whether inventions made

99 Jackie O'Brien Isobel Taylor, 'The year that was for DABUS, the World's First AI 'Inventor'' (Inside Tech Law 2021) <https://www.insidetechlaw.com/blog/the-year-that-was-for-dabus-the-worlds-first-ai-inventor> accessed 08 October 2023.

100 David Kirkpatrick, 'Toyota accelerates into cognitive ads for smarter personalization' (Marketingdive 2017)<https://www.marketingdive.com/news/toyota-accelerates-into-cognitive-ads-for-smarter-personalization/445051/> accessed 08 October 2023.

101 Laura McQuarrie, 'Fazenda Futuro's Futuro Burger Was Created with Artificial Intelligence' (Trendhunter 2019) < https://www.trendhunter.com/trends/futuro-burger> accessed 08 October 2023.

102 Preetipadma, 'Story Behind World's First AI-Generated Whiskey by Microsoft' (Globaltech Outlook, 2020) < https://www.globaltechoutlook.com/story-behind-worlds-first-ai-generated-whiskey-by-microsoft/> accessed 08 October 2023.

103 Joe Clifford, 'Lexus ES launches with advert scripted by artificial intelligence' (Lexus UK 2018) < https://mag.lexus.co.uk/lexus-es-launched-with-advert-scripted-by-artificial-intelligence/> accessed 08 October 2023.

by AI without or minimum human interference should be copyrighted or patented. Another issue is whether AI could be considered as an 'author' or an 'inventor' or not.

The primary objectives of the IP system are to foster the development of new technologies and creative works, as well as to establish a solid economic foundation for innovation and creativity. IP could be utilized to reward inventions or creations made by AI.[104] IP law protects inventions and prohibits their commercial usage without authorization. Traditional IP notions, such as patents, designs, literary and creative works, and so on, would also be altered by the development of AI technologies. For instance, it is unclear whether a constantly evolving algorithm or AI-inspired creation might be protected by copyright or patent. This is a new difficulty that we would need to handle.[105] IPR has an effect on AI, and AI has an effect on IPR[106], as well as vice versa. To handle new issues in the AI industry, an extra layer of intellectual property would be necessary.[107]

AI systems are designed and trained using a substantial amount of human effort, talent, and capital. Creators/owners of AI systems want to acquire rights to such outputs and utilize them commercially. However, it appears impossible to obtain such rights due to the absence of a suitable legal framework in that field. Hence, if AI creators/owners are not authorized to acquire IPR for AI outputs, this would deter both them and investors in this industry. Therefore, it is essential to establish a legal framework to oversee AI outputs. Once a framework is built, it would encourage and motivate AI developers and owners appropriately.

In addition, many AI startups will likely be acquired by other businesses as a commercial strategy.[108] Companies encounter difficulties in gaining IPR of AI-inspired discoveries while acquiring tangible corporate assets because there is no law controlling such acquisitions. If a suitable regulation existed, such acquisitions could be appropriately regularized while stimulating investment in the area.

Several difficulties have been presented in terms of copyright, patents, designs, trade secrets, databases, and integrated circuits as a result of the proliferation of AI-inspired creations and inventions, including: (1) who is the creator of an AI-inspired creation? (2) who is the inventor of an AI-created invention? (3) who is the designer of an AI-created design? (4) who owns an IC design developed by AI? (5) who owns the non-public data needed to produce AI output? (6) who is the owner of an AI-created database?

104 Francis Gurry, Artificial Intelligence and Intellectual Property: an interview with Francis Gurry, WIPO Magazine (September 2008) <https://www.wipo.int/wipo_magazine/en/2018/05/article_0001.html> accessed 08 October 2023.

105 WIPO, 'Artificial Intelligence and Intellectual Property: an interview with Francis Gurry', (WIPO September 2008) <https://www.wipo.int/wipo_magazine/en/2018/05/article_0001.html> accessed 08 October 2023.

106 WIPO, *Technology Trends 2019: Artificial Intelligence* (WIPO 2019) 143 < https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1055.pdf> accessed 08 October 2023.

107 WIPO, 'Artificial Intelligence and Intellectual Property: an interview with Francis Gurry', (WIPO September 2008) <https://www.wipo.int/wipo_magazine/en/2018/05/article_0001.html> accessed 08 October 2023.

108 ibid 33.

Existing grey areas surrounding the topic of AI-generated works make the current state of AI and IPR extremely difficult to navigate. Since AI machines are not recognized as legal persons, they cannot gain copyright, patents, design rights or other intellectual property rights. Therefore, it appears that the current definitions of "legal personality," "author," and "inventor" must be modified to incorporate AI computers. If patents could be given for AI-generated works, inventors would be incentivized to develop more novel AI technology, leading to the growth of the AI industry.[109]

4.1 International Perspective

AI has become the driving force for technological advancement in the 21st century. AI is achieving things in terms of creativity like what humans are doing. Technical fields such as drug discovery and product design, AI is very much already coming up with innovations and those potentially are similar to what a human invention might have come up with in the past. Sometimes the actual inventive contribution is not from the human, but from the AI itself (i.e., DABUS).

The fundamental goals of the IP system have always encouraged new technologies and creative works, and to create a sustainable economic basis for inventions and creations. AI creators, owners and user are responsive to patent incentives. And therefore, allowing AI generated creations and inventions to receive copyright and patent protection would result in more investment and development into build creative and inventive AI. Which would ultimately lead to more invention. Thus, allowing these works to be protected would facilitate the underlying purpose of copyright and patent law.

For instance, granting copyright and patent for the outputs of AI machine is an incentive for investing in machines like that. This would also allow to reduce human labour and use the machines in combination with humans if the company want to obtain copyright or patent. Otherwise, companies must use only human labour if they want to get copyright or patent for the AI generated creations and invention.

The developed countries like the EU, Germany, USA, UK and Australia appear to have much debate as well as more cases, policies and laws regarding the issue (i.e., the debate around DABUS). Recent scholarly contributions which present the international perspective on the issue of whether AI is creative and inventive are described below.

The Max Planck Institute for Innovation and Competition (2021)[110] provides a comprehensive review of challenges occurring at the junction of AI and European

109 Intepat Team, 'Intellectual Property Law for Artificial Intelligence' (Intepat 2020) < https://www.intepat.com/blog/intellectual-property/intellectual-property-law-for-artificial-intelligence/> accessed 08 October 2023.

110 Josef Drexl, Reto M. Hilty, Luc Desaunettes-Barbero, Jure Globocnik, Begoña Gonzalez Otero, Jörg Hoffmann, Daria Kim, Shraddha Kulhari, Heiko Richter, Stefan Scheuerer, Peter R. Slowinski, Klaus Wiedemann, 'Artificial Intelligence and Intellectual Property Law: Position Statement of the Max Planck Institute for Innovation and Competition on the Current Debate' (Maxplank 2021) <https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI_PositionPaper__SSRN_21-10.pdf> accessed 25 October 2023.

intellectual property regulations (copyrights, patents, designs, databases, and trade secrets) and considers potential solutions. It also discusses IP issues associated with (i) the inputs necessary for the development of AI, (ii) the AI process, and (iii) the output of AI applications.

The European Commission[111] analyses copyright and patent protection in Europe for AI-assisted outputs in three priority domains: (1) science (specifically meteorology), (2) media (journalism), and (3) pharmaceutical research. The Report also discusses how present IP laws apply to AI-assisted creative and inventive outputs, as well as the significance of alternative IP regimes, such as trade secret protection, unfair competition legislation, and contract law, in protecting such outputs.

Reto Hilty and colleagues[112] discuss the validity of IP rights for both AI as a tool and AI-generated product in light of deontological and utilitarian economic viewpoints, which are theoretical basis of IP protection. The study highlighted the need for more research to identify particular instances when IP protection is required. They also note that if AI outputs are not adequately justified and protected, theft may be feasible, hence discouraging businesses from investing in AI developments and advances.

According to Ryan Abbott[113], creative computers should be deemed inventors under patent and copyright law. Treating nonhumans as inventors would incentivize the production of intellectual property by encouraging the invention of creative computers. The article further elaborates on the challenges arising from computer creation, including the ownership of such inventions, the displacement of human inventors, and the necessity for consumer protection regulations.

Sofia Adolfsson[114] argues that the current intellectual property laws are unsustainable and must be modified to the difficulties faced by AI. Author investigates further the challenges posed by the implicit human requirement, harmonisation issues, the problem of discouraging AI-generated inventions and derivative outputs, and the issue of harmonization. The paper further examines legislative measures in the EU, United Kingdom, United States, and China, as well as recent Australian case law.

111 European Commission 'Final Report of 2020 on Trends and Developments in Artificial Intelligence Challenges to the Intellectual Property Rights Framework', 1-174.

112 Max Planck Institute for Innovation and Competition 'Intellectual Property Justification for Artificial Intelligence' (2020) 20-02 SSRN < https://ssrn.com/abstract=3539406> accessed 25 October 2023; And also, in; Reto M. Hilty, Jörg Hoffmann, Stefan Scheuerer, *Artificial Intelligence and Intellectual Property* (OUP 2020).

113 Ryan Abbott, 'I Think, Therefore I Invent: Creative Computers and the Future of Patent Law' (2016) 57 B.C. L. Rev. 1079.

114 Sofia Adolfsson, 'AI as a Creator: How do AI-Generated Creations Challenge EU Intellectual Property Law and How Should the EU React?' Master's Thesis (University of Uppsala 2021).
<http://www.diva-portal.org/smash/get/diva2:1589220/FULLTEXT01.pdf> accessed 25 October 2023.

Gerald Spindler[115] explores copyright protection of (1) AI itself and (2) works made using AI. AI is not protected as an algorithm under the EU Software Directive, and neither training data nor data created by AI are now protected under copyright law, according to the author. According to the EU Database Directive, only the database's structure is protected. However artificial intelligence-generated data can be safeguarded as a trade secret under the EU Directive on the protection of undisclosed know-how and business information (trade secrets).

AI-generated creations are adequately protected by Nigerian intellectual property law, according to Ukomadu[116]. The Author compares the EU and US approaches to authorship, copyright, and artificial intelligence. The author concluded that Nigeria's current intellectual property law must be modified to accommodate computer-generated works in the future. In addition, he thinks that machines should be awarded a unique form of legal authorship. The author views the application of vicarious liability principles as the most viable way for assigning responsibility for computer-generated works.

Kevin Warwick and Huma Shah[117] discuss the transcripts that resulted from a practical session of Turing's Imitation Game hosted at the Royal Society London on June 6 and 7, 2014. Turing's Imitation Game, more generally known today as the Turing Test, has become a significant benchmark in the field of artificial intelligence for determining whether a machine can think like a person.

Liza Vertinsky[118] examines the issues that a thinking machine model of innovation in which thinking machines play major and often dominant or even solitary roles in the creation process poses for U.S. patent law. It examines the distinction between a paradigm of thinking machines and the traditional model of inventor and innovation at the heart of patent law. It also examines some of the conceptual concerns and practical issues that result from this distinction. Finally, it provides four considerations for developing a policy response to this divergence.

Schiemer et al.[119] raise the question of whether the University of Surrey or any other body should be permitted to seek IP protection for an AI robot or system. The University of Surrey in the United Kingdom has filed multiple patents for the artificial intelligence robot DABUS, which was able to locate two medicinal medications.

115 Gerald Spindler, 'Copyright Law and Artificial Intelligence' (2019) 50 IIC 1049-1051.

116 Chijoke Ukomadu, 'An Appraisal of the Relationship between Artificial Intelligence and Intellectual Property Rights', (2019-2020) 5 (1) (ABUAD Law Review) 1.

117 Kevin Warwick and Huma Shah, 'Can machines think? A report on Turing test experiments at the Royal Society' (2016) 28 (6) Journal of Experimental and Theoretical Artificial Intelligence 989-1007 < https://www.tandfonline.com/doi/full/10.1080/0952813X.2015.1055826> accessed 05 October 2023.

118 Liza Vertinsky, Book Chapter 18 titled '*Thinking Machines and Patent Law*' published in *Research Handbook on the Law of Artificial Intelligence* (2018) Edited by Woodrow Barfield and Ugo Pagallo) (Edward Elgar Publishing 2018).

119 Schiemer, J., Tawse, N., and O'Rourke, J. S. 'Artificial Intelligence and Intellectual Property: Who Owns Property Created by an Algorithm or a Robot?' (2020) 13 Journal of Organizational Behavior Education 29-48.

Lord Sales[120] focuses on the question of how legal doctrine should adapt to processes governed without human agency by artificial intelligence such as by autonomous computers developing their own answers without direct human supervision. Throughout his discussion, the challenges of an algorithmic world and AI were highlighted. He believes that legal personality for AIs could be combined with other legal strategies, such as concepts of vicarious liability and requirements for mandatory insurance, in order to share risk throughout society.

4.2 Sri Lankan Perspective

During the covid-19 pandemic, Sri Lanka had a massive technology boom in paperless communication and other services in both the governmental and private sectors. However, due to the fact that Sri Lankan IP legislation is not tailored toward protecting AI-inspired inventions, inventors, investors, and other stakeholders in AI are strongly discouraged. This has an effect on the people's quality of life, as it is determined by the country's scientific growth.

There is a contentious issue in Sri Lanka in favour of using AI to promote business, education, health, transportation, agriculture, government services, the military, and weather forecasting sectors.

According to Ashwini[121], Sri Lanka adopts AI in numerous domains, including credit scoring and evaluation and healthcare. Her research reveals three interconnected levels that would be subject to oversight and regulation: (1) data (that is required to train the algorithm and its input into the system), (2) algorithm, (3) application/ deployment of the AI system. The author then analyses the governance of artificial intelligence through an ethical framework (fairness and lack of prejudice), transparency and explainability (the Black Box conundrum), accountability, and data protection.[122]

The Artificial Intelligence strategy established by SLASSCOM in collaboration with the ICTA and the Ministry of Digital Infrastructure and Telecom[123] presents multi-tiered strategies to AI from the vantage points of education, technology, ethics,

120 Lord Sales, Justice of the UK Supreme Court, 'Algorithms, Artificial Intelligence and the Law' (Sir Henry Brooke lecture for BAILII held at Freshfields Bruckhaus Deringer, London, 12 November 2019. < https://www.bailii.org/bailii/lecture/06.pdf> accessed 05 October 2023.

121 Ashwini Natesan 'Key Legal Challenges in Regulating Artificial Intelligence' 2022 National Law Conference Publication, Sri Lanka 101-107.

122 ibid page 107; And also in PricewaterhouseCoopers, 'ICTA together with PwC Introduces new Credit Evaluation Framework to support Tech Companies' (PricewaterhouseCoopers 2021). <https://www.pwc.com/lk/en/news-room/press-releases/press-releases-from-2021/icta-together-with-pwc-introduces-new-credit-evaluation-framewor.html#:~:text=The%20Information%20and%20Communication%20Technology,tech%20companies%20with%20minimal%20collateral.> accessed 08 October 2023.

123 Daily Mirror, 'SLASSCOM Launches National Policy Framework on Artificial Intelligence for Sri Lanka' (Daily Mirror 28 June 2019) <https://www.dailymirror.lk/Press-Releases/SLASSCOM-launches-national-policy-framework-on-Artificial-Intelligence-for-Sri-Lanka/335-170173> accessed 08 October 2023.

standardization, and policy. The policy describes the role artificial intelligence can play in education, governance, agriculture, and healthcare.

Dinesh Asanka and others[124] depict the status of artificial intelligence in the Sri Lankan software sector and discover that small- and medium-sized businesses provide greater support and sponsorship for AI than large and enterprise-sized businesses. As a result, the authors advise that Sri Lanka's education system provide the essential knowledge and labour force, with a greater emphasis on AI technology.

Even though IP rights are important for making AI-inspired products and processes available to the public, the current IP Act of Sri Lanka does not protect AI-inspired inventions directly. Since only natural people can claim IP rights for their inventions, it is not clear if these inventions can get IP protection in Sri Lanka. The study keeps looking for ways to solve this problem.

The present Sri Lankan IP law, the Intellectual Property Act No. 36 of 2003, protects a broad range of creations, designs and inventions under the regimes of copyright, patents, industrial designs, and trade secrets. However, it is not geared to protect works generated autonomously by AI and works generated with minimum human intervention. In other words, the current IP law primarily protect human creativity. Which means author and inventor has to be a natural person. Corporate bodies can own patents but they cannot be inventors. But this law was made 20 years ago in 2003 based on the initial statute which was enacted 40 years ago in 1979. Because most patents were filed by companies and there was a concern, that companies would file the patents and people who worked on them wouldn't be acknowledged. Therefore, the rule that inventor should be a natural person was made to allow companies to be patent owners but not to cut human inventors out of being acknowledged.

However, the said rational does not really work in the context of AI generated inventions. Thus, if the AI output is created by AI system instead of a human creator, then there might be issues in finding who will be the author, creator or inventor of such output. And whether the intellectual property of such output is legally protected or not. And whether who owns the IP ownership of such outputs. Machines cannot own copyright or patents rights because they are not humans. And the human behind the machine will fail to meet key criteria to claim IP rights, such as originality for copyright and an inventive step for a patent and, because they did not create the work. As a result, **AI generated creation and inventions would lack copyright or patent protection provided in IP law of Sri Lanka.**

The experiences of developed countries like EU, Germany, USA, UK and Australia on the issue of authorship and inventorship of AI outputs were never learned and adopted in Sri Lanka. Hence, there exists a considerable gap between the current research on

124 PPG Dinesh Asanka, M. Harindra R. Fernando, A.M. Tharindu B. Adhikari, I.P.V Vithana Pathirage, Asoka S. Karunananda, 'State of Artificial Intelligence in Sri Lankan Software Industry' (2014) 1 (8) IJIRT page 9-16.

this topic in Sri Lankan context and the said jurisdictions in terms of protecting AI generated inventions and creations without/ with minimum human intervention. Therefore, protecting such works remains an unexplored area of the legal landscape of IP in Sri Lanka.

In the absence of definitive protection for AI generated creations and inventions, such works in both goods and service industries in Sri Lanka would be discouraged. Although, the real value of the AI machines resides in its output (what it produces) rather than in the AI software itself, the people developing and investing in AI will only have rights in the underlying AI software or code and in the data (what they input into the machine). If no copyrights or patent rights are granted for AI generated creations and inventions then AI will not be promoted in the country. And it would not incentivise the original creators of AI as well as users who purchased AI for commercial use.

For instance, drug discovery companies screen databases to develop new drugs or repurpose existing ones. A large amount of their value lies in these discoveries. New drug discoveries should be credited to researchers of those companies. But if the rights in the invention were to lie with the AI creator originally then where does that leave those companies. On the other hand, AI creators will be disincentivise especially in the cases where they continuously update AI system by training data via cloud or internet. Thus, there exists a direct impact upon both AI creators as well as users who purchased AI. Consequently, the quality of life based on scientific progress would be seriously affected. Therefore, it is pertinent to address this conundrum viewed through the experience of international and aforesaid jurisdictions laws.

5. Recommendations

There is a legal debate over who will be the creator/rights holder of AI works and innovations. Although previous scholars have addressed the basic principles of AI and IP. However, they have not adequately dealt with the application of IP in the context of AI creations and inventions. Hence, it is clear that there exists a perceived gap in the existing literature pertaining to the intersection of AI and IP in the Sri Lankan and international context. Therefore, this information gap should be filled by contributing to the above discourse and exploring how best the IP regimes and AI can be linked for the benefit of the AI industry and its stakeholders.

Present IP law should be modified to accommodate computer-generated works and machines should be awarded a unique form of legal authorship. Providing patent protection for AI-generated inventions would accelerate innovation and make possible otherwise impossible achievements. In addition to that, the principle of vicarious liability could be applied for assigning responsibility on AI for infringement of IPR. There is a significant need to include provisions in the IP law that can deal with AI-generated

works, as well as to introduce new regulations that address infringement liabilities and remedies. WIPO[125] former Director General Francis Gurry, says that, in order to address the emerging issues in AI sector, an additional layer of IP is required, rather than the replacement of the existing system.

The policymakers should be guided in implementing legislative modifications that would maximize the societal advantages of artificial intelligence. They should also be guided if it is determined that copyright and patent law modifications are necessary. Expanding the subject-matter patentability criterion for artificial intelligence inventions in sectors deemed more socially beneficial, such as healthcare, agriculture, education, transport, weather forecasting, disaster warning, defence and education, could be one way to strike a balance between fostering innovation and addressing intellectual property concerns.

Since existing reliefs are not adequate to grant protection for creations, designs and inventions generated autonomously by AI, the civil remedies such as injunctions, interim injunctions, damages, restrain import and export, and other reliefs[126] as well as criminal sanctions (offences for infringement)[127] available to enforce IPR, should be improved to address AI disputes.

A legal framework on AI is essential to promote public confidence in the safety and reliability of using AI. Such public's trust in this new technology is crucial for the growth of this industry, as it would encourage the inventors and investors which ultimately enhances Sri Lanka's competitive edge. Additionally, Sri Lanka's education system should provide the essential knowledge on AI technology and then create required labour force.

6. Conclusion

Developed nations' intellectual property laws are employed to safeguard AI-inspired creations and inventions and there exists a gap between Sri Lanka and these countries in this respect. The study examines developing intellectual property challenges in the field of artificial intelligence and propose reforms to IP legislation pertaining to AI-generated works. The issues such as whether AI-generated creations are copyrightable and inventions are patentable, and whether AI could be considered as an 'author' or an 'inventor' or not, are analysed in light of fundamental purposes of IP law.

A regulatory framework on AI could foster public trust in the safety and dependability of AI. In turn this would assist Sri Lanka in achieving its other objectives and bring it closer to the Sustainable Development Goals. The study guides policymakers

125 WIPO, 'Artificial Intelligence and Intellectual Property: an interview with Francis Gurry' (WIPO September 2008) <https://www.wipo.int/wipo_magazine/en/2018/05/article_0001.html> accessed 25 October 2023.

126 IP Act No.36 of 2003, s 22 and s 170.

127 ibid ss 178-183; and ibid s 206 and s207 of the IP Act No. 36 of 2003 reading with s 125A and B of the Customs Ordinance Sri Lanka.

in implementing legislative modifications that would maximize the societal advantages of artificial intelligence. Current Sri Lankan IP law should be modified so that the benefits of AI-generated ideas and creativity can be reaped without compromising the intellectual property rights of individuals.

Finally, this study further serves as a resource for researchers, academics, and readers who are interested in AI and IP, and promote greater interest, as the Sri Lankan legal education system lacks awareness of IP laws that protect AI-generated creations and inventions. The outcomes of this research contribute to Sri Lanka's scientific and technological development and the expansion of the AI sector in Sri Lanka.

DECONSTRUCTION OF GENDER DIMENSIONS IN A LEGAL SENSE FOR ECONOMIC PROSPERITY

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Introduction:

The considerably high degree of Sri Lankan female education and their influential contribution especially in the skilled professions, in the light of demographic shifts shadowing risk of future labour shortage, our country has been inevitably driven by the need to ensure effective contribution of women to our economy. However, multiplicity of socioeconomic and legal complications such as gender stereotyping and subtle discrimination despite formal law preventing the said vast potential contribution of women to economy. Gender equality is more than a moral issue that the same is a vital economic issue, where the conditions conducive to all women reaching their potential need to be created[1]. In this regard, women are more likely to invest their resources in education, building capital for future growth[2]. Thus, helping women to fully participate in the economy is not only growthpromoting but also diversifies the economies, reduces income inequality, mitigates demographic shifts and contributes to financial sector stability[3]. Sexual harassment stealthily in workplaces, shocking rape or underaged rape incidents reflecting constant female insecuirity and the formal industrial laws failing to comprehend unique post-maternity childcare needs of women reflect tragic gender discrimination and gender inequality in substantive proportions. The legal regime governing gender protection and removal of discrimination considerably develops metamorphosis from International Conventions like the Convention on the Elimination of All forms of Discrimination against Women ('CEADAW') and the apex norm of gender protection law regime derives from the twin notions of equality and equal protection under Article 12 (1) of the Constitution, non-discrimination on sex under Article 12(2) as well as permitting special laws for the advancement of women under Article 12(4). The controversial public discussion decades ago on Penal Code (Amendment) Act No. 22 of 1995,which introduced a series of new offences such as sexual harassment, statutory rape, incest, rape under judicial separation, grave sexual abuse, pornographic

1 Maurice Obtsfled, Former IMF Economic Counselor 23rd March 2017

2 Ata Can Bertlay, Ljubica Dordevic & Cansever, "Gender Inequality and Economic Growth: Evidence from Industrial Level Data" [2020] p 1 citing Schultz T.P, "Why Governments Should Invest More to Educate Girls" World Development [2002]

3 Ibid, Gonzales C, S Jain-Chandra, K. Kochchar, M Newiak, and T Zeinullayev, 2015" Catalyst for Change: Empowering Women and Tackling Income Inequality", [2018] IMF Staff discussion note 15/20

publication of underaged[4] etc. developed expectations of women security in parallel to the discussion on the cultural impact of these laws. The Prevention of the Domestic Violence Act[5], which is a crucial step in pursuance of CEADAW vests comprehensive discretion in courts to act as the dynamic guardian of rights against gender oppression has been tested for nearly two decades. The practical testing of laws in court has given life to evidentiary principles like that it is unsafe or dangerous to act on the uncorroborated testimony of the victim of rape or similar offence like sexual harassment that may appear as gender stereotypical. Corroboration rules discriminate against women because the same requires a higher burden of proof than men in order to establish an offence to seek remedy[6]. Simultaneously, legal principles such as the use of the *Lucus* principle in statutory rape cases and resorting to presumptions that a male luring away a female to an isolated spot keeping her in wrongful confinement is done with the intention of having sexual intercourse[7], intimately analyzing social behavior and social stigma[8] etc. in considering the validity of victim testimony demonstrating protectionist approach adopted by courts are required to be analyzed cautiously and respectfully in the journey of facilitating social conditions conducive to optimizing women participation in our economy. Moreover, despite the women considerably engaging in paid labour, the sex-role stereotype[9], which binds looking after children and home affairs has remained static resulting in social complications. In the circumstances, maternity protection Industrial laws failing to comprehend post-maternity childcare or daycare needs of women in employment as well as return and reintegration in the Foreign Employment laws remaining as drastic gaps in the legal regime urgently require to be remedied from an innovative public law approach. A number of broad interpretations to the twin notion of equality and equal protection under Article 12(1) of the Constitution by the Supreme Court along with state obligation under the CEADAW to recognize right to work as an inalienable right of all human beings[10] demonstrate fertile grounds be explored in curing post-maternity childcare or daycare dilemma. In this respect, the persuasive effect of international treaties and conventions and judicial incorporation of the same in the land mark *Eppawala phosphate*[11] case, *Wattegedara Wijebanda vs. Divisional Forest Officer*[12] to

4 Penal Code (Amendment) Act No. 22 of 1995, 345, 363 (e), 364A, 365B, 286A

5 Prevention of Domestic Violence Act No. 34 of 2005

6 UN Women, "Gender Stereotypes in Laws & Court Decisions in South East Asia" [2016] p 57citing CEADAW General Recommendations No. 33,

7 *Perera vs. Attorney General* [2012] (2) Sri LR 69 His Lordship Ranjit Silva

8 *Democratic, Socialist Republic of Sri Lanka vs. Mannikam Navaratnam* CA Appeal 73/2017 [2020] CA Minutes dated 28-07-2020 Her Ladyship K Wickramasinghe

9 Pg. 25-31, Cook, R & S. Cusak, 2010, Gender Stereotyping: Transnational Legal Perspective: four types of gender stereo types i) sex stereo type ii) sexual stereo type iii) sex role stereo type iv) compound stereo type

10 CEADAW Convention, Article 11(1) (a)

11 Bulankulama vs. The Secretary, Minister of Inidustrial Development [2000] (3) Sri LR 243 His Lordship A.R. B Amarasinghe

12 *Wattegedara Wijebanda vs. Divisional Forest Office* [2009] (1) Sri LR 337

Chunnakam Power plant contamination[13] case etc. in conjunction with explicitly broad womens' rights in CEADAW reflect a remedial approach by intercourse of fundamental rights of equality and International Law. The methodology utilized in discovering suppressed dimension of undelying female reality and the term 'deconstruction' are somewhat inspired by Derrida's literary theory of Deconstruction, in which logocentrism is defined as phallocratic, patriarchal and masculine[14]. However idealistic or impractical certain legal interpretations ascertained in this paper may be especially in the context where there is an urgent need to optimize women's contribution to Sri Lankan economy, this paper strives its utmost to maintain a pragmatic perspective as much as possible. Thus, the objectives of this paper are as follows:

1. Understanding the significance of female labour in Sri Lankan context from a socioeconomic and demographic perspective;
2. Comprehending the nature, scope and extent of stealthy but persistent gender discrimination and gender stereotyping that restrains the valuable contribution of women to our economy;
3. The methodology used in understanding the oppressed dimension involving coarser reality Sri Lankan females and the term " Deconstruction" is inspired by Jaques Derrida's theory of Deconstruction, where the logocentrism is defined as phallocratic, patriarchal and masculinist repressing the female voice.
4. Analysing the existing legal framework in the gender protection law regime involving the offence of sexual harassment, work place sexual harassment and pragmatic operation of other gender-related offenses like rape, statutory rape and incest with reference to superior court judgements, Domestic Violence Act and observing the impact of the same in connection with economic rights of women;
5. Cautiously and respectfully ascertaining judgements that may be interpreted as gender stereotypical with special reference to evidentiary rules of corroboration of testimony and the evidentiary perspective resorted by courts in progressively overcoming inequalities in relation to rape and statutory rape cases;
6. Ascertaining a remedy for said sexual harassment, workplace sexual harassment and consequent gender stereotyping and its impact from the points of view of the court;
7. Identifying the significance of post-maternity childcare needs of women as an integral element women's employment and ascertaining the same in the context of the inalienable right to work of all human beings under CEADAW;

13 *Ravindra Gunewardene, Chairman Central Environmental Authority, Sri Lanka Electricity Board et al* SC FR 141/2015 SC Minutes dated 04th April 2019 His Lordship Prasanna Jyawardene PCJ

14 Wikepedia, Jaques Derrida P 7

8. Developing a remedial mechanism in the public law spear for post-maternity childcare dilemma in view of CEADAW, judicial incorporation of International Law Conventions, twin notions of equality and equal protection under Article 12 of the Constitution, freedom to engage in anyoccupation or profession under Article 14(1)(g) and Article 4(d) imposing all organs of state a mandatory duty to advance, secure and protect fundamental rights.

Existing Legal Frame Work of the Gender Protection Law Regime

The twin notions of equality of all persons and equal protection under Article 12(1), the prohibition against discrimination upon sex under Article 12 as well as the permission for special provision being made for the protection of women constitute the apex legal norm of women's protection law regime. Sri Lanka has ratified the International Convention on the Elimination of All Forms of Discrimination of Women (CEADAW), which is based on the principles of non-discrimination, state obligations and substantive equality and same was followed by Women's Chater in 1993. The Penal Code Amendment Act no. 22 of 1995 introduced a series of offences such as statutory rape under Section 363(e), incest under Section 364A, grave sexual abuse under Section 364B, judicial rape under Section 363(a) obscene publication or exhibitions relating to children under Section 286A, sexual harassment under Section 345 with broad explanatory notes, procuration for prostitution under Section 360A, sexual exploitation of children under Section 360B to trafficking children under Section 360C to some degree strived to cater burning social demand especially to ensure protection female victims in confrontation modern social complications. This amendment to the Penal Code was enacted in pursuance of the international obligations of Sri Lanka in terms of the CEADAW Convention and Convention on the Rights of Child. The Penal Code Amendment Act No. 16 of 2006 expanded the scope of protection with several broadened definitions of offenses while introducing new offences. This includes an added illustration of sexual harassment with an extending definition of injuries in the explanation as 'psychological or mental trauma'. The offence of mandatory duty cast on the computer service providers to inform of child abuse and duty placed on a person having charge of premises to inform of child abuse to nearest police station reflected strong protection for underaged children. Moreover, extending the definition of trafficking for prostitution and other forms of sexual exploitation and solicitng a child under 18 years for sexual abuse convey the wide scope of protection. Naturally, due to controversial social discussions on these amendments, the said amendments to the Penal code asserted the social message to potential offenders that such will not be tolerated and ensured a sense of security to all working women who are compelled to work at night time and leave their child vulnerable at home.

Domestic Violence Act No. 34 of 2005

This act focusing on the prevention of domestic violence and matters connected and incidental thereto reflects an extensively broad definition of the same. Domestic violence includes all offences affecting the human body, extortion, criminal intimidation, attempts to commit such offence and emotional abuse[15]. The definition of emotional abuse conveying a pattern of cruel, inhuman, degrading or humiliating conduct of a serious nature could be associated with modern psychological concepts of narcissism and gas-lighting. The provisions for specified interim protection orders under Section 11 of the Domestic Violence Act ranging from preventing the relevant person from entering residence or shared residence, prohibiting entrance to the aggrieved person's place of employment, preventing access to shared resources to preventing the sale, transfer or alienating matrimonial home in a manner leaving the aggrieved person to destitute function as expeditious relief ensuring non-discrimination. The provisions preventing entrance to the place of employment or shared resources and preventing alienation of matrimonial homes are important tools to be expeditiously resorted in economic empowerment of women. The urgent need to prevent domestic violence and the need to ensure the safety of the aggrieved person are the grounds for the issuance of interim protection orders[16]. The discretion vested in the Magistrate upon an interim protection order to refer the parties to a family counsellor or order parties for counselling and ordering monitoring by a family counsellor or probationary officer under Section 5(2) (a) and 5(2) (b) is a vital power focusing on protection of family entity parallel to eliminating violence. At the same time flexible procedure permitting affidavits to be considered for interim protection orders allows expeditious relief and in determining the final protection order, the contextually bound discretion vested in the magistrate to consider either affidavits or oral evidence or both[17] ensures that spirit of this legislature for speedy and effective relief are satisfied. The wide scope of orders to be made upon protection orders to direct respondent and aggrieved person to mandatory family counselling or psychotherapy or other forms of rehabilitation and urgent monetary support, continuation of occupation in residence are vital provisions that could be effectively utilized for the economic empowerment of women[18].

Pragmatic Operation of the Gender Protection Law Regime

Nevertheless, the Domestic Violence Act is criticized for the non-recognition of marital rape as a form of violence and as a consequence of patriarchal ideologies and gender inequalities that are embedded in Sri Lankan Culture and society. Thus, domestic violence

15 Domestic Violence Act No. 34 of 2005, 23 definition read with schedule I
16 Ibid 4(2)
17 Ibid 6(1)
18 Ibid 12

requires a holistic approach as it is a social problem necessitating a coordinated response from government, civil society organizaions and the community[19]. Simultaneously, the Asian Development Bank observes that criminalizing incest, sexual harassment by amending the Penal code, introducing the Prevention of Domestic Violence Act in 2005 and incorporating the SAARC Convention on Prevention and Combatting Trafficking in Women and Children for Prostitution have not been followed by Action. Weak law enforcement and lack of public awareness of these initiatives have been impediments to the reduction of violence against women[20]. The said report observes that the National Action Plan for Protection and Promotion of Human Rights 2011-2016 contains eight sections focusing on the government's commitment to the protection of women against violence and the elimination of discriminatory laws, policies and practices that are expected to ensure the economic empowerment of women[21].

The Harmful Impact of Sexual Harassment on Female Employment

Despite the increasing of women's contributions to Sri Lankan workforce, their contribution rate is so low compared to men and a major reason for such low contribution is the sexual harassment in workplaces forcibly depriving them of employment regardless of economic, social and education position[22]. The types of workplace sexual harassment involve *quid pro quo* harassment, where supervisors use supervising authority to obtain sexual favours from employees. This includes the women employees being compelled to tolerate their supervisor's harassment for the purpose of wage increases, promotions, training opportunities, obtaining new jobs as well as keeping the existing employment[23]. The second one is hostile working environment harassment, where verbal, non-verbal, and physical conduct of a sexual nature that unreasonably interferes with her work performance or creates an intimidating hostile working environment[24]. A multiple impact of *quid pro quo* sexual harassment could be the indirect discrimination of other competent female workers who are not directly exposed to harassment but inevitably hostile working environment pursuant to heavy work and deprived of deserving benefits. The impact of this form of passive impact of sexual harassment on the economic empowerment of women and Sri Lankan economy is worthwhile research to be undertaken.

19 Ainkaran Kugathasan, "Sri Lanka's Prevention of the Domestic Violence Act: An Eye Wash"[2012], Peace and Conflict Monitor dated 27th April 2012

20 Asian Development Bank, "Country Gender Assessment Sri Lanka 2015 update"[2015] p 6

21 Asian Development Bank, Country Gender Assessment Sri Lanka 2015 update, p viii

22 Pg. 40, Karunaratne Mihiri Madushika, Sexual Harassment at Sri Lankan Work Places and its Legal Remedy & Muthusamy E 2009, Problems Faced by Working Women in the Era of Globalization

23 Salary.lk, "Sexual Harassment worldwide" Wageindicator.org

24 Karunaratne, Mihiri Madushika, Sexual Harassment at Sir Lankan Work Places,[2014/2015] p. 41 citing Fremling G.M, Posner. R.A, Status Signaling and the Law, with Particular Application to Sexual Harassment, University of Chicago Law School, John M, Olin Law & Economics Working Paper No. 69

Current Case Law on Sexual Harassment, Statutory Rape and Rape

In the landmark judgement *Manohari Palleketiya vs. H.M. Gunewardene, Secretary Ministry of Education* & *Premalal Kumarasiri, Principal, Mahanama College et al SC FR 76/2012* fundamental rights application His Lordship Anil Gooneratne discerned that sexual harassment or workplace stress and strain occasioned by oppressive and burdensome conduct under colour of executive office would be an infringement of the fundamental rights of the Petitioner and clearly the fact that the Petitioner, in this case, snapped under the long and prolonged oppressive conduct directed towards her cannot be held against the petitioner in the advancement and enforcement of fundamental rights which this Court is perforce bound to promote and protect.

The undoubted impact of this judgment on the social conscience is that sexual harassment in the workplace shall not be tolerated and said rights are broadly interpreted in view of international conventions like CEADAW. This is a crucial message to the economic empowerment of women. To some extent, sexual harassment in government institutions is controlled by resorting to fundamental rights and writ jurisdiction.

Judgments that may be interpretated as Stereotypical and Progressive Efforts of the Court to Remedy Inequalities

The author simply quotes the following passage by The Centre for Equality & Justice, which has not substantiated their findings only for the purpose of maintaining a balanced perspective for deconstructing gender perceptions while disagreeing with the same from a broader point of view.

The Centre for Equality and Justice in its publication making a controversial statement states "*Rape and Sexual Violence in Conflict" that broadly the attitude in Sri Lankan courts represent a series gap in understanding and applying current progressive approaches to the definition and prosecution of rape in a manner that is victim centered justice and rights oriented*[25]*. The decisions also indicate how rape myths and gender stereo types are pervasive through the legal system and how it impacts pervasive through the legal system affecting victim's right to redress*[26].

The evidentiary principles that could be identified with certain gender stereotypical notions could be observed in a series of case law. In CA 145/2014 *Hewagegaganege Ninhal Shantha vs. Democratic Socialist Republic of Sri Lanka, Her Ladyship Devika Livera de Tennakoon* in analyzing the evidentiary test of credibility spontaneity and probability in *Karunasena vs. The Republic* and *Sunil Vs. Attorney General* as follows:

"In a charge of this nature (rape), a proper direction would have been to tell the jury that it is unsafe to convict a person on uncorroborated testimony of the prosecutrix but that the

25 Centre for Equality and Justice, " Rape and Sexual Violence in Conflict" [2018] p 10
26 Ibid p 15

jury if they are satisfied with the truth of her evidence may do so after paying attention to said warning." [27]

Similarly in *Sunil* & *Another vs. Attorney General*[28] it was held that it is very dangerous to act on the uncorroborated testimony of a women victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration.

In the recent case of *Ajit vs. Attorney General* 2009(1) SLR 23 His Lordship Sisira de Arbrew quoting a passage from Dr. Granville Williams's book: Proof of Guilt 3rd Edition pages 158 & 159 ascertaining reasons for said principle held that

"On charge of rape and similar offenses it the practice to instruct jury that it is unsafe to convict on the uncorroborated testimony of an alleged victim. The rule applies to charge of indecent assault, or any sexual offence including the unnatural offenses between the males. There is a sound reason for it because these cases are particularly subjected to the danger of deliberate false charges, resulting from sexual neurosis, fantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed."

Naturally, these evidentiary principles in relation to the rule of corroboration sometimes evolve in confrontation of deliberate false charges and abuse of process of courts. However, an important mode of balancing conflicting but important interests must not only be done but also seen to be done with extreme caution. This is further left to be ascertained in the remedial process herein

In the recent case of CA 73/2017 *The Democratic Socialist Republic of Sri Lanka vs. Mannikkam Navaratnam*, Her Ladyship K.K Wicremasinghe referring to the Indian Case of *Lokesh Mishra vs. State of New Dhelhi CRL A. 768/2010* dated 12.03.2014 held that as per established law the conviction of a perpetrator of a crime could be based even on the uncorroborated testimony of the prosecutrix. The prime reason for attaching such importance to the testimony of the prosecutrix is that a girl or woman in a traditional non-permissive society in India would be extremely reluctant to falsely implicate or even to admit any incident, which is likely to reflect on her chastity or put to risk of her own image, dignity and prestige in the society.

The Pragmatic Operation of Maternity Law and Post-Maternity Childcare or Daycare Need as an Integral Element of Gender Discrimination

The rate of female participation in Sri Lanka is one of the lowest in the region that the country will soon face a contraction of its labour supply and this will constrain future economic growth, the return on the invested capital and corporate profits and living standards in the Country. Consequently, many countries seek to increase overall labour participation by increasing female labour. Measures to improve maternity benefits

27 *Hewagegaganege Ninhal Shantha vs. Hon. Attorney CA 145/2014 [2016]* CA Minutes dated 21st September 2016
28 [1986] (1) Sri LR 230

generally increase the recruitment and retention of women by workforce and such benefits will become increasingly important in Sri Lanka in sustaining economic growth[29]. The fundamental legislation governing maternity benefits in Sri Lanka is the Shops and Office Employees (Regulation of Employment and Remuneration) Act, Maternity Benefits Ordinance[30] and Establishment Code. All female employees related to a shop or office are governed by the Shops and Office Employees Act. It provides 84 working days for the first two children and 42 working days for the third child[31]. Although the payment of salary is provided in full, no nursing intervals are provided. The Maternity Benefits Ordinance covers all females employed on a wage in any trade, industry or business undertaking including the estate employees in the plantation sector. These laws also provide 84 working days (parental and post-natal) as well as nursing intervals for breast feeding and this was recently amended by the Maternity Benefits (Amendment) Act no. 15 of 2018. Establishment Code[32] governing all female employees employed in the public sector or statutory boards provides considerable benefits extending from 84 days leave with full pay, another 84 days of half pay leave and additional 84 days of no-pay leave and nursing benefits until the infant is 6 months old. Sri Lanka has ratified the International Labour Organization Maternity Convention of 1952, which includes the basic principles of a) the right to maternity leave, b) the provision of healthcare during maternity, c) the right to cash benefits during pregnancy and maternity leave, d) the right to job security during maternity leave, e) the right to nursing breaks during working hours and f) employers should not be individually liable for costs of maternity benefits. Current global discussion in connection with ILO mainly focuses on the possibility of maternity benefits being taken over by social insurance scheme. In this regard, at the International Labour Conference in 2011, it was the understanding of social partners that the government of Sri Lanka would progressively replace the direct employer liability system with a social insurance scheme. However, the Sri Lankan government had subsequently indicated that it would be difficult to provide cash for a government-sponsored social insurance scheme[33]. A government-funded social insurance scheme for maternity benefits would undoubtedly have a revolutionary impact on discriminatory attitudes of Sri Lankan private sector employers. Currently from the point of recruitment female employees are discriminated based on their marriage prospects as well as on their prospects of having children. Certain questions by human resource departments of private sector employers even in the context of high-skilled job interviews shockingly result in blatant discrimination on gender and the reproductive role of women. Therefore, it is high

29 International Labour Organization, "Study on Maternity Protection Insurance in Sri Lanka"[2016] p 1

30 Maternity Benefits Ordinance No. 32 of 1939 as amended by Act No. 43 of 1985 & Act No. 15 of 2018

31 Shops and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954, amended by Act No. 60 of 1957, 53 of 1981 and 44 of 1985, 18 A-18 G

32 Chapter XII or Administrative Circular No. 04/22005, February 2005

33 International Labour Organization(2016), Study on Maternity Protection Insurance, p 26

time that the government show real commitment towards ILO Convention 103 in initiating an insurance scheme for maternity benefits in the journey towards the elimination of gender inequalities.

Although parental, pre-natal, natal care and post–natal care are covered by current maternity laws post-maternity childcare and issues connected and incidental to maternity like post-maternity childcare or child protection being vastly unregulated is a serious gap in the maternity laws. In Sri Lanka, daycare centres are hardly regulated and a few attempts by Ministry of Women and Child Affairs like the National Policy for Child Daycare Centres, which is an attempt by the Ministry of Child Affairs, Dryzone Development with tectnical assistance of UNICEF 2019 does not seem have produced any positive outcome. Thus, post-maternity childcare and daycare need, which is an integral element in the economic empowerment of women remain a drastic gap in gender protection laws. The vision of the same to ensure the availability of quality, affordable and accessible daycare after laps of three years raises serious issues

Among the eight women business and law indicators, parenthood and child care is identified as important component in the economic decision-making capacity of women and according to said indicators the enactment of policies to make childcare available, affordable and of decent quality is a priority because of their potential to make a better outcome for women children and economy overall. The findings of pilot projects and empirical research in this regard reflect that targeting access to available, affordable and quality childcare services can have far-reaching positive impacts not only for women as active participants in the labour market but also for child development and economic growth[34]. Empirical support to the argument that gender equality is macrocritical or in other words, the same affects the macro-economy in a significant way[35]. Therefore, high priority should be assigned to policiees designed to ensure level playing field for women such as women's rights, women's health, educational access, financial services and technology[36]. However, in Sri Lanka persistent inequality exists on account of the superior status of the father as the legal guardian of marital children, mother as the sole guardian of non-marital children, custody guardianship according to best interests of the child and cultural sensitivity preventing discrimination in the personal laws of Sri Lankan Tamils, Muslims and Kandyan Sinhalese[37]. Around two-thirds of the female labour force are in the informal sector and are outside the ambit of labour legislation that protects the rights of most workers in the informal sector[38].

34 WOMEN, BUSINESS AND THE LAW [2023], "The State of Women's Legal Rights", p 37 & 38

35 Ata Can Bertay, Ljubica Dordevic and Can Sever, "Gender Inequality and Economic Growth: Evidence From Industry Level Data", IMF Working Paper, p 21

36 Ibid, citing Jain-Chandra S,K, K. Kochchar, M Newiak, Y Yang and E, Zoli, [2018], " Gender Equality: which Policies have Biggest Bank for Buck" IMF Working Paper 18/105. Washington International Monetary Fund

37 Asian Development Bank, "Country Gender Assessment of Sri Lanaka an update"[2015], p 5

38 Ibid citing R. Jayasundare Understanding Gendered Violence against Women in Sri Lanka: A Background Proper for Women Defining Peace [2009],

The Rights of Agrarain Women - Land Development Ordinance

The gender discriminatory inheritance or intestate succession schedules to the Land Development Ordinance (LDO) in terms of Section 51 of the Land Development Ordinance 1935 was remedied by the Land Development Ordinance (Amendment) Act No. 11 of 2022, where the same was amended with the substitution of gender-neutral list of successors very much in line with the purpose of LDO. Despite progressive steps of this nature, strong stereotypical social attitudes in the traditional agrarian societies obstruct the dynamic multitasking contribution of female labour to the economy. The said amendment focuses on preventing alienation of land unsurveyed by the surveyor general, liberalising barriers to mortgage, powers of the president or the commissioner of land to cancel grants obtained fraudulently etc. along with removal of gender discriminatory schedule appears an attempt to remedy complications, which have been existing for a considerable period of time. However, it is only time would decide whether the real purpose of this amendment would be successful in remedying hyper complications for nearly a century and resulting in substantive equality. This is because our agrarian hearts of north central province, where LDO operates seem to have been alarmed by the coaser reality of the disorted patriarchal dominance of men who are addicted to drugs and illegal liquor[39]. Thus, a holistic approach with a coordinated response from the government, civil society and the community is in line with the true spirit of this LDO amendment is needed in order to ensure that this will result in substative equality for hardworking and multitasking agrarian women.

Women in Foreign Employment

In the foreign employment sector where the contribution of Sri Lankan women is overwhelming, a strong institutional framework exists with Sri Lanka Bureau of Foreign Employment, National Policy on Decent work initiated by International Labour Organization, the National Labour Migration Policy and the successful implementation of reforms to improve the situation of the migrant worker. Despite these efforts, the foreign employment sector is plagued by widespread allegations of malpractices, corruption and exploitation of the migrant workers. The majority of the workforce consists of low-skilled labour, mainly women from impoverished rural areas who are vulnerable to exploitation, have little bargaining power and are frequently ill-informed of their rights[40]. Even though Sri Lanka Bureau of Foreign Employment Act contain explicit provisions for the protection return migration and reintegration could be observed as a drastic gap in the law that requires to be remedied in ensuring the economic empowerment of women.

39 Experiences of the author as the District Judge/Magistrate in the Agrarian hearts of Kebithigollawa

40 Transparency International Sri Lanka," Integrity in Foreign Employment, An Analysis of Corruption Risks in recruitment" [2010] p 3

Remedial Approach for Sexual Harassment and Gender-Oppressive Offenses

The fundamental socio-legal scenarios preventing the dynamic potential contribution of women to Sri Lankan economy are threefold: a) persistent sexual harassment in workplaces and consequent gender stereotyping both in relation to skilled, semiskilled and non-skilled employment, b) Subconscious Message to the society at large in pragmatic operation of gender-sensitive laws and judicial pronouncements concerning the same and c) Current Maternity Laws failing to comprehend the significance of childcare needs of working women as integral element of gender equality or economic empowerment of women

In terms of Article 5 of CEADAW, state parties are bound to take appropriate measures to modify the social and cultural patterns with the view of elimination of prejudices and practices based on superiority or inferiority of either sex. In prosecuting the criminal offence of sexual harassment under Section 345 of the Penal Code and subsequent wide illustrations introduced by amendment no 16 of 2006 like mental psychological trauma being defined as sexual harassment, an extensive scope of preventing same could be observed. Furthermore, the delays in the police investigation and medico-legal reports are obstacles in giving effect to the legislative intention of non-tolerance of sexual harassment. In this regard, quasi inquisitorial nature of powers vested in the Magistrate's court in assisting and facilitating investigation[41] could be resorted. Moreover, in considering bail applications, balancing conflicting but important interests of rule as to granting bail and reasons for refusing bail under Section 14 of the Bail Act such as interference with witnesses or evidence or obstructing course of justice as necessities of effective investigation and international obligations such as CEADAW should be given attention. A recent analysis of bail conditions trivializing the trauma undergone by the victim-survivors and adversely affecting their dignity ascertained by the Indian Supreme Court in case *Aparna Bhat Ors vs. State of Madhya Pradesh Criminal Appeal No. 329 of 2021* as discerned by Honorable Justice S Ravindra Bhat " Judges can play a significant role in riding the justice system of harmful stereotypes. They have an important responsibility to base their decisions on law and facts in evidence, and not engage in gender stereotyping. This requires judges to identify gender stereotyping, and identify how the application, enforcement or perpetuation of theses stereotypes discriminates against women or denies them equal access to justice[42]. Stereotyping might compromise the impartiality of a judge's decision and affect his or views about witness credibility or culpability of the accused persons[43]. Honarable Justice Bhat further stated quoting the Bangalore Principles

41 Code of Criminal Procedure Act No. 15 of 1979, 124

42 Aparna Bhat & Ors vs. State of Madhya Pradesh [2021] Criminal Appeal No. 329 of 2021, The Supreme Court of India dated 18th March 2018

43 Simon Cusack, "Eliminating Judicial Stereotyping", Paper submitted to the Office of the High Commission fro Human Rights [2014] p 22

of judicial conduct 2002 stated that " 2.4" *judges shall not knowingly, while a proceeding is before or could come, judge make any comment that might reasonably be expected affect the outcome of any proceeding or impair manifest fairness of the process. Furthermore, Rule 5.1, a judge shall be aware of and understand diversity in society from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation and social and economic status and others like causes (irrelevant grounds)*[44]. Thus, a paramount duty is placed on the judges to exercise extreme caution in gender-sensitive cases from the point of considering bail to pay severe focus to prejudicial gender stereotyping, International obligations like CEADW and Bangalore principles in eliminating gender discrimination in the process of economic empowerment of women.

In the Court of Appeal Case No. HCC/187/19 *Attorney General vs. Wewathenne Siriniwasa* in respect of an indictment of grave sexual abuse of an under aged, His Lordship Wickum Kaluarachchi demonstrating understanding of social diversity, differences arising from sex, disability, age, marital status, sexual orientation etc. as enshrined in the Bangalore principles declared quoting *Thibirigolle Sirirathana vs. OIC* Police Station, Rasanayakepura that "*at the time of incident PW1 was 14 years old and when a child is sexually assaulted by an adult, it is natural for the victim's family to think twice before making a complaint to the police" but in the instant action there was no-delay in making a compliant. It was held in the cases of sexual offenses that courts have found that victims of sexual offenses can react in different ways. Some may compliant immediately. Others may feel for example afraid, shocked, ashamed, confused or even guilty and may not speak out until sometime has passed away*."

Her Ladyship Wicremasinghe in the afore-quoted *Mannikam Navaratnam* Case considering the fact that the alleged victim is just 16 years and 5 months, whose modesty would be affected is naturally reluctant to explain to everybody without knowing whether explicit details as in the trial is required by a medical officer held that

"As Judges we have to consider the social behavior of the victimized witness. Evidence of such witness cannot be treated as equally with a trained witness. Due to social stigma, most of such witnesses are reluctant witness. This is a case where it affects the modesty of the victim. One cannot blatantly reject or accept here evidence. It should be carefully analyzed.[45]*"*

His Lordhsip Anil Gooneratne in the Land mark case of *Manohari Palleketiya vs. H.M Gunewardene, Secretary Ministry of Education & Premalal Kumarasiri, Principal, Mahanama College et al SC FR 76/2012* analysing the persuasive effect of international obligations concerning the convetions like CEADAW and wide interpretations to sexual harassment in other jurisdictions held as follows:

44 Rule 2.4 & 5.1 Bangalore Principles of Judicial Conduct 2002

45 *Democratic Socialist Republic of Sri Lanka vs. Mannikkam Navaratnam* [2020] CA 73/2017 CA Minutes dated 28th July 2020, p 13

Sri Lanka has undertaken international obligations to eliminate all forms of discrimination against women by acceding to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) on 17.07.1998 and in pursuance of these international obligations Sri Lanka has also enacted several to give vent to these global rights in favour of women. In the circumstances this Court holds that the regime of affirmative rights referred to above cannot be restricted or limited by the provisions of Establishment Code and we are also mindful of comparative jurisprudence such as the House of Lords decision of R v. Ireland and Barstow 1998 AC 147 where it was held that silent phone calls to a women amounted to an assault. But here in this instance we are confronted with a continuous course conduct which is quite offensive of Article 12 of the Constitution[46].

The above judgment is an important guideline to be followed in the remedial approach for pervasive gender oppression reflected in workplace sexual harassment or in any gender-related offence even in determining a summary criminal action in the Magistrate's court. A worthy discussion on the principles of international law principles enshrined Conventions like CEADAW and Bangalore Principles in judgements, orders and even bail orders similar to the method adopted by Indian Court would undoubtedly convey a clear message to public at large.

It is noteworthy that abuse of the process of courts with blatantly false complaints by mala fide litigants for ulterior motives seemed to have resulted in some case laws reflecting gender stereotypical comments. Thus, even in a case concerning *mala fide* false complaint parallel to evidentiary analysis, which appears stereotypical in order to ensure a balanced perspective discussion on CEADAW, gender stereotyping and Bangalore principles is essential. Discussion of these rights could be maintained in the courts of first instance like Magistrate court since the same is the direct point of contact with the general public. This form of analysis or discussion seems impractical or challenging on account of the heavy number of calling and trial cases. However, it is a worthwhile arduous task to be undertaken by the judges who are bound to maintain irrevocably indisputable integrity, duty and diligence[47] as well as being bound by commitment to lofty principles like Bangalore principles.

Remedial Approach for Post - Maternity Childcare Dilemma and Foreign Employed Female Workforce

Radical socio-economic structural changes in Sri Lanka with the shift from extended family to a more nuclear family post maternity childcare needs or desperate daycare needs stand a formidable barrier drastically impeding female employment, especially in the formal sector. As the Sri Lankan private sector employer bear the full cost of maternity

46 SC FR 76/2012 P.S Manohari Palleketiya vs. H.M Gunewardene, Secretary Ministry of Education & Premalal Kumarasiri, Principal, Mahanama College et al [2016] SC Minutes dated 8th July 2016

47 His Lordship Chief Justice Hon. Jayantha Jayasooriya, Judges Conference, 2019

benefit while the state-funded social insurance scheme covering maternity benefits seems long away from reality post maternity childcare needs or daycare need seem almost an impossible scenario. However, especially in the context where our country is confronted with the desperate need to preserve both skilled, semiskilled and non-skilled female labour, it is high time that the post- maternity childcare protection and daycare being considered an integral element of industrial law governing maternity.

Gender equality is empirically supported as macrocritical that the same should be assigned a high priority on policy maker's agenda[48]. The policies designed to ensure a level playing field for women, such as improving rule of law and women's legal rights in particular women's health, access to education, finalcial services and technology are not only a matter of human rights, equity and social justice but also relevant policy levers to boost economic growth-benifiting economy as a whole[49].

The preamble to the CEADAW convention declares that *"convinced that the full and complete development of a country, the welfare of the word and cause of peace require maximum participation of women on equal terms with the men in all fields, bearing in mind the great contribution of women to welfare of the family and development of the family, so far not fully recognized the social significance of maternity and the role of both parents in the family……."* amply demonstrate the striking significance attached to the employment of women in all field, maternity issues, matters connected and incidental to maternity or post-maternity.

In terms of Article 11 of the CEADAW, state parties are bound to take appropriate measures to eliminate discrimination against women in field of employment in order to ensure, on the basis of equality of men and women and the right to work is recognized as an inalienable right of all human beings[50].

Moreover, Article 1 of the International Labour Organization Convention on Discrimination (Employment and Occupation) Convention 1958 (No. 111) defines discrimination as any distinction, exclusion, or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

Sri Lanka has ratified the CEADAW Convention and to a considerable extent such obligations have been transformed to local legislation including the Penal Code (Amendment) Act No. 22 of 1995, Domestic Violence Act etc. State obligations such as

48 Ata Can Bertay & Ljubica Dorevic & Can Sever," Gender Inequality and Economic Growth: Evidence From Industrial Level Data", IMF Working Paper, [2020] p 21

49 Ibid citing Jain Chandra, S, K Kochchar, M.Newiak, Y Yang & E Zoli, 2018." Gender Equality: Which Policies Have the Biggest Bang for Buck?" IMF Working Paper 18/105 Washington IMF

50 Article 11(2) of the CEADAW

post-maternity childcare or dacare needs being considered as an integral element of the right to work or maternity laws as well as the effect of Article 11 of CEADAW, which recognizes right to work as an inalienable right of all human beings could be ascertained in terms of the Administrative Law and fundamental rights jurisdictions. It is noteworthy that under the CEADAW state obligations, Sri Lankan state must respect, secure, promote and fulfill the inalienable right to work and equal playing field by positive state intervention in addressing the post-maternity childcare or daycare dilemma. Moreover, ILO Convention on the Maternity Protection Convention No. 103 was ratified by Sri Lanka and ILO Convention No. 111 seems a heavier standard which has not yet been ratified. Furthermore, Sri Lanka ratified the Convention on the Protection of Rights of All Migrant workers in 1996 and in terms of Article 67(2) of the said Convention convey inter-state cooperation as means to promoting adequate economic conditions for migrants' resettlement, orderly return of migrant workers to state of origin and durable social and cultural re-integration in the state of origin. The Agenda 2030 for sustainable development calls for underlining the right of migrants to return to their country of citizenship and states must ensure that their returning nationals are duly received[51]. This is vital in relation to remedying the problematic issue concerning the return and reintegration of our foreign-employed women.

In the landmark judgment of *Bulankulama vs. Ministry of Industrial Development* analyzing the concept of judicial incorporation of international law His Lordship A.R.B Amarasinghe applied the principles of Rio Declaration:

"Admittedly the principles set out in the Stockholm and Rio de Janeiro Declarations are not legally binding in the way an act of parliament would be. It may be regarded merely as soft law. Nevertheless as a member of United Nations they could hardly be ignored by Sri Lanka. Moreover, they would in my view be binding if they have either been expressly enacted or become a part of domestic law by adoption by the superior courts of record and by the Supreme Court[52]. With reference to said *Eppawala Phosphate case*, her ladyship Thilakawardne observed in *Wijebanda vs. Conservator General of Forestry*[53] that although international instruments and constitutional provisions are not legally binding they constitute an important part of our environmental protection regime.

This judicial activism moving towards monism was criticized for trespassing into the legislative sphere in the *Sinharasa case*[54]. However, the Indian Supreme Court justified its activism that it was merely ensuring that the advantage of treaty reaches citizens

51 Wicramasekera, P, *International Migration and Employment in the Post Reforms Economy of Sri Lanka, International Migration Program*, p 30

52 *Bulankulama vs. Ministry of Industrial Development* [2000] (3) SLR 243, His Lordship A.R.B Amarasinghe

53 *Wijebanda vs. Conservator General of Forestry [2009](1) SLR 337* Her Ladyship Thilakawardene

54 *Nallaratnam Sinharasa vs. Attorney General* 2013 (1) SLR 245

and it is not thwarted by executive lethargy in not incorporating into domestic law[55]. Thus, judicial incorporation of articles of International Law Conventions such as the inalienable right of all human beings to work and elimination of discrimination against women in employment under CEADAW, Articles of ILO Conventions and the articles concerning return and reintegration in the Convention on Rights of All Migrant workers are crucial safeguards to be given effect.

In considering Article 12 equality from broad dimension, His Lordship Yasantha Kodagoa *in Wijeratne vs. Sri Lanka Ports Authority SC FR Application 256/207*[56] held that "The concept of equality was originally aimed at preventing discrimination based on or due to such immutable and acquired characteristics, which do not on their own make human being unequal. It is now well accepted that the 'right to equality' convers much wider area aimed at preventing other 'injustices' too that are recognized by law. Equality is now a right as opposed to a mere previledge or entitlement"[57]. These broad notions of equality are to be read with the right of every citizen to engage in any lawful occupation, profession, trade, business or enterpirze in respect of Article 14(1) (g) of the Constitution.

These rights declared by CEADAW and ILO Conventions must necessarily be identified within the scope of fundamental rights enshrined in Article 12(1) ensuring equality and equal protection, Article 12(2) non-discrimination based on sex, Article 12(4) possibility of special provision for the protection of women along with industrial or labour laws governing maternity. This, could also be construed as interpreting substantive equality under CEADAW within the scope of equality under Article 12, where state the fails to take into account the inherent inequality pursuant to denying post-maternity childcare or daycare needs. Simultaneously, in terms of Article 4(d) of the Constitution, which states that fundamental rights, which are by the constitution declared and recognized shall be advanced, secured and protected by all organs of the state and shall not be abridged denied nor restricted ensures that organs of state including the ministry of labour, ministry of women and childcare are bound by the fundamental right to equality. In other words, equality is violated in strengthening the hands of men by maintaining formal approach with no-special provision covering post-maternity childcare and denying protection to women, who are ultimately placed equally on account of the inalienable right to work of all human beings.

55 Sonarajah, M (2016) *The Reception of International Law in the Domestic Law in Sri Lanka in the Context of Global Experience(R.K.W Goonesekere Memorial Lecture)* p25 & 26, https://jil.law.cmb.ac.lk/wp-content/uploads/2018/08/Vol25_01.pdf

56 Wjeratne vs. Sri Lanka Ports Authority [2020] SC R Applicaion No. 256/2017- SC Mnutes dated 11th December 2020

57 Dr. Galmangoda Guruge Chamal Snjeewa vs. Hon. Keheliya Rambukwella, Hon. Minister of Health et al [2023] SC FR SC Mnutes dated 26 May 2023 His Lordship Priyantha Fernando.

In parallel, the development in the public law regime that international treaties and conventions could be discerned as soft law with persuasive effect is a vital development to be exploited in remedying the post maternity childcare or daycare being recognized an integral element of non-discrimination of women in employment. Therefore, it is open for skilled women who are compelled to resign from their jobs on account of post maternity childcare issues to resort to fundamental rights or writs in the sphere of public law. Simultaneously, it is open for voluntary organizations like the Environmental Law Foundation to seek remedy for this dilemma by means of public interest litigation especially in the context where Sri Lanka is currently being driven by the urgent demand to protect female labour in the best interests of Sri Lankan economy.

Conclusion

On account of the demographic circumstances of Sri Lanka concerning ageing of population, fall of bith rate, female labour participation being the lowest in the region, our country's work force will soon be exposed to a labour contraction constraining future economic growth, retun on invested capital, coprate profits and living stadards. Therefore, an urgent need to address this labour shortage dilemma by optimizing female participation in the work force has sprung up. Owing to considerably high degree of women education in Sri Lanka while women capacities being vastly underutilized in remdying the staggering Sri Lankan econmy, we are confronted with the desperate necessity for protecting, preserving and optimizing female labour. However, the formidable obstacles preventing women in employment are gender bias, gender stereotyping and discrimination in multiple facets persistent in our society.The most drastic form gender stereotyping and discrimination that restrains women's contribution to our economy is sexual harassment in the work place. Despite the introduction of rigourous criminal offences like statutory rape, incest and expanded scope of sexual harassment under the Penal Code (Amedment) Act No. 22 of 1995 and Act No. 16 of 2006 in pursuance of International convetnions like Convention on the Elimination of All Forms of Discrimination against Women (CEADAW), persistant inequality prevails. This is because formal operation of said law fails to take into account actual inequalities that need to be remedied in a corrective approach. In this regard, weaknesses in the law enforcement and lack of public awareness of legal intiatives have prevented objectives of said law being satisfied. From a legal point of view, the courts of first instance like Magistrate's court, which is a close and direct point of contact with general public can play a significant role in eliminating gender stereotyping, discrimination and oppression. Said role mainly involves process of judgments, orders or even bail orders, where the court can engage in a discussion of principles of international obligations like CEADAW as well as gender stereotying from an evidentiary perspective. Needless to state

that this would open public discussion, which is vital both in eliminating pervasive sexual harassment in work place, gender stereotyping and in facilitating free women participation in the economy. Neverthelss, portions the judgements that could be perceived as stereotypical from a hyper feminist perspective are sometimes due to false allegations by *malafide* complianants, which results in abuse process of court. The effective remedy is an explcit discussion of priciples of CEADAW principles, Bangalore Principles, rationale for sexual harassment, statutory rape etc. laws in judgments and orders as much as possible. Although the Domestic Violence Act does not seem to have generated expected results it's explicit provisions demonstrate a master piece of legislation with wide discretion being vested in Magistrate's courts to effectively eliminate violence in ensuring both gender equality and economic empowerment of women. The provisions for family counselor, psychotherapy and flexible procedure are potential tools of providing expedicious and effective results in economic empowerment of women and swift relief. Neverthless, on account of patriarchal values and stereotypes embedded in the society, a holistic approach with coordinated efforts of government, civil society organizations and community at large is needed in meeting the intentons of these laws. Moreover, the Land Development Ordinance Amendment in 2022, which removed the prolonged gender discriminatory intestate sucession schedule intended to address various complications of LDO. However, pursuant to distorted stereotypical notions or patriarchal values dominated by men addicted to drugs and liquor in agrarian hearts like north central province, it is still a formidable challenge whether said amendments can ensure substantial economic justice to multitasking agrarian women. The other formidable barrier pervasively preventing vital contribution of women to the economy is the post maternity childcare or daycare dilemma. This is because the maternity protection law regime, which includes Shops and Office (Regulation of Employment and Remuneration) Act, Maternity Benefits Ordinace and Estabshiment Code do not extend to the post-maternity childare or child development need, which is an integral element in ensuring women's employment. In terms of CEADAW Convetion, the right to work is recognized as an inalienable right of all human beings and ILO Conventions and ILO 111on Non-Discrimination could be ascertained within the scope of equality under Article 12(1) of the Constitution readwith Article 14(1)(g) of the Constitution involving the freedom to engage in any occupation, profession or trade. This mutual intercourse between International Law Conventions like CEADAW and ILO Articles and equality Articles of Sri Lankan Constitution is somewhat controversial in the dualist context. However, a series of judgements by Sri Lankan superior courts ranging *from Eppawela phosphate case, Wettegedara Wijebanda, Chunnakam Power Plant Contamination case* etc. declared judicial incorporation of international treaties/conventions and thereby considered

the same as soft laws. This judicial incorporation of international law as well as the extensive scope of the twin notions of equality and equal protection convey the possibility such worthy intercourse in the public law sphere under fundamental rights and writ jurisdiction. Simultenously, Article 4(d) of the Consittution that imposes a mandatory obligation on all organs of state like ministry of women's affairs, child affairs, Industrial Affairs etc. to respect, secure and advance fundamental rights like equality and neither to deny nor restrict the same. Thus, it is open for skilled women who are deprived of career prospects due to the lack of post-maternity childcare or daycare or any volutanry organization to challenge this dilemma in the public interest in the fundamental rights and writ jurisdiction in pursuance of the struggle for economic rights of Sri Lankan women with dynamic potensies.

THE REQUIREMENT OF ESTABLISHING THE BREACH OF PEACE IS THREATENED OR LIKELY IN THE PROCEEDINGS UNDER SECTION 66 OF PRIMARY COURTS PROCEDURE ACT

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1. Introduction

> "A Magistrate is authorized to issue an order declaring a party to be entitled to possession of a land until evicted therefrom in due course of law. The Magistrate does not purport to decide a party's title or right to possession of the land but expressly reserves that question to be decided in due course of law. The foundation of his jurisdiction is on apprehension of the breach of the peace, and, with that object, he makes a temporary order irrespective of the rights of the parties, which will have to be agitated and disposed of in the manner provided by law. The life of the said order is conterminous with the passing of a decree by a Civil Court and the moment a Civil Court makes an order of eviction, it displaces the order of the Criminal Court."[1]

As described in the above-quoted judgment of the Supreme Court of India, Sri Lankan law also has provided a special mechanism under the Primary Courts' Procedure Act, No. 44 of 1979 (hereinafter sometimes referred to as the 'Act') regarding inquiries into disputes affecting land where a breach of the peace is threatened or likely.[2] The Judges of the Primary Court[3] are provided with the jurisdiction to inquire into the disputes affecting land where a breach of the peace is threatened or likely.[4] Even though a dispute affecting land is a civil dispute by its nature, the Judges of the Primary Court are empowered to

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1 *Bhinka and Others v. Charan Singh* 1959 AIR 960, 9

2 Part VII of the Primary Courts' Procedure Act, No. 44 of 1979

3 Even though the Primary Courts and Judges of the Primary Court for each judicial division has been established under Section 5(1) of the Judicature Act, No. 02 of 1978 as amended by Act No. 34 of 2022, in practice, the Judicial Service Commission appoints the same judicial officer as the Magistrate as well as the Judge of the Primary Court for a judicial division. For practical reasons, both the Magistrate's Court and the Primary Court is held at the same court in the judicial division as well. Therefore, simultaneous use of the terms 'Judge of the Primary Court' and the 'Magistrate' can be found in case law.

4 Section 66 (1) of the Primary Courts' Procedure Act, No. 44 of 1979

inquire into such civil disputes, subject to the existence of two conditions; *i.e.* (1) a dispute affecting land, (2) a breach of the peace is threatened or likely.

During the last few decades, a debate can be evident from a series of judicial decisions of the superior courts of Sri Lanka as to whether there is a duty cast upon the Judge of the Primary Court to satisfy himself that those two conditions exist. Some of the case law support the idea that the Judges of the Primary Court automatically assume jurisdiction once the report is filed under Section 66 of the Act. In contrast, some of the other case laws stress the necessity of the Judges of the Primary Court to make an initial decision on the presence of a beach of the peace is threatened or likely owing to a dispute affecting land in order to have the jurisdiction. In this Article, the present Sri Lankan law on the subject area will be discussed with reference to the case law from Sri Lanka as well as from India.

2. Ascertaining the breach of peace is threatened or likely

To have a better understanding regarding the development of law in Sri Lanka with regard to the inquiries on disputes affecting land where a breach of the peace is threatened or likely, it is worth looking at the previous law which governed the subject area. That is section 62 of Administration of Justice law, No. 44 of 1973 which reads as follows;

Section 62 of Administration of Justice Law:

> "Whenever a Magistrate on information furnished by a police officer or otherwise has reason to believe that the existence of a dispute affecting land situated within his jurisdiction is likely to cause a breach of the peace, he may issue notice-
>
> (a) fixing a date for the holding an inquiry into the dispute; and
>
> (b) requiring every person concerned in the dispute to attend at such inquiry and to furnish…"

As per the above law, the Magistrates are empowered to inquire into the information they received, once they have **reason to believe** the existence of a dispute affecting land is likely to cause a breach of the peace. In other words, the Magistrates had to satisfy themselves that there is a dispute affecting land and a breach of the peace was likely to occur as a result of such dispute. This contention was further established through case law where His Lordship Soza J. has stated *inter alia* in the case of ***Navaratnasingham v Arumugam***[5] as follows;

> "The local decisions on section 62 of the Administration of Justice Law, No. 44 of 1973, are agreed that all that is necessary is that the

5 (1980) 2 SLR 1

> Magistrate himself must be satisfied on the material on record that there is a present fear that there will be a breach of the peace stemming from the dispute unless proceedings are taken under the section."

In the said *Navaratnasingham case*, the attention was drawn to the Indian case of ***Bisnam v Kamta Pd.***[6] and section 145 of Indian Criminal Procedure Code which is similar to section 62 of the Administration of Justice Law of Sri Lanka. Even though the two provisions are not identical to each other,[7] the jurisdiction given to the Magistrates is similar. Therefore, it is important to refer to the provision of Indian Criminal Procedure Code together with the case law interpreting the same for the comprehensiveness of this study.

Section 145 (1) of Indian Criminal Procedure Code:

> "Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute."

Accordingly, section 62 of the Administration of Justice Law as well as section 145 of Indian Penal Code expressly requires the Magistrate to form an opinion as to whether a breach of peace is likely owing to a dispute affecting land. However, Sri Lankan law on this subject matter was changed with the introduction of section 66 of the Primary Courts' Procedure Act.

The Section 66(1) of the Act Provides as follows;

(1) Whenever owing to a dispute affecting land a breach of the peace is threatened or likely-

(a) the police officer inquiring into the dispute-

(i) shall with the least possible delay file an information regarding the dispute in the Primary Court within whose jurisdiction the land is situated and require each of the parties to the dispute to enter into a bond for his appearance before the Primary Court on the day immediately succeeding the date of filing the information on which sittings of such court are held; or

6 1945 AIR 32

7 *Navaratnasingham v Arumugam* (1980) 2 SLR 1, 4

(ii) shall, if necessary in the interests of preserving the peace, arrest the parties to the dispute and produce them forthwith before the Primary Court within whose jurisdiction the land is situated to be dealt with according to law and shall also at the same time file in that court the information regarding the dispute; or

(c) any party to such dispute may file an information by affidavit in such Primary Court setting out the facts and the relief sought and specifying as respondents the names and addresses of the other parties to the dispute and then such court shall by its usual process or by registered post notice the parties named to appear in court on the day specified in the notice-such day being not later than two weeks from the day on which the information was filed.

Section 66(1) of the Act facilitates three ways to initiate proceedings before a Judge of the Primary Court namely; (1) a police officer files information and requires the parties to enter into a bond or the appearance before the Judge of the Primary Court, (2) a police officer arrests the disputing parties and produce before the Judge of the Primary Court with filing information at the same time, and (3) a party to such dispute files information before the Judge of the Primary Court through an affidavit. With the introduction of these three separate ways to initiate proceedings, different constructions of law can be found regarding ascertaining the presence of dispute affecting land and breach of the peace.

The first type of interpretation can be found in a series of judgments including ***David Appuhamy v Yasassi Thero***.[8] His Lordship Wijethunga J. compared the present law with the previous provisions of the Administration of Justice law and held that unlike under section 62 of the Administration of Justice Law, the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute under section 66 of the Primary Courts' Procedure Act.[9] This school of thought was further elaborated in the case of ***Velupillai v. Sivanathan***[10] and his Lordship Ismail J. differentiates the assumption of jurisdiction based on whether information is filed by a police officer or a disputing party. It was held that the Magistrate is not required to form an opinion as to the breach of the peace owing to the dispute affecting land once the information is filed by a police officer under section 66(1)(a) of the Act. Conversely, it was held that if the information is filed by a party to the dispute

8 (1987) 1 SLR 253
9 *Ibid,* 256
10 (1993) 1 SLR 123

under section 66(1) (b) of the Act, the Magistrate should proceed cautiously and ascertain for himself that there is a dispute affecting land and a breach of the peace is threatened or likely.[11] The same construction of law was applied by his Lordship Ismail J. in the case of ***Punchi Nona v Padumasena***[12]. This approach has been followed in several other judicial decisions as well.[13]

However, this approach in interpreting section 66(1) was reconsidered by His Lordship Sisira de Abrew J. in the case of ***J. A. Priyantha Perera Samarasinghe v. Dharmapala Colin Abeywardene***[14] and held *inter alia* that;

> "The above judicial decisions (David Appuhamy Vs Yassasi Thero, Velupillai and others Vs Sivanathan) confirm the position that when a police officer files a report under section 66(1)(a) of the Act, the Magistrate is vested with jurisdiction to inquire into the matter. This is only with regard to the assumption of jurisdiction. But above judicial decisions do not take away the power of the Magistrate to reach a conclusion at the end of the inquiry whether or not there was a breach of peace. What happens at the end of the case if the Magistrate observes that there was no breach of peace or breach of peace is not threatened? In my view at the end of the case if the Magistrate finds that there was no breach of peace or breach of peace is not threatened the Magistrate is entitled to dismiss the case. If this power is not given to the Magistrate, decision maker on the question whether or not there was a breach of peace would be the police officer and not the judicial officer. Therefore in my view the Magistrate holding an inquiry under section 66 of the Act is entitled to make a judicial pronouncement whether or not there was a breach of peace. If the judicial pronouncement confirms that there was no breach of peace or breach peace is not threatened, the Magistrate/ Primary Court Judge should dismiss the case."[15]

According to the said decision, even though the Judge of the Primary Court is vested with jurisdiction once the information is filed by a police officer, the final decision as to whether there is a dispute affecting land and whether a breach of peace is threatened or likely should be made by the judicial officer. In other words, the Judge of the Primary Court should be satisfied by himself at

11 *Ibid*

12 (1994) 2 SLR 117

13 *Kokmaduge Ramani Fernando v. Amarasinghe Arachchige Chathuranga Niroshan Peiris*, CA PHC 171/2014, decided on 22.07.2019

14 CA PHC APN 64/2010 decided on 05.05.2011

15 *Ibid*, 6

the end of the inquiry that those two conditions are complied with for him to make a determination.

Even though ***J. A. Priyantha Perera Samarasinghe case*** was decided in 2011, some other judicial decisions can be found where the first approach of construction of law was followed. For example, in ***Ananda Paranawithana v Upali Jayasinghe***[16], His Lordship L. T. B. Dehideniya J. decided *inter alia* that the police officer has to make the decision as to whether the breach of peace is likely or not under section 66(1)(a) and it is the duty of the court to decide whether the breach of peace of the peace is threatened or likely when the information is filed under section 66(1)(b). Further, in the case of ***the Municipal Council Batticaloa v M. K. Ratnasingam***[17], his Lordship Padman Surasena J. adopted the same approach and held that a party invoking the jurisdiction under section 66(1)(b) of the Act should first satisfy the court that a breach of peace is threatened or likely.

Thirdly, a different approach of interpretation was introduced by His Lordship Samayawardhena J. in ***Jayasinghe and others v. Loku Bandara***[18] where His Lordship discussed in detail the reasons for introducing section 66 of the Primary Courts' Procedure Act in place of section 62 of the Administration of Justice Law. His Lordship was of the opinion that the new mechanism under section 66 of the Act was introduced as a lot of judicial time was wasted on the question of jurisdiction and as there was a reluctance on the part of the parties to the dispute to initiate action under section 62 of the previous law. Therefore, it was held *inter alia* that;

> "Under Section 66(2), it has been enacted that when the first information is filed under section 66(1), irrespective of whether it is filed by the police or a party to the dispute, the Magistrate is automatically vested with jurisdiction to inquire into and determine the matter without further ado."[19]

It was further held that the formation of an opinion as to the peace is threatened or likely is left with the person who files the first information before court, notwithstanding whether it is by the police or a disputing party, because both are on equal footing.[20] Accordingly, it was further held that ***Velupillai v Sivanathan*** does not represent the correct position of law and need not be followed. However, in the said judgment of ***Jayasinghe and others v. Loku Bandara***,

16 CA PHC 184/2005 decided on 16.05.2017
17 CA PHC 287/2005 decided on 08.02.2018
18 (2019) 2 SLR 202
19 *Ibid*, 212
20 *ibid*

the decision in the case of ***J. A. Priyantha Perera Samarasinghe case*** has not been referred or mentioned.

Finally, an extensive analysis of judicial interpretations on this area of law can be found in the case of ***Sumith A. De Dilva and others v. Denish Hettiarachchi and others***[21] where His Lordship B. Sasi Mahendran, J. has held in conclusion that a Magistrate should undertake an initial inquiry to see whether there is a dispute affecting land and whether a breach of the peace is threatened or likely, despite the information is filed by a police officer under section 66(1)(a) or a disputing party under section 66(1)(b) of the Act. By citing the case of ***Ramalingam v Thangarajah***[22] regarding the determination to be made under section 68 or 69 of the Act, his Lordship B. Sasi Mahendran, J. held *inter alia* as follows;

> "It is interesting to note that although section 72 provides that 'a determination or order under this part [Part VII] shall be made after examination and consideration of…' his Lordship Sharvananda J., … observed that Section 72 applies to 'determination and order under section 68 and 69' without mentioning section 66(2). Section 66(2) also provides for making a 'determination or order on…the dispute regarding which the information is filed' *i.e.* in our view, for making a determination or order on a dispute affecting land owing to which a breach of the peace is threatened or likely. Thereby, it is safe to presume that since section 66(2) provides for a determination or inquiry, and that section 66(2) requires an inquiry to be conducted on whether the two conditions are met"

It was further held that the initial inquiry should not hinder the primary objective of the proceedings under section 66 of the Act; *i.e.* expeditious and speedy disposal of the case. It was stated as follows;

> "It must be reiterated that such a screening process cannot and should not result in a long-protracted trial as maintaining law and order is paramount. Such an inquiry can be conducted on the day the information is filed or the next day. But such an inquiry cannot be dispensed with."

Accordingly, it is evident from the above judicial decisions that there are different approaches and interpretations applied by the superior courts of Sri Lanka when deciding on the assumption of jurisdiction by the Judges of the Primary Court under section 66 of the Primary Courts' Procedure Act. In that sense, it is essential to have a better understanding of the nature of the disputes affecting land and the

21 CA RII 07/2021 decided on 14.10.2022

22 (1982) 2 SLR 693

objective of introducing such provisions into Sri Lankan law regarding inquiries into disputes affecting land where a breach of the peace is threatened or likely.

3. Primary objective of the jurisdiction conferred upon the Judges of the Primary Court

In general terms, disputes affecting land are civil disputes in nature as they are about the civil rights of two or more individual parties. However, His Lordship Bonser C.J. has very correctly pointed out in ***Perera v. Gunathilaka***[23] that such disputes may lead to severe riots unless they are prevented at the very beginning. It was held *inter alia* that;

> "In a country like this, any attempt of parties to use force in the maintenance of their rights should be promptly discouraged. Slight brawls readily blossom into riots with grievous hurt and murder as the fruits. It is therefore, all the more necessary that courts should be strict in discountenancing all attempts to use force in the assertion of such civil rights."

Likewise, His Lordship Sharvananda J. held *inter alia* in ***Kanagasabai v Mylvaganam***[24] that;

> "The primary object of the jurisdiction so conferred on the Magistrate is the prevention of a breach of the peace arising in respect of a dispute affecting land. The section enables the Magistrate temporarily to settle the dispute between the parties before the Court and maintain the status quo until the rights of the parties are decided by a competent civil Court. All other considerations are subordinated to the imperative necessity of preserving the peace… At an inquiry under that section the Magistrate is not involved in an investigation into title or right to possession, which is the function of a civil Court. The action taken by the Magistrate is of a purely preventive and provisional nature in a civil dispute, pending final adjudication of the rights of the parties in a civil Court. The proceedings under this section are of a summary nature and it is essential that they should be disposed of as expeditiously as possible."

This contention was further established by His Lordship Salam J. in the case of ***Jayantha Gunasekara v. Jayathissa Gunasekara***[25] and emphasized that the intention of the legislature in enacting Part VII of the Primary Courts' Procedure

23 4 NLR 181
24 78 NLR 280
25 (2011) 1 SLR 284

Act is to preserve the peace in the society. Thus, His Lordship stressed that the execution mechanism also should be in line with the legislative intention.

The same kind of recognition can be found in Indian case law as well. For example, In the case of ***Debi Prasad vs. Sheodat Rai***[26], the Allahabad High Court of India has stated *inter alia* that;

> "The object of the section is merely to prevent a breach of the peace by maintaining one or other of the parties in the possession which the Court finds they had immediately before the dispute."

Further in ***Krishna Kamini Chowdhurani and Others vs. Abdul Jabbar Chowdhry and others***[27]**,** the High Court of Calcutta held that;

> "But the law does not require this nor is it the object of the proceedings under section 145 that the Magistrate should deal with the matter before him as if he were acting as a civil court. The object in view is to prevent a breach of the peace by determining the actual possession of land, etc., in dispute between certain parties who are likely on this account to break the peace."

Undoubtedly, it is clear from the aforementioned judicial pronouncements that the Judges of the Primary Court are vested with the jurisdiction to deal with a dispute of a civil nature purely for a limited purpose, *i.e.* the maintenance of the peace. Therefore, the Magistrates are empowered to determine only the actual possession of the land, but not the right to possession or the title of the land. For the sake of preserving the peace by determining who is in actual possession of the land, the rightful owner of the land may have to lose his right to possession until the title of the land is finally adjudicated by a civil court. Therefore, a duty casts upon the Judges of the Primary Court to be cautious and vigilant to avoid possible abuses of this process to obtain the possession of the land more easily, without having too lengthy, time and money-consuming civil law actions.

This was discussed in the above-mentioned ***Sumith A. De Dilva and others v. Denish Hettiarachchi and others***[28]*,* where his Lordship Sasi Mahendran, J. held that;

> "The court must take care to prevent it from becoming an instrument at the hands of one to be used to his or her undue advantage to hamper the affairs of another"

26 (1908) ILR 30 All 41

27 (1903) 30 Cal. 155

28 Supra note 21

In the case of ***Gajadhar Singh vs. Chunni & Ors***[29], the Allahabad High Court of India held that the tendency to use these provisions, not with the object of preventing a breach of the peace, but with the object of getting possession of the property should be discouraged and avoided. Further in ***Indira & others vs. Dr. Vasantha & others***[30]***,*** it was held *inter alia* that;

> "The jurisdiction conferred upon an Executive Magistrate under S. 145 of the Code of Criminal Procedure is an exceptional one and the provisions of the section should have to be strictly followed while taking action under it. The object of the section is not to provide parties with an opportunity of bringing their civil disputes before a Criminal Court or of maneuvering for possession for the purpose of the subsequent civil litigation, but to arm the Magistrate concerned with power to maintain peace within his local area. Therefore, a duty is cast on the Magistrates, to guard against abuse of provisions by persons using it with the object of getting possession of property while attempting to drive the other side to a Civil Court."

As an example of where parties are abusing the procedure provided under part VII of the Act, it is interesting to refer to the factual background of the ***Municipal Council Batticaloa v M. K. Ratnasingam case***[31]. In this case, the Municipal Council of Batticaloa had leased out one of its properties to the Respondent and terminated the said lease agreement as the Respondent failed to pay the rent. Since the Respondent's application for a writ of certiorari quashing the termination was refused by the Provincial High Court, he invoked the jurisdiction of the Primary Court under Section 66(1) (b) of the Act. The question to be decided by the Court of Appeal was whether a dispossession of an unlawful occupier of State property through an action by a State institution in the exercise of its statutory power could amount to a breach of the peace within the meaning of section 66 of the Act. Finally, it was held in this case that the exercise of statutory power by a statutory authority to evict a person from a State land or a building cannot amount to a dispute affecting land where a breach of the peace is threatened or likely.[32]

Similarly, it can be seen that most people tend to initiate proceedings under section 66 of the Act once they come to the possession of land, perhaps rightfully or forcibly. In such scenarios, sometimes the rightful owners of the land can be identified as law-abiding persons who do not want to take control by breaking the

29 1949 CriLJ 967
30 1991 CriLJ 1798
31 Supra note 17
32 Supra note 17, 10

law or breaching the peace. Instead, the title owners used to file civil suits to secure their property rights. Since the Judges of the Primary Court are empowered solely to look into the actual possession of the land, the persons who initiate the Section 66 proceedings while in possession of the land generally get the order or final determination in their favour. Then they try to use such orders as a tool to place the title owner in an unfavourable position in the civil action, especially in the injunction cases. In practice, this is one of the many ways in which people exploit judicial proceedings for their hidden purposes.

It is clearly evident from the above analysis as well as from the Sri Lankan and Indian judgments that there may be situations where the procedure provided under Part VII of the Act is abused by certain individuals to accomplish their ulterior motives. Avoiding such misapplications is essential to maintain the definite legislative purpose of enacting Part VII of the Primary Courts' Procedure Act.

4. Conclusion

Notwithstanding the first information under Section 66 of the Primary Courts' Procedure Act is filed by a police officer or a disputing party, adjudication of the matter should be totally aligned with the legislative intention of introducing this special jurisdiction. That is the speedy and expeditious disposal of the disputes affecting land with the sole object of preventing the occurrence of a breach of the peace. In conclusion, the author believes that the Judges of the Primary Court have the responsibility to be vigilant to ensure that unnecessary exploitation of legal procedures is discouraged, while strengthening the maintenance of law and order.

THE CONCEPT OF LEGITIMATE EXPECTATION IN A NUTSHELL

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01. INTRODUCTION

'The central task of administrative law has been to define which interest should be afforded the protection of public law. The concept of legitimate expectation has been employed in a wide variety of circumstances. It focuses upon the conduct of the decision-maker; it is the expectation created by his conduct that creates the legitimate expectation, which in turn provides the jurisdiction for judicial intervention.'[1]

With the development of the concept of separation of power, the legislature is supposed to enact laws, while the executive is to enforce the laws that were enacted by the legislature. On the other hand, the judiciary is required to review the actions taken by the executive or administrative arm. Therefore, in this process, sometimes the general public's expectations towards the above institutions are high, which tends to break them in the process of protecting the majority's desires. That paved the way for the concept of legitimate expectation, which has rapidly become one of the most promising grounds for judicial review against administrative actions.

01.1. MEANING OF LEGITIMATE EXPECTATION

'The doctrine of legitimate expectation is a mechanism in administrative law that enables expectations raised as a result of public authorities conduct to be legally protected.'[2] When there is a right, it has to be protected. It is said that not only justice must be done, but also seen to be done. If it is violated, there has to be a remedy, whether it is stipulated or not. It has been greatly expanded with the time being because it originated from English law. But when it comes to defining the concept, it is difficult to give a definite interpretation since the very concept itself is a common law concept.

Legitimate expectation for substantive relief may arise on account of a statutory conferred right if the said right is availed of as mandated by the provisions of such statute. It may also arise on account of an acquired right to the extent that such a right would be enforceable by Mandamus even if a statutory duty cannot be shown to exist to put a wrong or illegal decision right [once it is shown to be amendable to quashing by way of Certiorari in as much as the duty to put a wrong or illegal decision right would rise

1 Mahilar v. Commissioner of National Housing (2002) 1 Appellate Law Recorder 19

2 Paul Reynolds; legitimate expectation and the protection of trust in public officials; Public Law; 2011

on account of the fact that state, public, statutory, and functionaries are conferred with power or authority to hold the same in trust for the public and good governance]. In so far as expectant rights are concerned, an aggrieved party would have a right only to a fair hearing [procedural legitimate expectation] to pursue his expectation for success. [In a substantive sense][3]

01.2. DEVELOPMENT OF THE CONCEPT

As mentioned above, legitimate expectation is the result of a promise, long-lasting tradition, governmental policy, or expectant right that may be granted. If it is violated, legitimate expectations will arise. This originates from procedural content. When there is a fixed law, tradition, or policy, people expect that way to continue until it is changed in a formal way. When it breaches, people will not be able to organize their lifestyle. Thus natural justice involves the application of procedural requirements designed to achieve fairness in the decision-making process. A failure to do so is controlled by the courts, basing themselves on the ultra vires doctrine. Breach of the rules of a fair hearing (the audi alteram partem rule) and the breach of the rule against bias (the nemo judex causa in re sua rule). These rules provide a scheme of basic fairness in the decision-making process. It must be pointed out that natural justice has spawned the concept of legitimate expectation.

02. DISCUSSION

In Sri Lanka, the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV, along with the directive principles of state policy and fundamental duties that guide Parliament, the President, and the Cabinet of Ministers in the enactment of laws. And the governance of Sri Lanka for the establishment of a just and free society, even though they are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal. Some of them are to protect and promote fundamental rights, the welfare of society, the improvement of living conditions, the development of the country, and the welfare of the public.[4]

Therefore, when an infringement of fundamental rights occurs because of a policy decision taken by the executive or administrative body, judicial review may go in vain. Initially, this had been a general norm, but with the fundamental rights, their ultimate importance made a room for a right-based approach, and hence, this traditional point

3 Dr. Jayantha De Almeda Gunaratne; The scope and content of the doctrine of legitimate expectation; Vol ii and iii; JB LJ (2006/ 2007)

4 see generally Article 27 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978

of view is also being challenged for good. With the common law ground of England and the constitutional approach of Sri Lanka, the concept of legitimate expectation has come from being a mere procedural norm to a substantive ground for judicial review of an administrative action, the concept itself has come a long way.

Legitimate expectation should distinguish from mere hope. When a person enjoys a benefit, he expects that it will continue without being interrupted. Being a country of constitutionalism, Sri Lankan adaptations of this concept mostly depend on the constitution. In our constitution, sovereignty lies with the people.[5] and they are vested with fundamental rights to enjoy[6] when they breach that particular person can invoke his right by way of fundamental right or writ jurisdiction in Sri Lanka.[7] On that note, legitimate expectations have been developed as substantive rights in today's context.

Legitimate expectations have evolved with judicial intervention. Initially, It was not particularly concerned. i.e., in the case of Schmidt v. Secretary of State for Home Affairs[8], in this case, two students were refused an extension for their stay in England when their right to be there had expired. They complained that the extension of the right to stay had been denied to them without being heard. Lord Denning was of the view that the students had no right to stay in England. They could therefore not have any legitimate expectation of a hearing. Regarding the early view of the aforesaid matter, it was a very narrow view. Even though they had no right, but when there is a due process to be followed, it should have been followed without interpreting the black letter law in its literal meaning. But in this case only they considered that there was no right or expectation to be followed.

When it comes to the Sri Lankan context, the case of Sudharakaran v. Bharathi and others[9] has a significant role to play. The petitioner was an applicant for a liquor license and had been granted the same for the previous two years. He was asked to pay the license fee for 1987. When he proceeded to the office to pay, he was informed that a license could not be issued since he had failed to obtain the consent of all the members of the parliament for his continuance in terms of a circular. He appealed to the minister of finance and got no response. Then he moved for a writ of mandamus to compel them to issue the license. The Court of Appeal refused the appeal, saying that since it was an executive policy, the judicial review was inappropriate. But in the Supreme Court, this decision was reversed and legitimate expectations adopted in a substantive way.

'It has been repeatedly recognized that no man is deprived of his property without having the opportunity of being heard. Even if what he had was mere permission, to which the

5 Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978

6 see Chapter iii of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978

7 see Article 17 together with the article 126 and the Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978

8 (1969) ALL ER 904

9 (1987) 2 Sri LR 243

appellant petitioner had no legal entitlement or claim of right, the refusal of permission that had previously been granted, I think, may be at least sufficiently comparable to the act of taking away property so that the audi alteram partem rule will apply. I am unable to agree with the learned counsel for the respondents that the petitioner appellant was simply hoping against hope of being granted a renewal of license. He had, in my view, a legitimate expectation of success and therefore a right to a full and fair opportunity of being heard.[10]

But according to Prof. Shivaji Felix, the above statement cannot be assailed. 'It is regrettable that the said conclusion was founded on the basis of a vested right in a property. It would have been preferable if the court had come to the conclusion that the legitimate expectation of a hearing was created as a result of the principle of good administration and that the refusal of a renewal without a right to a hearing would amount to a procedural impropriety, justifying judicial review. On the other hand, if the argument is advanced that the petitioner is being deprived of a vested right to property, the legitimate expectation of a right to a hearing will have no application. The legitimate expectation created is in the nature of a substantive right, a right that, if taken away, would result in there being an abuse of power sufficient in law to justify the intervention of the courts.[11]

In the case of Jayasena v. Punchi Appuhamy[12], the petitioner had been issued a license valid for one year to prospect for gems but which was recalled by the relevant authority after seven months without the petitioner being given an opportunity to show cause against the said cancellation. It was decided that this act took away the petitioner's right to property. It is a remarkable approach; even though the petitioner's rights were not absolute but acquired rights, it is accepted that he had the right to full enjoyment of them without being interrupted. 'The legislature addressed this question and provided a constitutional remedy for compensation in monetary terms as an alternative to mandamus in such eventualities, perhaps by an amendment to Article 140 of the Constitution of Sri Lanka, similar in terms of Article 126(4) of the Constitution conferred on the Supreme Court in relation to its fundamental jurisdiction.'[13]

After considering the above statements, one can argue that the legitimate expectation is a ground for a substantive right and a corner stone of the good administration. And that has shaken the foundational principles of the judicial review of administrative actions. 'Though the doctrine of Ultra Vires was considered 'the central principle of administrative law' it has moved from Ultra Vires rule to concern for the protection

10 Amarasinghe J in Sudharakaran v. Bharathi and others (1987) 2 Sri LR 243

11 Shivaji Felix; The concept of legitimate expectation in commonwealth Administrative Law; Sri Lanka Journal of International Law; 76-94pp

12 (19980) 2 Sri LR 43

13 See, generally, Constitution of the Democratic Socialist Republic of Sri Lanka 1978

of individuals and for the control of power rather than powers or vires. Therefore, the present tendency is to uphold the principles of good administration. On the other hand, the administrative law in Sri Lanka relating to judicial control has developed several principles such as proportionality, legitimate expectation, public trust doctrine, and the right to equality. In Sri Lanka, there are two ways of challenging the discretionary power of public authorities which are writs and fundamental rights.'[14]

Being a country of constitutionalism, Sri Lanka's adaptation of this concept mostly depends on the constitution.[15] There are two methods by which people can invoke their rights. Fundamental right jurisdiction is the major instrument of that. It made the way of considering legitimate expectation as a right. In the case of Dayaratne and others v. Minister of Health,[16] Justice Amarasinghe stated that, 'by supreme court fundamental jurisdiction, the doctrine of legitimate expectation featured in a wide range of cases'. In the Republic of Sri Lanka, sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights, and the franchise. But when protecting people's individual rights, it may affect some policy decisions taken by the government for the public's benefit. Therefore, it is a mandate to balance both rights and sustainable development. When a policy decision is being challenged, the judiciary should consider the above matters.

When an individual seeks judicial review on the ground of his legitimate expectation being defeated, courts have to first determine whether there exists a legitimate expectation. A legitimate expectation is said to arise "as a result of a promise, representation, practice, or policy made, adopted, or announced by or on behalf of the government or a public authority." Therefore, it extends to a benefit that an individual has received and can legitimately expect to continue or a benefit that he expects to receive.

Subject to the provisions of the Constitution, the Court of Appeal has the power and authority to grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus, and quo warranto, and this provision also acts against administrative actions.[17] Also, the High Court for each province shall have jurisdiction to issue, according to law, writs of certiorari, prohibition, procedendo, mandamus, and quo warranto against any person exercising within the province in respect of any matter set out in the Provincial Council List.[18] Therefore, in Sri Lanka, legitimate expectations of claimants are protected constitutionally. But to enforce the law, there has to be a very active and independent judiciary.

14 Article 126 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978

15 hereinafter referred to as the constitution of Sri Lanka

16 (1999) 1 Sri LR 393

17 Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978

18 Article 154(P) of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978

In Council of Civil Service Unions v. Minister for the Civil Service (CCSU)[19], it is said that 'even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and if so, the courts will protect his expectation by judicial review as a matter of public law.'[20] This view is a very progressive approach since it gave rise to even an expectation that is not absolute and also should be protected by saying that previous patterns of conduct can also take into account of legitimate expectation.

When public authority makes a policy decision, it is for the majority's benefit. But in doing so, they have to ensure that the individual's fundamental rights are also being taken care of. In the case of R v. North and East Devon Health Authority, ex.p. Coughlan[21], a severely disabled woman, was given the assurance that she would be provided nursing care for life at Mardon House. But after sometimes the house was shut down and the claimants were transferred to a local authority. That was the claimant's breach of legitimate expectation, and it is said that frustration with the individual's expectation is so unfair as to be a misuse of the authority's power, and legitimate expectation is worthy of protection under English law.

According to Robert Thomas[22], a legitimate expectation is one that concerns the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual's confidence in expectations raised by administrative conduct and the need for administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority. The principle therefore concerns the degree to which an individual's expectations may be safeguarded in the face of a change of policy that tends to undermine them. The role of the administrative courts is to determine the extent to which the individual's expectations can be accommodated within the changing policy objectives.

Even though the constitution has vested fundamental rights upon its citizens, they are subject to many restrictions. In the matter of Leader Publications v. Ariya Rubasinghe, The Director of Information and the Competent Authority et al.[23], it is emphasized that 'Every country imposes restrictions on freedom of expression to safeguard national security and public order. However, such restrictions are only legitimate if they are clearly and narrowly drawn, if they are applied by bodies that are independent of governmental or political influence, and if there is a sufficient nexus between the prescribed expression

19 3 WLR 1174

20 Lord Fraser in Council of Civil Service Unions v. Minister for the Civil Service (CCSU) 3 WLR 1174

21 3 All ER 850

22 Thomas R; 2000; p 41

23 SC (FR) No 362/ 2000

and the risk of harm to national security or public order. In addition, the guarantee of freedom of expression means that sanctions for breaches of these restrictions may not be disproportionate to the harm caused. This brief argues that Regulation 14 of the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2000, both in general and as applied to Leader Publications, breaches these standards and that it is not, as a result, of a legitimate restriction on freedom of expression.'[24]

In R v Secretary of State for Home Affairs, ex p. Hosenball[25] The claimant was an American journalist whose activities were embarrassing the government. The Home Secretary sought to deport Hosenball. He claimed that 'national security' was an issue, although he declined to give any explanation as to how Hosenball's activities had this effect. In Lord Denning's view, notwithstanding the severe consequences for Mr. Hosenball of the Home Secretary's decision, the government was under no obligation to give Hosenball details of the case against him so that he might convince the Home Secretary that the government's suspicions were ill-founded. There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world, national security has on occasion been used as an excuse for all sorts of infringements on individual liberty. But not in England. . . Ministers . . . have never interfered with the liberty or freedom of movement of any individual except where it is absolutely necessary for the safety of the state.[26]

In Sri Lanka, every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by an executive or administrative action[27]of a fundamental right. But if that infringement was caused by a policy decision, then the judicial review of that matter is questionable. When it comes to particular sensational matters like national security, national health dangers, environmental protection, economic security, and the unity of the state, the public interest shall prevail over individuality.

Prof. Craig stated that in all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is what the public authority, whether by practice or promise, has committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; and the third is what the court should do.[28]

24 see the introduction of the Act

25 (1977) 1 WLR 766

26 Ian Loveland; Constitutional Law, Administrative Law and Human Rights; A Critical introduction; 6th edition; Oxford University Press; 2012

27 Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka

28 Paul Craig; Administrative Law; 5th edition; 2003

It might readily be conceded that in respect of some types of governmental decisions, there may be strong public policy grounds both for limiting the content of any hearing and for relieving the decision-maker of any obligation to provide precise information about the case an applicant has to answer. In the case of R v. Gaming Board for Great Britain, ex p. Benaim and Khaida[29], the applicants had been refused a license to run a casino. They had been granted a hearing by the Gaming Board prior to the decision being made. However, they were not permitted to know the details of the evidence that the Board had considered, which led it to conclude that they were not fit to be granted a license. The Board refused to provide such information on the basis that it would jeopardize the confidentiality of its sources. This was a consideration of some importance given the suspected links between the gambling industry and organized crime. In the Court of Appeal, Lord Denning held that this was a pertinent factor for the court to consider. He also observed that 'the plaintiffs were not being deprived of any existing entitlement but were rather seeking permission to begin a new venture. Therefore, without proper grounds, one should not ask for a legitimate expectation as a ground for judicial review.

In Sri Lanka, our fundamental rights chapter does not recognize the right to education. But in the sense of the fundamental right of equality before the law[30], in the case of Arambawala v. Principal, Sirimavo Bandaranaike Vidyalaya[31], the interview board for admission to grade one had set aside the application of the petitioner to the school on the basis that they were not permanently residents at the address that they had provided in the application. However, no reasons for such a conclusion were apparent. The court ordered that the child shall be admitted to the school. In this regard, the court directly didn't address the concept of legitimate expectation. But in the end, it was considered a substantive right.

In Noble Resources International (PVT) Ltd. v. Ranjith Siyambalapitiya and others[32], the petitioner is a company incorporated under the laws of Singapore and has its registered office and principal place of business in Singapore. The petitioner pleads that it has supplied coal to the third respondent since November 2010. However, the petitioner claims that the decision to award the tender was unlawful, unreasonable, and irrational. It violated the petitioner's legitimate expectations, was a gross violation of the tender procedures, violated the petitioner's fundamental rights, and was contrary to the terms and conditions of the bid document, the procurement guidelines, and the procurement manual. Even though the petitioner was a company, legitimate expectations and fundamental rights were raised here, which was remarkable, and if the administrative officials intended to abuse the power by misusing due process, the concept of legitimate expectation could apply against them as a ground of judicial review.

29 (1970) 2 QB 417

30 Article 12 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978

31 SC (F/R) 37 2013

32 SC F/R No. 394/ 2015

In English law, sometimes legitimate expectations were applied indirectly by using another administrative principle. R (on the application of BAPIO Action Ltd) v. Secretary of the State for the Home Department[33] this case discussed the legality of guidance issued by the Department of Health April, 2006 which barred doctors who had qualified in another country and were in the England, under the immigration rules from getting work in England and the government encouraged them to the country without work permit. Without altering the immigration rules the department of health had altered their impact by the guideline. Lord Roger stated that ' this is unlawful because it frustrated the claimants legitimate expectation and as a substantive one.

Legitimate expectation is the combination of fairness, abuse of power, and principle of good administration and this is clearly visible in England in the landmark case of R (on the application of Bhatt Murphy (affirm) v. Independent Assessor[34] Lord LJ emphasized that 'the fact that legitimate expectation has grown so swiftly without jurisprudential clarity is probably good evidence that the different terms are being used interchangeably and are about as useful as one another'. It is further stated that the difficulty in drawing the line between a substantive legitimate expectation and ordinary judicial review of a new policy or decision was a more acute problem. Judicial review engages the traditional Wednesbury point of view.

Similar to the aforementioned BAPIO case in England, most recently, in the case of Kasthuriarachchi vs. Sri Lanka Medical Council[35], the Apex court of Sri Lanka gave a prominent verdict that a violation of legitimate expectations will amount to infringe a fundamental right. In this case, the petitioner, after completing her medical degree from a foreign university recognized by the Sri Lanka Medical Council, applied for provisional registration, which is a prerequisite to sitting for the examination. But the SLMC refused the same on the basis that the petitioner had not satisfied the pre-entry Advanced Level qualification imposed by the SLMC in 2010 for foreign medical graduates. The Supreme Court held that according to the sections of the Medical Ordinance, to be entitled to provisional registration as a medical practitioner, a bachelor of medicine degree or equivalent qualification from any university in any country other than Sri Lanka recognized by the SLMS is a requirement. The petitioner had entered a foreign university recognized by the SLMC, and therefore she had a legitimate expectation of the opportunity to sit for the ERPM once she completed the foreign degree. Thus, by declining the petitioner to sit for the ERPM, the fundamental rights guaranteed to the petitioner under Articles 12(1) and 12(1)(g) of the constitution have been infringed by the arbitrary acts of the SLMC. Therefore, this case has interpreted the legitimate expectation as a substantive right that has been protected by the Constitution. In this regard, it is clear

33 (2007) EWCA CIV 1139
34 (2008) EWCA CIV 755
35 (2020) 1 Sri LR 272

that even though the legitimate expectation is a common law concept, it has been recognized as a substantive right that cannot be extracted from a fundamental right.

In the above case, it has elaborated the view of S.F. Zamrath vs. SLMC and others[36]. It is emphasized that 'As the Apex court of the country, this court encourages the flexibility and adaptability of the administrative authorities in making policies and taking decisions, but still insists on the facts that such conduct should not be used unfairly and arbitrary'. Therefore, it is clear that, as to be expected, the given promises would be protected without being affected by the policy decisions and other decisions of the administrative and executive arms, which are recognized as substantive rights. But to recognize, protect, and promote the concept, it is important to have a secure social, economic, and political environment. If the aforesaid grounds are shaking and imbalanced in the country, policymakers tend to make their decisions to balance society, which will eventually break significant protected promises, and ultimately, policy decisions will prevail over legitimate expectations.

It is clearly seen in the case of Withanagama and Others vs. The Incorporated Council of Legal Education and Others[37]. In this case, the petitioner challenged the decision of the first respondent to declare the cut-off mark of the entrance for the Sri Lanka Law College for the year 2014. For the academic year 2014, only 177 students were selected. But for the last period of 1981–2012, the average intake was 225. Thus, the petitioner claimed that they had a legitimate expectation of getting admitted. But it is quoted in this case that

'It is not enough that an expectation should exist. It must, in addition, be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of the law. ...But some points are relatively clear. First of all, for an expectation to be legitimate, it must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation.[38]'

In this case, it is decided that deciding the cut-off mark is in the hands of the first respondent since he has given the discretionary power to decide the number of students for the respective year. On the other hand, it is mentioned that even though the petitioner may expect that the previous year's tradition will be continued, it is not a guarantee. Due to the lack of infrastructure facilities and other mandatory necessities, the administrative authority is empowered to decide the number of students that they are going to admit for the respective year. Therefore, to execute the discretionary powers in line with legitimate expectations, it is required to have a secured social, economic, and political system. And to ensure the aforesaid, rule of law and good governance, are also mandatory.

36 SC/FR/119/2019, SC Minutes of 23.07.2019

37 (2021) 1 Sri LR 43

38 H.W.R. Wade and C.F. Forsyth, Administrative Law, 10th edition, 449pg

03. CONCLUSION

Certain laws and affairs based on the concept of legitimate expectation and shall continue its presence and it has guaranteed that the public can manage their lifestyle. If it is changed, it shall be previously informed. But practically, a country has to fight its own battles, which may requires some immediate amendments for the public interest that lead to making policy decisions. In such situations, it gives rise to a legitimate expectation of individual rights. Recently, the whole world went through a pandemic of the COVID-19 outbreak, which had shaken the daily lives of billions. To survive the pandemic, the administrative bodies had to take immediate steps, which eventually restricted individual rights and made certain immediate laws and regulations which breached several legitimate expectations.

During this pandemic, there had been an island-wide curfew and the closure of many institutions that have been fulfilling people's rights, but those policy decisions cannot be challenged since they protected the majority over individual rights, even if these decisions were imposed without being informed or breached their constitutionally secured fundamental rights. Initially, the health authorities issued a circular saying that when Sri Lankans abroad come to Sri Lanka, they are given a free quarantine period at governmental cost. But after sometimes, they issued a new circular that the immigrants had to bear all the expenses, including basic medical checkups, and had to accommodate at selected hotels without giving any proper reasons which eventually breached their legitimate expectation of having been treated by the previous circular. In such situations, their right to equal protection of the law, and some of their major rights infringed and went unanswered. As the pandemic went beyond the capacity of the government, the administrative and executive had to alter their previous regulations for the public interest. Therefore, to function a legitimate expectation as the conceptual reality, whether procedural or substantive, there has to be a democratic and developed political culture, economic independence and the general public has to have the knowledge and active pressure groups and whistle blowers to go to the judiciary on behalf of the aggrieved party, not as a mere busy body but with the genuine concern for them.

Finally, in the case of Bhatt, it is stated that 'where a substantive legitimate expectation is to run the promise or practice, its genesis is not merely a reflection of the ordinary facts that a policy with a no-termination date or terminating event will continue in effect until rational grounds for its cessation arise. Rather, it must constitute a specific undertaking directed at a particular individual or group, by which the relevant policy's continuance is assured[39].

39 Laws LJ in R (on the application of Bhatt Murphy (affirm) v. Independent Assessor (2008) EWCA CIV 755

Therefore, to achieve the ultimate goal of administrative law, there must be good governance. When there is a right, it shall be protected and promoted, but when it clashes with the public interest, individual rights are limited to the extent for the benefit of the majority. Having a general public who is aware of their rights and limitations and the administrative bodies who act to establish good governance, a legislature that makes needful amendments to the law that ensure public interest and individual rights are protected at the same time, and a creative judiciary to interpret the law to uphold the best interest of the general public always will ensure the people's legitimate expectations and fundamental rights will remain in a good administrative system.

INTRODUCTION OF PLEA BARGAINING INTO THE SRI LANKAN CRIMINAL JUSTICE SYSTEM; CRITICAL ANALYSIS OF ANTI - CORRUPTION ACT NO.9 OF 2023

Manodhi Hewawasam*
Additional Magistrate, Anuradhapura.

1. INTRODUCTION

Sri Lankan Parliament recently passed the awaiting new Anti-corruption bill on the 9th of August 2023 which came into effect on the 15th of September 2023 by the Gazette notice issued by the Minister of Justice on the 8th of September 2023. The new Anti-Corruption Act No. 9 of 2023 comprised five parts and included 164 provisions. The act is being redirected to the parliament again for minor amendment and will soon be available to combat corruption.

This article aims to discuss one of the salient features of the Act; the concept of plea bargaining, which is relatively novel to the Sri Lankan criminal justice system, while glancing at some of the key provisions of the new law. The introduction of plea bargaining originated in the United States of America and thereafter many civil law countries followed this concept successfully.

1.1 BACKGROUND

The recently introduced Anti-Corruption Act could be considered a comprehensive legal framework as the new act is drafted amalgamating all prevailing anti-corruption laws in the country into a single legislation and introducing many new legal concepts to deal with the modern-day complex legal issues. It repealed[1] the Declaration of Assets and Liabilities law[2], the Bribery Act[3], and the Commission to Investigate Allegations of Bribery or Corruption Act.[4] Mainly, it is evident that the new Act provides a fairly positive response to the socio-economic demand of the country and attempts to upgrade the Sri Lankan anti-corruption legal landscape to the international standards to in par with the United Nations Convention on Anti-Corruption (UNCAC).

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1 Anti-Corruption Act No. 9 of 2023, s 163

2 No. 1 of 1975

3 No. 11 of 1954

4 No. 19 of 1994

The introduction of new offences; such as private sector bribery,[5] Bribery of foreign public officials,[6] failure to declare conflicts of interest,[7] and corruption in sports[8] might be more beneficial to deal with mega-level corruption. Meanwhile, the new act has empowered the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) by adopting a multidisciplinary approach by enabling and introducing procedures to strengthen the investigations such as; the power to issue seizing and freezing orders,[9] orders prohibiting dealings with properties outside Sri Lanka,[10] obtaining assistance from the experts,[11] collecting specimens from suspects,[12] empowering Magistrate's to conduct identification parades,[13] international corporation,[14] and importantly provisions for whistle-blowers protection[15] have undoubtedly given more force to the law to combat corruption in Sri Lanka. Other salient features of the new law are the introduction of a civil debt[16] provision enabling private parties to sue the suspect for damages in civil courts and mitigatory and aggregatory factors for sentencing.[17] Hence, the new law introduced sentencing guidelines to the courts which is also a novel to the Sri Lankan criminal justice system.

Further, it is interesting to see that the new Act not only focuses on the criminal aspect of the anti-corruption framework but also has given considerable effort to include prevention mechanisms to make this legislation a comprehensive law to fight against corruption in Sri Lanka. However, this paper is not intended to discuss all provisions of the Act, it is focused on discussing the introduction of the concept of plea bargaining; which is new not only to the anti-corruption regime but also to the Sri Lankan criminal justice system.

1.2 CONCEPT OF PLEA BARGAINING

Plea bargaining can be defined as pre-trial negotiations between the accused and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution.[18] However, unlike most contractual agreements, it is not enforceable until approved by a judge. The Americans first originated the plea bargaining mechanisms in the world's criminal justice systems. In the United States, the criminal

5 ibid, s 106
6 ibid, s 105
7 ibid, s 107
8 ibid, s 108
9 ibid, s 45, 49 & 53
10 ibid, s 54
11 ibid, s 50
12 ibid, s 51
13 ibid, s 52
14 ibid, s 63
15 ibid, s 73
16 Similar to Singapore, Prevention of Corruption Act 1960, s 14
17 ibid, s 151
18 *State of Gujarat* v *Natwar Harchandji Thakor*, 2005 CrLJ 2957 (2978-2979) (Guj-DB

trial is an elaborate exercise with extended *voir dire* and faces absolute challenges during jury selection, numerous evidentiary objections, complex jury instructions, motions for exclusion etc. Accordingly, it has been the most expensive and time-consuming in the world. Hence, plea-bargaining gradually became one of the most popular mechanisms to evade complex processes in litigation. In 1970, through *Brady v United States*[19] the constitutional validity of plea-bargaining was upheld and it was stated that it is not unconstitutional to extend a benefit to an accused that in turn extends a benefit to the State. Further, The Supreme Court of the United States formally accepted that plea-bargaining was essential for the efficient administration of justice in the case of *Santobello v New York.*[20]

Though there are various methods of adjudication in civil litigations such as arbitration, mediation, and negotiation, the common method of adjudication in criminal matters is conducting trials before the state-appointed independent judge/s to punish the accused upon proving the guilt. Plea bargaining is accepted as a general concept in civil law practice countries in criminal litigation. However, it is less attractive in common law countries for the main reason that the common law criminal justice system is strict on concepts such as; constitutional rights of a fair trial, presumption of innocence, and proving the guilt beyond a reasonable doubt.[21]

Further, under the adversarial adjudication followed by the common law system in criminal matters, it is essential to gather evidence and produce it in court to prove the guilt of the accused beyond a reasonable doubt. Nevertheless, with strict compliance with the admissibility of evidence and procedures, it is somewhat difficult to prove the ingredients of a charge beyond reasonable doubt. Furthermore, when it comes to white-collar crimes such as corruption and money laundering, most of them engage with the bulk of documents and transactions and it takes more time to conclude such cases. That is one of the reasons why the general public is not satisfied with the system. It was the main demand by society to punish culprits of corruption immediately. However, the prevailing system of adjudication could not cater for it with the heavy case backlogs stagnated in courts.[22]

The general public, legislators and prosecutors of most civil law countries accept plea bargaining as an essential component of the administration of justice. Once the U.S. Supreme Court held that;

19 297 US 742-25 L.Ed. 2d 747

20 404 US 257 (1971).

21 Stephen C. Thaman, World plea bargaining: Consensual procedures and the avoidance of the full criminal trial xxii edn, 2010.

22 Judicature (Amendment) Act No. 9 of 2018, s 12. [One of the remedial steps taken by the legislature for this issue is establishing a permanent High Court-at-bar to hear cases day-to-day basis under the discretion of the Chief Justice.]

> "without plea bargaining in the system, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." [We] accept plea bargaining because many believe that without it ... our system of criminal justice would grind to a halt."

Accordingly, plea bargaining plays a major role in criminal justice systems in the world to reduce backlog of cases in courts and to achieve speedy administration of justice.

2.0 PLEA BARGAINING PROVISIONS IN THE NEW ANTI-CORRUPTION ACT OF SRI LANKA

Sri Lanka Criminal Justice system is mostly based on the common law system. Conversely, being an exception the new Anti-Corruption Act combined both systems together. It can be stated that the concept of plea bargaining is not completely novel to the Sri Lankan Criminal Justice Administration. For example, the Excise Ordinance[23] recognized the concept to some extent of settling matters without conducting a trial. Accordingly, an officer authorized under the Ordinance has been given the power to compound the offences committed under the Ordinance on the agreement to pay Rs. 50,000.00 by the suspect within a specified period of time. On payment of such amount, the accused person or any other property seized shall be discharged or released and no further proceedings shall be taken. Even though it has been stated in the Ordinance as a power to settle the matters, it can be considered as a pre-trial negotiation with an accused by the prosecution. In this negotiation, the accused admits his guilt and agrees to fulfil a condition which is to pay Rs 50,000.00 within a stipulated time period expecting the termination of proceedings. There is no judicial intervention for settling a matter as above and therefore it can be considered as an administrative action. The Forest Ordinance also provide a similar provision empowering prosecution authority to settle matters under certain conditions for limited offences.[24] Even though the provisions for settlement under forest ordinance and excise ordinance are not subject to judicial scrutiny. Withdrawal of an indictment or postponement of proceedings under the Anti-corruption Act No. 9 of 2023 has to take place with the permission of the court. Therefore, plea bargaining provisions under the new Anti-corruption Act are wider, illustrative and judicial.

Earlier, under the previous law, the Director General of the CIABOC had the power only to file a written complaint in the Magistrate court similar to other public officials. In contrast, the new act has given power to the Director-General of CIABOC to file charges directly in the Magistrate Court without filing a written complaint under section 136(1) (b) of the Criminal Procedure Code Act No. 15 of 1979.[25] The provision for filing indictments directly in the High Court has not been changed by the new Act hence as

23 Excise Ordinance No. 8 of 1912.

24 Forest Ordinance No. 16 of 1907 amended by Act No. 13 of 1966, s 51.

25 Earlier the Director General as a public officer had to file a written complaint before the Magistrate and the Magistrate framed charges against the Accused.

usual the is empowered to file indictments directly in the High Court by the Director-General of the CIABOC remains unchanged by the new act. It is notable that the plea bargaining provisions are not applicable to the Magistrate Court proceedings and it is applicable only to the High Court proceedings.[26]

2.1 WITHDRAWAL OF AN INDICTMENT UNDER THE NEW ANTI CORRUPTION ACT.

Section 67 of the new Act provides that at any time before the judgement is delivered by the High Court against a person who has been indicted for having committed one or more offences under the Act, the Director-General **may** with the **sanction of the Commission**, having **due regard** to the facts specified[27] and subject to one or more **conditions** referred in the subsection 3 of section 67 with the **permission of the High Court**, withdraw the indictment against such accused.

The facts should be given due regard as follows;

(i) the national interest and public interest;

(ii) views of the victims of the offence; and

(iii) representations that may be made by the accused person or on his behalf by his Attorney-at-Law.

Additionally, when withdrawing an indictment the Director-General **may** impose one or more of the following conditions on the accused to be fulfilled within a stipulated period;

(i) to publicly express remorse and apology before the High Court, using a text issued by the Commission;

(ii) to provide reparation to victims of the offence, as specified by the Commission;

(iii) to publicly undertake that he refrains from committing an offence under this Act; or

(iv) to permanently refrain from holding both elected and appointed publicoffice.

If such person fulfils the conditions imposed on him/her during the stipulated period, the Director-General **shall** not present a fresh indictment against the accused thereafter on the same charges specified in the original indictment.[28] However, if the accused fails without reasonable cause to comply with the said conditions, the Director-General **shall** file a **fresh indictment** against the accused on the same charges specified in the original indictment and proceed to prosecute the accused after the lapse of the period given for the accused to fulfil such conditions.[29]

26 Anti-Corruption Act No 9 of 2023, s 67.
27 ibid, s 67(2)
28 ibid, s 67(4)
29 ibid, s 67(5)

When scrutinizing the provision it is evident that the Director-General being a direct appointment of the President has not given sole power to decide on withdrawal. For a withdrawal, there must be both the sanction of the Commissioners and the permission of the Court to proceed. Therefore, there is hardly a risk of an arbitrary decision on the withdrawal of an indictment as it serves the check and balance between the executive, independent commission, and judicial function. Further, it is mandatory to consider the national and public interest and the views of the victim before agreeing on a withdrawal of an indictment. Therefore not only the judicial permission but also the aggrieved party's concerns are similarly essential to proceed. The Accused must initiate the plea bargaining and not the prosecution agency. Conversely, in the United States, the prosecution agency should initiate plea bargaining and not the accused. In that sense, the Sri Lankan Act adopted a mechanism similar to the Indian criminal justice system where the power to initiate the plea bargain lies with the Accused.

Secondly, as per the plain meaning of section 67(3), it is not mandatory for the Director-General to impose a condition to be fulfilled by the accused as the word used in the section is not 'shall' but 'may'. However, it can be noted that when section 67(3) is read with section 67(1) it gives mandatory effect to impose one or more conditions to consider a withdrawal.

2.2 DEFERRED PROSECUTION AGREEMENTS

Another novel concept introduced in the new Act is that the Commission has the power to postpone or suspend criminal proceedings for up to ten years with the sanction of the High Court. As it based on an agreement between suspects of offences under the Act and the prosecuting agency it can be considered as a pre-trial negotiation. However, the suspension of criminal proceedings is limited only to two newly introduced offences to the anti-corruption laws which are the private sector bribery[30] and sport corruption.[31]

When considering a suspension of a criminal proceeding the Commission must give due regard to the following facts;[32]

(a) the state policy on the prevention of bribery and corruption;

(b) the national interest and public interest;

(c) views of the victims of the offence, if any; and

(d) the representations that may be made by the accused person or on his behalf by his Attorney-at-Law.

Similar to withdrawal there are conditions to be fulfilled which are stated in section 71(3);

30 ibid, 106

31 ibid, 108

32 ibid, 71(2)

(a) to publicly express remorse and apology before the High Court, using a text issued by the Commission;

(b) to provide reparation to victims of the offence, as specified by the Commission;

(c) to publicly undertake that such person refrains from committing an offence under this Act; or

(d) to pay as compensation to the State the full amount relating to the offence of which twenty-five per cent shall be credited to the Fund of the Commission.

Once the Commission agrees to suspend the criminal proceedings the Commission shall prefer an application to the High Court, to obtain the sanction. Then the High Court if satisfied that such agreement is in the **interest of justice** and the **terms of the agreement** are **fair**, **reasonable** and **proportionate** may approve such agreement and notify such person of the agreement. The agreement shall come into force on the date of approval by the High Court.[33] If such a person fulfils the conditions during the period stipulated in the agreement the Commission shall not proceed against such person in respect of the offence alleged to have been committed.[34] However, if the person fails without valid excuse to comply with the conditions, the Commission shall make an application to the High Court, and commence criminal proceedings against such person upon indictment.[35] At the expiration of the period stipulated in the agreement, if the party complies with the conditions the Director-General shall, having informed and obtained permission from the High Court discontinue the proceedings.[36] Importantly, this agreement also can be entered between the Director-General and a body corporate.[37]

The most important feature of these provisions are that the court does not decide on the sentence. Under the plea bargain followed by most legal systems, once the process is initiated by either party the prosecutor reduces charges and then the accused pleads guilty for such charges and the court sentence accordingly. Therefore, it is evident that under the new Act, there is no sentence imposed by the court instead the accused shall fulfil the conditions imposed by the Director-General or the Commission. Once the party fulfils the conditions the indictment will not filed. Though it is not pleading guilty before a judge it can be considered as a pleading guilty for the offences.

Nevertheless, the ultimate decision lies on the judiciary to consider such a request to postpone the criminal proceedings. For a postponement of criminal proceedings, the Court has to give due concern to the State policy on the prevention of bribery whereby upholding the State responsibilities guaranteed under Article 27 and the Judicial duties guaranteed under Article 4(d) of the Constitution. However, it has to be decided case by case basis depending on the facts of the cases.

33 ibid, 71(4)(b)
34 ibid, 71(5)
35 ibid, 71(6)
36 ibid, 71(7)
37 ibid, 71(8)

3.0 CRITICISM OF PLEA BARGAINING

In the United States, the initiation of plea bargaining lies with the prosecuting agency where it places a great amount of responsibility and power to the prosecuting agency to deal with the case. It is debatable when the prosecution agency has been given the power to initiate plea bargaining that process is beyond the control of the accused or the Court. in India and Sri Lankan, the accused has to initiate plea- bargaining therefore, the prosecutor will not be subject to criticism in deciding which case to offer a plea bargain. As per the provisions in the act, it is well evident that the Director General has no power to initiate the process unless there is a request made by the Accused or his/her Attorney. On the other hand, both the sanction of the Commission and the permission of the Court are essential for a withdrawal or suspension of the proceedings it can be considered as a more transparent and accountable process.

Another criticism for plea bargaining is that prosecuting agencies are given wide power to decide on the sentence. In many countries, once the initiative has been taken for plea bargaining the conditions are decided by the prosecutor. Accordingly, the prosecutor is empowered to decide the number of charges against the Accused and to reduce them as a negotiation. Accordingly, the process can lead to more corruption within the criminal administration system. For example in Nigeria, a chief executive officer and managing director of Oceanic Bank Plc was charged with 25 counts of different offences of corruption worth more than 150 billion Nigerian Naira.[38] After negotiation with the anti-corruption body, the charges were reduced to three and the accused pleaded guilty to the reduced charges and the accused sentenced has been to six months imprisonment on each of the three counts to be served concurrently.[39] Likewise, the whole process can be misused by both parties. Therefore, it is safe to have an effective judicial intervention with this regard.

> "*The judiciary accepts responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.*"[40]

The new Anti-Corruption Act in Sri Lanka provide specific guidance to all parties the prosecution, the defence, the victim, as well as the judiciary. Therefore, there is no such

38 More than 20 million US dollars.

39 Akeem N and Tunde O (2010). "Cecilia Ibru Jailed. To Lose N191bn", Saturday Tribune of October 9, 2010. Available at http://www.tribune.com.ng/sat/index.php/front-page-articles/2237-cecilia-ibru-jailed-to-lose-n91bn.html. [Accessed on 12 June 2023].

40 R v. Horseferry Rd. Magis. Ct. ex parte Bennett [1993] UKHL 10, 13-14, [1994] AC 42 (UK).

risk as the conditions are stated in the Act itself and therefore the Director General has no discretion to decide on the conditions rather parties have to decide on what option under section 67(3) or 71(3) they should select to agree on a plea bargain and the ultimate decision lies on the judiciary to grant permission for a withdrawal or a suspension.

Another possible criticism can be that with the plea bargain, the Accused will not be served imprisonment or a punishment which is the main purpose of criminal law. When it comes to corruption or any other white-collar crime cases, with the bulk documentation involved generally, it takes a considerable period of time to finish a trial even after the trial there is no assurance either for conviction or acquittal. Therefore, with the prevailing case backlogs, this mechanism leads to minimum risks of undesirable results for either party, avoiding the uncertainty of trial.

The most common criticism is that, through plea bargains, the constitutional right of a fair trial is waived. It pushes the Accused to give up the right to appeal for a reduced sentence and forces him to choose between a guaranteed reduced sentence and a fair trial. *As per* the new Act, the provision is clear that, initiative has to be taken by the accused and not the prosecutor. Therefore, the accused has the option to either to go for the trial, plead guilty or to plea bargain. If the accused chooses to initiate plea bargaining, it is his discretion and it cannot be differentiated from pleading guilty or not guilty which has an uncertain end. Rather it can be considered as an additional option given to the accused which is more specific as the end result is certain. Therefore, the plea bargain process under the new Act cannot be considered an infringement of the constitutional right of presumption of innocence and to have an impartial jury or judge simply for a fair trial.

4.0 CONCLUSION

The concept of Plea bargaining has been introduced to the Sri Lankan criminal justice system through the new Anti-corruption Act. It includes many international anti-corruption trends to combat the menace of corruption. Sri Lanka being a dualist country it is essential to enact enabling laws to give the fullest effect to international conventions as mere ratification of international treaties does not cater the international obligations.

Previously Sri Lanka did not have a comprehensive law to enable provisions of the UNCAC and it will not be exaggerated to mention that the new Anti-corruption Act was able to fill the gaps by giving more teeth to the law to combat corruption. Among many other positive initiatives taken by the new Act plea bargaining also will play a major role in speedy adjudication as an alternative method for a criminal trial as it fairly works as a better compensation method, cost-effective adjudication and the extension of rights of both; the accused and the prosecution.

It can be concluded that the concept of plea bargaining can only be achieved when judges, public prosecutors, defence parties, investigating officers and the victims cooperate and work together. Since the new Anti-corruption Act is still not implemented, it is too early to comment on the practicality of plea bargaining in the Sri Lankan criminal justice system. However, it is certain the introduction of plea bargaining will open a new regime in criminal adjudication in the Sri Lankan justice system.

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INTERNATIONAL CRIMINAL COURT
and the Juris effectus in executione consistit

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1. Introduction

The idea of establishing International Criminal Court was first suggested by then President of the ICRC, Gustave Moynier in 1872 though it did not come to fruition with the less interested number of states.[1] Many years after, even in the well-known trial of *Leipziger Prozesse*[2] created under the Peace of Treaty of Versailles at the end of the World War I, the *lex fori* was emphasized to deal with mass scale crimes.[3] The end of World War II and another horrific mass violence around the world were also marked as an era where both individual states and the international community failed to live up to their most basic and compelling responsibilities to address mass violations.[4]

However, with establishment of International Military Tribunal in Nuremburg 1945, the international community commenced opening of a new majestic portal to vindicate the implicated and victimized humanity during this brutal legacy. Thereafter from International Military Tribunal for the Far East (*IMTFE, also Known as Tokyo Tribunal*) to International Criminal Tribunals for the former Yugoslavia (*ICTY*), International Criminal Tribunal for Rwanda (*ICTR)* and to Special Court for Sierra Leone *(SCSL),* United Nations Transitional Administration in East Timor *(UNTAET),* Extraordinary Chambers in the Courts of Cambodia *(ECCC)* and to Special Tribunal for Lebanon *(STL)* there were significant international prosecutorial interventions to punish most serious crimes occurred around the world. These efforts have finally ripened the time to undertake a new global attempt to create a permanent International Court to deter such heinous criminals confirming the idea of Endicott Peabody that *the trend of civilization is forever upward and rising towards the heights through in middle peaks and valleys of the centuries*.

Accordingly, the institutionalization of International Criminal Court *(ICC)* in 2002 is indeed an ultimate example of the evolution of International Criminal Justice to execute the code of international crimes at international level. By today the two-third of world

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1 Christoph Safferling, *International Criminal Procedure*, (OUP, 2012) p 8

2 The Leipzig War Crimes trials were held in 1921 before the highest German Court, the Reichsgericht in Leipzig

3 Ibid at 10

4 Dr. Héctor Olásolo, The Role of the International Criminal Court in Preventing Atrocity Crimes through timely intervention, Lecture delivered at the Utrecht University, 18.10.2010, p 1

states (with 123 ratifications) has gathered into one roof nearly after 21 years of its fully operational status to address the most serious crimes of concern to international community as a whole.[5] Though it is yet to receive the global consent to become a 'world court',[6] 'ICC expressed Kofi Annan, is a gift of hope to a future generations, a giant step forward in the march towards universal human rights and the rule of law and, an achievement which only a few years ago nobody would have thought possible.'[7]

1.01 The Statue

The Statute of the Court along with the Rules of Procedure and Evidence, the Regulations of the Court, the Regulations of the Office of the Prosecutor and the Regulations to the Registry has provided a sketch of the procedural order of the ICC[8] reflecting the international law norm of punishing individuals for human rights violations upon penalties proportionate to the gravity of their crimes.[9] It is usually known as Rome Statutes and it consists of 128 articles. The Statute represents the Westphalian paradigm that presupposes state's authority to do justice to his people[10] and, refers the Principle of *pacta sunt servanda.*

1.02 Crimes and Jurisdiction

The ICC is indeed the missing link in the international legal regime that close the gap in making perpetrators of core international crimes around the world criminally accountable upon the beforehand laid down parameters of the jurisdiction. Hence, the concept of international crimes is neither new nor untested one.[11] From the writings of Sun Tzu on *the Art of War* in Sixth Century BC, there are records of crimes beyond the confines of municipal law.[12] The well-known *Flick* case also held that 'International law binds every citizen just as does ordinary municipal law and the application of international law to individuals is no novelty'.[13]

Therefore, firstly in terms of jurisdiction *ratione materiae* pursuant to Article 5 of the Statute, the jurisdiction of the court is only provided to 'most serious crimes of concern

5 Ibid, Preamble

6 Christoph Safferling, Supra n 1 at 51-52

7 http://www.un.org/press/en/1998/19980720.l2890.html

8 Ibid, Article 21; Christoph Safferling, Supra n 1 at 50

9 Marisa R. Basset, 'Defending International Sentencing: Past Criticism to the Promise of the ICC',(2009), human Rights Brief, 22

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11 Alton Frye, Toward an International Criminal Court: Three Options presented as Presidential Speeches, (Council of Policy Initiative, 1999) P 49

12 Marco Sassòli Antoine A. Bouvier Anne Quintin, How Does Law Protect In War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, (Vol.1, 3rd edn,, ICRC, 2011) P 54

13 Flick case, Law Reports of the Trial of War Criminals (L.R. T. W. C.), Vol. IX(1949), 1191

to international community as a whole'. Thus the four core crimes defined in treaties or found in Customary International Law[14]as the Crime of Genocide[15], Crimes against Humanity[16], War Crimes[17] and the Crime of Aggression are considered as the crimes within the jurisdiction of the court. Crime of Genocide is indeed an international crime that acquired jus cogens status and it has been recognized both under customary international law and Genocide Conventions of 1948. Crimes against Humanity have also considered in the Nuremburg, Tokyo, ICTY and ICTR trials and recognized as crimes that may occur during peace time and both internal and international conflicts situations. War Crimes also have been recognized under the customary international law and many international treaties including Geneva Conventions 1949 and the Crimes of Aggression will receive the jurisdiction in future though it is currently declared dormant with its present no definition status.[18]

Secondly, in terms of jurisdiction *ratione temporis* pursuant to Article 11 of the Statute, the retroactive jurisdiction is ruled out and the jurisdiction of the court is provided for the crimes committed after the establishment of ICC. In general, the ICC is a two-fold system; where a case can be referred to the court or the prosecutor can commence his proceeding on his own motion. But noteworthy feature is that no referral can be possible for the crimes committed prior to 1 July 2002. With respect to the countries which become members to the Rome Statute after 2002, it is necessary to complete the ratification process to begin the jurisdiction of the court. However, there is a provision in the Statute where a State can declare to begin the jurisdiction of the court for war crimes after the period of 7 years from the date of their ratification of this statute.[19]Upon the request of Security Council, there may also be a deferral of investigation or prosecution for a period of 12 months.[20]

Thirdly, in terms of jurisdiction *ratione persone,* the jurisdiction of the court is accepted over natural persons upon the principles of *Nullum crimen sine lege,*[21] *Nulla poena sine lege*[22] and non- retroactivity.[23] No provision in the Statute is made to affect the responsibility of the State under international law and the jurisdiction of the court is also allowed for the persons who attained the age of eighteen at time of the alleged commission of the crime.[24]

14 Leila Nadya Sadat, The International Criminal Court: Past, Present and Future, (2014), Harris Institute Working Paper Cambridge Compendium of International Criminal Law , p 7
15 Rome Statute, Article 6
16 Ibid, Article 7
17 Ibid, Article 8
18 Christoph Safferling, Supra n 1 at p 83
19 Rome Statute, Article 124
20 Ibid, Article 16
21 Ibid, Article 22
22 Ibid, Article 23
23 Ibid, Article 24
24 Ibid, Article 26

However, both the actual perpetrators of the crime and, those who are responsible as individually or jointly as a group for ordering, soliciting, facilitating, aiding, abetting, otherwise assisting for the commission or an attempted commission of crime, are made liable under individual criminal responsibility regardless of their official capacity and state immunities.[25] In pursuant to Article 28 of the Statute, therefore military or de facto commanders and other superiors are held criminally responsible and liable for punishment for the acts of their forces and subordinates while in pursuant to Article 33, the provisions are made to express the non-liability of a person who committed a crime on the orders of the government or a superior, to the extent that person was under a legal obligation to obey orders of the government or the superior in question, and that person did not know that the order was unlawful and, the order was not manifestly unlawful[26].

Fourthly, in terms of jurisdiction in formal sense, it is required to fulfill the preconditions and conditions mentioned in Article 12 of the Statute to exercise the jurisdiction of the court. Therefore, it is accepted that when the crime was committed on a territory, the State on the territory of which the conduct in question occurred or, was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft or, was committed by a person, the State of which the person accused of the crime is a national, are required be signatories of the Statute in order to activate the court's jurisdiction against the questioned crimes.[27]

Thus it is clear that, it is necessary for States to become parties to the Statute to admit the court's jurisdiction over them. However, the court may exercise its jurisdiction over non-signatory states as well when they accept the exercise of the jurisdiction of the court by declaration lodged with the registrar.[28] Therefore, there is a possibility to exercise the court's jurisdiction over nationals of non-signatory States as well but noteworthy feature of this court is the need of triggering and activating the jurisdiction of the court upon three trigger mechanisms of State's self-referral[29], Security Council referral[30] or *proprio motu* investigation of the Prosecutor[31]even after these preconditioned are fulfilled.[32] The Court's jurisdiction over Uganda, the Democratic Republic of Congo and the Central African Republic has begun with such State's self-referrals and, over the situations in the Dafur region and in the Libyan Arab Jamahiriya the jurisdiction of the court has begun with two Security Council referrals.[33] Similarly, the jurisdiction of the court

25 Ibid, Article 27
26 Orders to commit genocide or crimes against humanity are manifestly unlawful
27 Rome Statute, Article 12 (2)
28 Ibid, Article 12 (3)
29 Ibid, Article 13 (a) and 14
30 Ibid, Article 13 (b)
31 Ibid, Article 13 (c) and 15
32 Christoph Safferling, Supra n 1 at 86
33 UN Resolution 1593/2005 and 1970/2011

was activated against the situation in the Republic of Kenya upon the *proprio motu* application made before the Pre-trial chamber and hence, it can be seen that 'Rome Statute has made an innovative attempt to widen the reach of ICC not to confine its jurisdiction to territorial or national conditions' but to come close to universal jurisdiction as possible by considerably reducing the scope of the consent principle and relying on territorial[34], national[35] and consensual[36] principles.[37] Indeed, it has created a system of judicial enforcement for the prosecution of the most serious international crimes at both the domestic and international levels furthering a new relationship between national and international authorities.[38]

2. Principle of Complementarity

It is therefore without doubt that Complementarity is central to the philosophy of the court[39] because in so doing, the Rome Statute tried to create a 'Rome System of Justice' where both domestic and international level governance has interrelated international legal duties to ensure effective prosecution against international crimes.[40] The enforcement regime established by the Statute has thus created the court as a last resort supra-national authority to provide more space to national co-operation and, the first and foremost opportunity to try the alleged offenders in its own domestic courts.[41] Pursuant to Article 17 of the Statute, the jurisdiction of the Court is thus made inadmissible against States when they have undertaken such a case to carry out genuine investigations and prosecutions. Accordingly, the court's jurisdiction is only accepted when such a State is unwilling or unable to genuinely carry out those investigations or prosecutions.[42]

In order to determine unwillingness, the principles of due process is encouraged as there could be situations where there were national decisions to shield a person concerned from criminal responsibility[43] during the investigation and prosecution processes in

34 When a person commits a crime in other territory, he comes within the jurisdiction of the court if the State territory of which the crime is occurred is a party to the ICC and even though his state is not a party to ICC Statute

35 When a person commits a crime in other territory, he comes within the jurisdiction of the court when his state is a party to ICC Statute even though the State territory of which the crime is occurred is not a party to the ICC

36 When a person commits a crime in other territory, he comes within the jurisdiction of the court even though both his state and the State territory of which the crime is occurred are not parties to the ICC, if one of states makes declaration accepting jurisdiction of the court.

37 Christoph Safferling, Supra n 1 at 86

38 William W. Burke-White, 'Proactive Complementarity: The International Criminal Court in the Rome System of International Justice', (2008), Harvard International Law Journal, Vol.49, p 56-57

39 William Schabas, *The International Criminal Court*, (Oxford University Press,2010) p 336

40 Rome Statute, Preamble; Ibid

41 Ibid, Article 1; Antonio Cassese, Supra n 3 at 10,164

42 Ibid, Article 17 (1)

43 Ibid, Article 17 (2) a

national level with an unjustified delay[44] and, lack of independence and impartially.[45] The two cases of *ICC Prosecutor v. Kony et al.* case[46], and *ICC Prosecutor v. Bemba* case[47], were good examples for this as both the cases were admissible before the court with the simple reason that both Uganda and Central African Republic has indicated their unwillingness to prosecute the accused domestically. Similarly, the inaction on the part of a State having the jurisdiction to hear made the case of *ICC Prosecutor v. Katanga and Chui* admissible before the court.[48] In this case the Chamber further ruled that, 'a State which chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention to seeing that justice is done, must be considered as lacking the will.'[49] In the case of *ICC Prosecutor v. Garda* as well, the chamber rendered the case admissible as Sudan did not reply to the notifications of the prosecutor.[50] Similarly, the findings of the case of *ICC Prosecutor v. Ruto et al.*, clearly pointed out that the genuine domestic investigations may make a case inadmissible before the court under Article 19 of the Statute.[51]

In determining the inability of the State authorities to conduct genuine investigations and prosecutions, the court is in similar way encouraged to consider whether it was with the State's inability to obtain the necessary evidence and testimony due to a total or substantial collapse or unavailability of the national judicial system.[52] Indeed, the fact that DRC does not provide criminal offences of the enlistments and recruitment of child soldiers made the case of *ICC Prosecutor v. Lubanga* admissible before courts.[53] Similarly, in the case of *ICC Prosecutor v. Bemba* the court held that the incapacity of CAR to conduct a trial of this kind upon the lack of human resources, the number of cases pending before the national courts and the shortage of judges rendered the case admissible before the court.[54] Thus it is clear that 'the jurisdiction of the court is thus supplementary to national jurisdictions and is not to be exercised when those national jurisdictions are functioning properly.'[55]

The rule of *double jeopardy* enshrined in Article 17 and Article 20 of the Statute as well ensure the respect for the domestic decisions. The principle of *Ne bis in idem* incorporated to the Statute thus clearly mentioned that no person should be tried by

44 Ibid, Article 17 (2) b
45 Ibid, Article 17 (2) c
46 PTC I, ICC-02/04-01/05-377, 10 March 2009, Para 37
47 TC III, ICC-01/01-01/08-802, 24 June 2010, Para 243
48 AC, ICC-01/04-01/07-1497, 25 September 2009, Para 78
49 TC, ICC-01/04-01/07-1213, 16 June 2009, Para 77
50 PTC I, ICC-02/05-02/09-243, 8 February 2010, Para 29
51 PTC II, ICC-01/09-01/111-101, 30 May 2011, Para 53
52 Rome Statute, Article 17 (3)
53 PTC, ICC-01/04-01/06-803, 14 May 2005
54 TC III, ICC-01/05-01/08-802, 24 June 2010, Para 245
55 Dapo Akande, 'The Jurisdiction of the International Criminal Court over National of Non-Parties: Legal basis and Limits', (2003), Journal of International Criminal Justice, Oxford University Press, P 647

the court if that person has been already prosecuted by another court and vice versa.[56] The case of *ICC Prosecutor v. Bemba* is again significant in this context as it manifested how the domestic proceedings which were carried out for the purpose of shielding a person against the internationally recognized due process norms activate the jurisdiction of the court.[57]

In this sense, the gravity of the threshold enshrined in Article 17 (1) (d) of the Statute is also significant as it has emphasized the difficulty of bringing a crime before the court without fulfilling this gravity threshold.[58] Therefore, in determining the gravity threshold, *the Situation in the DRC* proved that the subject of the case must be either systematic or large-scale or, may have caused a social alarm in the international community.[59] Therefore, it is clear that the sovereignty of a State may only be infringed when such a responsible State fails to conduct its duties properly by investigating and prosecuting large-scale crimes.[60] In this role, Marquardt writes that, the court would not override national legal systems, but rather enhance them and it would improve states' ability to respond to those transnational crimes that fall between the cracks of existing systems of national jurisdiction or create difficult tensions and conflicts among national systems."[61]

3. The Composition of ICC and its function

The Rome Statute is therefore more than the creation of a new court and indeed is a challenging mixture of the two elements of international law: the *international aspect* of domestic criminal law, and the *criminal aspect* of international law.[62] The ICC system consists with four organs namely the Presidency, the Judicial Division, the Office of Prosecutor and the Registry and, the judicial division further divided into three chambers as the Pre-Trial Chamber, the Trial Chamber and Appeals Chamber.[63]

Therefore, any investigation action of the prosecutor must be first approved by the pre-trial chamber[64] and it is the responsibility of the pre-trial chamber to issue arrest warrant upon the reasonable grounds demonstrated by the prosecutor.[65] Once the trial has commenced, the Trial Chamber must ensure fair and expeditious hearing during the entire trial procedure with given full respect for the rights of both the accused and,

56 Rome Statute, Article 20 of the Statute; Christoph Safferling, Supra n 1 at 106

57 TC III, ICC-01/05-01/08-802, 24 June 2010,

58 Christoph Safferling, Supra n 1 at 108

59 PT I, ICC-01/04-02/06-20, 10 February 2006, Para 47

60 Prosecutorial Strategy 2009-2012, Para 26

61 P.D. Marquardt, 'Law without borders: The constitutionality of an international criminal court', (1995), Columbia Journal of Transnational Law, p 105

62 M. Cherif Bassiouni, *International Criminal Law: Sources, Subjects and Contents*, (3rd edn, Martinus Nijhoff Publishers, 2008), p 5

63 Rome Statute, Article 34

64 Ibid, Article 57

65 Ibid, Article 57 (3) (a) and Article 58

victims and witnesses.[66] After the trial, the court may impose a term of imprisonment not exceeding 30 years or a life imprisonment[67] however the death penalty has been omitted from its sentencing provisions.[68] The court may award compensation to victims as well[69] and further upon Article 80 of the Statute the States are expressly left their own national devices to impose penalties which do not prescribed in the Statute. Appeals against the court's decisions of acquittal or convictions are also allowed in accordance with the Rules of Procedure and Evidence[70] and thus the system of the ICC provides a better space to enforce international justice while ensuring the safeguards for States to avoid interventions into domestic affairs as well.

4. Enforcement of International Humanitarian Law Norms

Indeed, the Rome Statute contains two explicit methodologies that the ICC is not bound by *stare decisis* rule and is formally bound by human rights.[71] Thereby the ICC has encouraged discouraging future perpetrators to violence as per the limits established by law. In so doing, international humanitarian law has played a decisive role in the Rome System of Justice through its norms including both the laws and customs of war and the rules for the protection of victims.[72] The entire customary and treaty-based law that combined with international humanitarian law to limit the means and methods of warfare and to protect victims of armed conflicts can be found in the material scope of the Rome justice system[73] and hence, the ICC Dr. Helen Durham writes that 'is a major step forward for international humanitarian law to bring the world closer to end impunity for those who accused of committing atrocities.'[74]

The core crimes within the jurisdiction of the ICC are indeed an extension of the crimes found in treaties and customary law under the IHL regime.[75] The grave breaches of Geneva Conventions 1949, its additional protocols and, the law of Hague are incorporated into ICC jurisprudence with individual criminal responsibility and command responsibility and with an extensive list of war crimes. In this context, crimes identified as grave breaches of the Geneva Conventions particularly the humiliating and degrading treatment, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence are also identified as crimes

66 Ibid, Article 64

67 Ibid, Article 77

68 Claire de Than and Edwin Shorts, *International Criminal law and Human Rights* (Sweet and Maxwell, 2003) 335

69 Rome Statute, Article 75

70 Ibid, Article 81

71 Christoph Safferling, Supra n 1 at 119

72 Hortensia D.T.Gutierrez Posse, 'The Relationship between International Humanitarian Law and the International Criminal Tribunals', (2006), IRRC, Vol 88 No 86 1, P 65-66

73 Ibid at 65

74 Helen Durham and Katie O'Byrne, 'The dialogue of difference: gender perspectives on international humanitarian law', (2010), IRRC, Vol 92 No 877, P 48

75 Leila Nadya Sadat, Supra n 19 at 7

to activate the jurisdiction of the court under broad core crime categories.[76] These references thereby lead to incur responsibility against individuals when there is a violation of IHL principle as the principle of distinction, of proportionality and/or of military necessity.[77]

The Rome Statute further accepts the jurisdiction against the serious violation of Common Article 3 of four Geneva Conventions[78] and other serious violations of laws and customs applicable in armed conflicts not of an international character.[79] In so doing, the Rome Statute has included the regulations annexed to the Hague Convention 1907 as well into Rome System of Justice. *Tadic* judgment[80] was also significant in this context as it led to specify in the elements of crimes mentioned in Article 9 of the Statute that there is no requirement to establish the character of the conflict as international or non-international but the existence of an armed conflict.

The Statute ensures the entitlement to protection given to civilians and civilian objects so long as they do not participate in the direct hostilities.[81] Intentionally directing attacks against natural environment, buildings dedicated to religion, education historic monuments or hospitals are also made admissible before the jurisdiction of the court providing a special protection for cultural property as well.[82] The case of *ICC Prosecutor v. Ahmad Al Faqi Al Mahdi*[83] is particularly important in this context as it was the first time the ICC has indicted an individual for the war crime of attacking religious buildings or historical monuments.[84] Further, the Statute requires 'in particular' that such crimes must be committed as part of a plan or policy or as part of a large-scale commission of such crimes although in customary law under IHL war crimes can be committed by a person acting on his own and not having received an order to perpetrate them.[85] Further, the use of weapons, projectiles and materials and methods of warfare which are of nature to cause superfluous injury or unnecessary suffering is also made under the jurisdiction of the court providing space to include future weapons as well with the inclusion as a comprehensive prohibition in an annex of the Statute.[86] Similarly Article 77 of Geneva Convention I of 1949 was upheld in the Rome Statute opening the court's jurisdiction

76 Rome Statute, Article 8 (2) (b)(xxii); Geneva Convention IV Article 27

77 Hortensia D.T.Gutierrez Posse, Supra n 78 at 81

78 Rome Statute, Article 8(2)(c)

79 Ibid, Article 8(2)(e)

80 *Prosecutor v. Dusko Tadic*, IT-94-1-T, 14 July 1997

81 Rome Statute, Article 8(2)(b)(iii)

82 Ibid, Article (8)(2)(b)(ix); refers only art and historic monuments

83 ICC-01/12-01/15, 07 October 2016

84 On 27 September 2016, Trial Chamber VIII found that Al Mahdi was guilty, as a co-perpetrator of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, in 2012 and hence sentenced to 9 years

85 Rome Statute, Article 8(1)

86 Ibid, Article 8(2)(b)(xx)

against the enlistment, recruitment and the use of children under the age 15 as active part in hostilities.[87] Thereby it is seen that the establishment of the ICC was well founded on the International Humanitarian Law and Criminal Law and it has given 'a stupendous impulse to the evolution of a Corpus of International Criminal Rules proper'.[88]

5. Conclusion

The ICC is an extension of national jurisdiction which is activated with a State's failure to prosecute those who engaged in prohibited conducts including individuals with power and political influence. [89] Indeed, this is the system used for the Nuremberg International Military Tribunal, the International Military Tribunal for the Far East *(IMTFE)* and for the International Criminal Tribunals for the former Yugoslavia *(ICTY)* and the International Criminal Tribunal for Rwanda *(ICTR)* in the 1990s and a system of justice which is established to enforce the norms of International Humanitarian Law.

It is true that the ICC cannot eliminate all the evils of humankind. However, it can help to avoid some conflicts, prevent some victimization, and to bring to justice some of the perpetrators of those crimes with the State's failure to do so. Thus the ICC serves as an enforcer of international norms by its mere existence and implicit deterrent value to the world, and additionally acts as a safety net in the event that a national criminal jurisdiction collapses.[90] Thereby the ICC has strengthened the world order, peace and security and international rule of law[91] making a friendly pressure to States and its individuals to bring justice by domestic courts themselves. 'As long as there is no judicial organ for the trial of international crimes, Jean Graven writes, there will be neither a serious codification of international criminal law nor any serious application of an international sanction and, hence the world will go on living in a judicial anarchy under the violence and injustice with the risk of running into destruction.'[92] Therefore the summation can be made with the words of Kofi Annan that we need the International Criminal Court more than ever! [93]

87 Ibid, Article 8(2)(b)(xxvi)

88 Antonio Cassesse, *International Criminal Law*, (OUP, 2nd edn, 2008), p 7

89 https://www.ictj.org/complementarity-icc/

90 P.D. Marquardt, Supra n 67 at 73-148

91 https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law

92 Christoph Safferling, Supra n 1 at 1; Jean Graven in 1948, cited by V Pella, 'Towards an International Criminal Court', 44 AJIL, 1950, p 37

93 https://www.theguardian.com/commentisfree/2016/nov/18/state-impunity-international-criminal-court-african?CMP=share_btn_tw

APPLICATION OF CLASSICAL AND NEO - CLASSICAL THEORY IN SRI LANKAN CRIMINAL JUSTICE SYSTEM: A CRITICAL EVALUATION

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INTRODUCTION

"Theory in criminology refers to efforts to explain or understand crime causation"[1]

-Frank E. Hagan -

Each theory of crime has been influenced by the religious, philosophical, political, economic, social, and scientific trends of the time.[2] However Ronald L. Akers states that 'if a theory is properly developed it would help to reveal and express real human scenarios and experiences, a properly developed theory could be helpful to test the known facts against the new ones.'[3] Each particular school of thought in their broad perspective on criminology tries to explain not only crime but also the appropriate measurements which could be taken to reduce or minimize the number of crimes, the appropriate punishments, and the protection of both the victim and the offender from the unwanted consequences of crime.[4]

Classical theory can be categorized in to;

- Pre-classical
- Classical
- Neo-classical

These three theories, although they belong to the major species of the "classical theory", are providing different arguments on crime causation. It differs from the demonological arguments made during the pre-classical era to the free will theory postulated under the classical theory to the consideration of extenuating factors during the neo-classical era.[5]

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1 Frank E. Hagan, 'Early and Classical Criminological Theories',(2010)

2 The foundations of Criminal Justice,

3 Ronald L. Akers (2013)

4 K. A. A. N. Thilakarathna "Classical School of Criminology and Its Application in the Sri Lankan Criminal Justice System"US-China Law Review (July 2019 Vol.16 No. 7) 271-280 doi:10.17265/1548-6605/2019.07.002

5 ibid

CLASSICAL SCHOOL OF CRIMINOLOGY; THE FREE WILL THEORY

Basic principles of the classical School

"The purpose of punishment is deterrence. Punishment should be imposed in order to prevent offenders from committing additional crimes. It is a tool, not an end in itself. To help prevent crime, adjudication and punishment should be: swift, severe and certain. But only severe enough so as to outweigh the personal benefits derived from crime commission."6

-Classical Theory of Crime-

The classical school of criminology was the first modern approach regarding crime and criminal behavior. It is a body of thought about the reform of crime and the best methods of punishment by a group of European philosophers and scholars in the 17th and 18th century.[7] It developed as a separate school of thought that rejected barbaric methods used under the pre-classical era which was heavily influenced by the demonological thought and the classical school changed this idealism with the *rational choice theory* which advocates that *humans as rational beings have free will to decide on their actions or omissions*.[8]

Jeremy Bentham and Italian Philosopher *Cesare de Beccaria* is considered to be the founders of Classical School of Criminology, where Beccaria wrote and published anonymously in 1764 his revolutionary work, *An Essay on Crimes and Punishments.* However *Rousseau, Montesquieu, Voltaire, Jeremy Bentham, William Blackstone and Samuel Romilly* are also considered as thinkers of the classical school.

The key features of Classical Theory can be pointed out as follows;[9]

- Principle of rationality: human beings have free will and their actions are the result of choice, a more rational approach to punishment.
- Utilitarianism: behavior is purposeful and not motivated by supernatural forces.
- Pleasure and pain[10] (or rewards and punishment are the major determinants of choice).
- Deterrence is the best justification for punishment.
- Punishment and sentences: proportional to the seriousness of the crime.[11]

6 http://www.julianhermida.com/crimclassical.htm
7 (WiseGeek, 2003)
8 K. A. A. N. Thilakarathna "Classical School of Criminology and Its Application in the Sri Lankan Criminal Justice System"US-China Law Review (July 2019 Vol.16 No. 7) 271-280 doi:10.17265/1548-6605/2019.07.002
9 (Williams and McShane, 1999)
10 Donald Taft stated that; this doctrine implied the notion of causation in terms of free choice to commit crime by rational man seeking pleasure and avoiding pain.
11 http://www.julianhermida.com/crimclassical.htm

- Human rights and due process principles, human beings have certain inalienable rights, therefore no secret accusations, Public trials should be held. Offender is considered to be innocent until proven guilty.
- No penalty unless sentenced by a court of law, unless proved that he committed the crime.
- Only the legislature could specify punishments. The law must apply equally to all citizens; no defences to criminal acts were permitted.
- There is a social contract between citizens and the state.
- Minimize capital crimes, abolish corporal punishment, degrees of culpability and condemned the torture of suspects.
- Classical school measures crime by the harm done to society by the offender and not by the intention of the person. Also when considering the harm,it can be individuals, society and the state.

Classical school pioneers state that humans are fundamentally rational and most human behavior results from free will and rational choice. According to the Classical School of criminology, individuals were guided by a pain-and-pleasure principle by which they calculated the risks and rewards involved in their actions.[12]

"Criminals make a rational choice, and choose to do criminal acts due to maximum pleasure and minimum pain."

– Classical School -

The ultimate goal of this theory was to ensure that the benefits of crime never outweighed the potential pain from punishments the offender would receive.[13] They believe in a preventive approach for crimes and despite the social or physical characteristics of the criminal, the punishment should suit the offence that has been committed. Beccaria believed that the effectiveness of crime prevention is down to three main ideas, these being the certainty of the crime and how likely it is to happen, the celerity of the crime and how quickly the punishment is inflicted and the severity of the crime, and how much pain is inflicted.[14]

"Criminals have control over their behavior, they choose to commit crimes and they can be deterred by the threat of punishment"

-Beccaria-

12 (Lilly, Cullen, &Ball, 2011).

13 (Greek,2005)

14 Nirvaan S L and one other 'A comprehensive study of the classical school of criminology' International Journal of Academic Research and Development (Volume 3 Issue 1 January 2018) 01-06 <www.academicsjournal.com>

The Classical school strongly believed that the most effective deterrent for criminal behavior would be swift punishment rather than long trials. The school sought to reduce crime through reform to the criminal punishment system, which they felt tended to be cruel and excessive without reason as well as an ineffective deterrent.[15] Beccaria thought that the severity of the penalties given should be proportionate to the crime committed and no more than what is necessary in order to deter the offender and others from committing further crimes.[16]

The idea of a social contract is a key feature of the classical school and includes the notion that transgressions that breach the social contract are seen by society as 'crimes'.[17] Therefore,to maintain the said social contract and control the human behaviors punishment should be used as a tool of a deterrent. According to classical school of criminology, crime is seen as a moral transgression against society.[18]

Beccaria[19] stated that; *'It is better to prevent crimes than to punish them. Criminals are rational, they weigh up the costs and therefore we should create deterrents which slightly outweigh what would be gained from the crime.*"

According to the above view,it is clear that classical thought of crime does not encourage punishment and strictly considers imposing capital punishment as is pointless. However, Bentham argued that in case of murder,the death penalty could be used as a deterrent measure to the other offenders. The establishment of prisons in the second half of the eighteenth and nineteenth centuries mainly intended to punish the mind and soul rather than the old ways of bodily punishments.

Challenges to The Classical School of Criminology

The Classical school of criminology has 3 main challenges.[20]

- As all criminals do not act rationally and of their own free will, it is difficult to serve the interests of justice and equality with this theory, when faced with a particular defendant in court.
- As the main purpose of criminal justice bureaucracies such as the police is to decrease the crime rate, the emphasis on equal justice may not always be compatible.
- The rationalization of the legal system potentially means some reduction in their power, which may backfire in terms of being a deterrent.

15 (WiseGeek,2003)

16 Nirvaan S L and one other 'A comprehensive study of the classical school of criminology' International Journal of Academic Research and Development (Volume 3 Issue 1 January 2018) 01-06 <www.academicsjournal.com>

17 (Williams and McShane,1999).

18 https://www.open.edu/openlearn/society-politics-law/introduction-critical-criminology/content-s

19 (1764/1963: 93)

20 White and Haines (2004)

Classical School under Criticism

With the emergence of scientific criminology in the latter part of the 19th century, the classical view on criminal justice came under great criticism.

The offender was defined in Classical theory, as free-willed and rational and also stated that the punishment should be given in proportionate with the offence committed. Although the classical school identified all offenders rational creatures, individuals with mental illness or physical defects or insane cannot be considered as rational and free will creatures. (ex: a person with schizophrenia cannot be considered a free-will creature)

Classical School disregards the idea that the, "offender is driven by biological, psychological and pathological influences" and it is the major criticism and weakness that the classical school has.

NEO CLASSICAL SCHOOL OF CRIMINOLOGY

Basic principles of the Neo-classical School

"Neo-classists represent a reaction against the severity of the classical view of equal punishment for the same offence"[21] foot-note.

- Professor Gillen-

This theory is based on concepts of hedonism, utilitarianism and free will but this is a modification of the Classical School of Criminology. This theory came up in the 19th century and it focuses on policies rather than crime causation. Although Neo Classical theory does not completely deny the Classical concepts, it basically considers the different status of the guilty mind of the offenders which the classical school disregarded. This is the first theory which has taken the "*Mens rea*" of the offender into consideration.

Neo-Classical theory also identified that positivism is based on hard determinism. This theory believes that crimes are resulted from forces that are beyond the control of the individual and the concept of free will is rejected. This theory applied scientific techniques to the study of crime.

Benigno Di Tullio[22] is one of the most important thinkers of new classical theory. Unlike the classical school, the neoclassical school was not a scientific school of criminology but it did begin to explore the causation issue.some individuals possess a tendency or inclination to delinquency, which doesn't exist in others, and the external circumstances which provoke their criminal tendency and lead them to delinquency, not produce the same effect on the part of ordinary persons.

21 (Paranjape, 2018, p. 47).

22 The theory was established in his work,"criminal constitution or predisposition".

The key features of Neo-Classical Theory;

- Concerned on Individual rights and due process.
    - Right to life, liberty and security of person should not be deprived except by the principles of fundamental justice;
    - Every person should be Secured against unreasonable search or seizure;
    - Every person should not be arbitrarily detained or imprisoned;
    - No one should be arrested or detained arbitrarily and the reason for arrest must be informed promptly. The offender must be allowed to take legal assistance and challenge the validity of such detention by a habeas corpus application.
    - In legal proceedings rights such as the presumption of innocence,the right to ask for bail and not to be subjected to double jeopardy should be secured.
    - Punishments should not be cruel or inhumane.
- An alternative sentencing Policy was introduced. (Ex: conditional sentences, home confinement, halfway houses, psychological treatments, etc.)
- Separate treatment of children, mentally ill and insane persons was introduced. (Ex: Children under seven years of age were exempt from the law on the basis that they could not understand the difference between right and wrong).[23]
- Neoclassical Theory introduced the idea of Premeditation as a measure of the degree of free will.
- Mitigating circumstances as legitimate grounds for diminished responsibility and introduction of mitigation of punishments.
- Admissibility of expert testimony into court procedures on the question of degree of responsibility.[24]

APPLICATION OF CLASSICAL AND NEO-CLASSICAL THEORY IN SRI LANKAN CRIMINAL JUSTICE SYSTEM: A CRITICAL EVALUATION

The main legal framework for the criminal justice system in Sri Lanka is set out in;

- Penal Code
- Criminal Procedure Act
- Evidence Ordinance No. 14 of 1895
- Fundamental Rights chapter of the 1978 Constitution and other statutes relevant to criminal offences

23 Theories of criminology
24 ibid

Classical principles provide the basement for the Sri Lankan Criminal Justice system. There are several examples where the theories of classical school have been embedded in Sri Lankan Penal Code. Further the Neo-Classical principles have influenced our law to be tenderedin nature.

Section 37 of the Penal Code interprets the term "voluntarily" as follows;

"When he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it."

Unless the contrary is proven, a man is supposed to be in control of his faculties and therefore rationally knows the consequences of the act or omission which he can be made accountable for.[25] In **Nandasena** v. **A.G**[26] it was also held that "every man is presumed to be responsible for his acts till the contrary is clearly shown" and this is a clear depiction of classical theory principle of free will.

Sections 78 and 79 of the Penal Code which deals with intoxication state that unless the person was intoxicated without his knowledge or against his will, in such an instance a person being in an intoxicated state of mind will nevertheless be held accountable.[27] Otherwise the offender will be held accountable. These provisions are developed with the classical notion which states that a person who acts under his free will be held accountable for his own conduct. Therefore if someone voluntarily gets intoxicated he cannot seek protections under our law.

In ***Dayaratna*** *v.* ***Republic of Sri Lanka***[28] it was held that;

"The basic premise of liability under our criminal law is that a man is presumed to intend the natural consequences of his act. This, however, is a rebuttable presumption. Therefore, an accused who seeks to set up a plea of voluntary intoxication has to, on the evidence, rebut the application of that presumption."

Although the Classical school does not consider mens rea of a particular individual, the offences under the Penal Code of Sri Lanka generally require both actus reus and mens rea to be present in an offender. However there are instances in Sri Lankan law where mens rea is not taken into consideration.

Ex: Strict Liability offences

Section 14 of the Consumer Protection Act No.37 of 1980

However, it is evident that Sri Lankan Criminal Justice system is closer to neo-classical principles rather than classical principles. Because the Classical School rejected the mens

25 K. A. A. N. Thilakarathna "Classical School of Criminology and Its Application in the Sri Lankan Criminal Justice System"US-China Law Review (July 2019 Vol.16 No. 7) 271-280 doi:10.17265/1548-6605/2019.07.002

26 [2007] 1 Sri LR 237.

27 ibid

28 [1990] 2 Sri LR 226

rea when deciding the culpability of an offender. There are certain instances where the mental status as well as the extenuating or external circumstances of an offender has been taken into consideration.

Our Penal Code considers, external factors like age, sex, and different mental conditions when deciding punishments for a certain offence. In **Prasad Perera** v. **A.G**[29] Court observed that;

"Intention is the determination of the will and implies volition and willingness-knowledge, and on the other hand implies cognition and consciousness. In determining these, the surrounding circumstances should be looked at in arriving at a decision as to the culpability of the accused."

Section 53 of the Penal code, provides that, "no person who is below the age of 18 shall be given the death penalty" and Section 54 stipulates that, "no pregnant women should be given the death penalty."

Classical school believes that similar offences must be given similar punishments; however, this has been followed by Sri Lankan Penal Code and Criminal Procedure Code. As an example section 296 of the Penal Code stipulates death penalty for the offence of murder and the other less severe offences carry lesser punishments. This idea complies with the below view of Beccaria:

"Let the punishment fit the crime"

The Penal Code of Sri Lanka has explained some general and special defences/exceptions by which an offender can mitigate the punishment and reduce the culpability of the offence he has committed.

The Penal Code specites Special defences under the exceptions in Section 294 which read as Grave and Sudden provocation, Self defence, acts done in a sudden fight, acts done in discharging a public duty, causing death to a baby less than 12 months by her mother. These exceptions show that different states of the mind of an offender has been considered when deciding the culpability which is much closer to neo-classical view.

Section 69 to 99 of the Penal Code explains the general defences (Mistake, Automatism, Insanity, Intoxication, Necessity, Duress, Infancy, Superior orders and Private Defence) and if one of these defences can be proved by the offender that person will not be liable for the said offence as he doesn't have required mens rea.

Further *Section 114 of the Evidence Ordinance speaks about a non-rebuttable presumption that; "a boy below the age of 12 cannot commit a rape." This is because the law believes a boy in such age couldn't have required mens rea for the said offence.*

29 2004(1) Sri L.R 417

These concepts are in line with the neo-classical ideology that considers the extenuating circumstances (Age, Mental status, Sex) for deciding culpability.

In the case of ***Gamini*** v. ***Attorney General***[30] plea of epilepsy and defense of automatism was brought by the accused. It was stated by the court that *"when a provisional presumption is displaced and the prosecution is required to prove the legal burden and discharge the ultimate burden of proving that the act was voluntary. However, in order to displace the presumption of mental capacity, defense must place a sufficient foundation by evidence from which it may reasonably be inferred that the act was involuntary"*

Classical theory became irrational and non-pragmatic as it only focused on criminal act. The true reasons behind crime causation were not found in that theory. This makes it clear that the neo-classical stance regarding taking into extenuating factors has become the rule while the classical notion of disregarding extenuating factors has become the exception.[31]

APPLICATION OF CLASSICAL AND NEO-CLASSICAL THEORY IN UNITED STATES OF AMERICA: A CRITICAL EVALUATION

"If we grant the assumption of classical theory, we can hold people criminal 100% responsible for their actions because it was a choice."[32]

Modern deterrence theory is perhaps the most dominant philosophy of the American criminal justice system.[33] Although hedonism was the foundation for the American criminal justice system the neo-classical principles were also well encapsulated in the American criminal justice system.

The founding fathers of the classical schools, Beccaria and Bentham heavily influenced in making the US Constitution and as a result of that, the classical view can be seen in many areas of the US Criminal justice system. The below amendments to the US Constitution are the best examples of the above influence;

4th Amendment : Prohibit unreasonable search and arrest

5th Amendment : Privilege against self-incrimination which forbids double jeopardy

8th Amendment : protection from cruel and unusual punishments

14th Amendment : Due process and equal protection under law, fair treatment

30 [1999] 1 Sri LR 321.

31 K. A. A. N. Thilakarathna "Classical School of Criminology and Its Application in the Sri Lankan Criminal Justice System"US-China Law Review (July 2019 Vol.16 No. 7) 271-280 doi:10.17265/1548-6605/2019.07.002

32 <https://openoregon.pressbooks.pub/ccj230/chapter/4-4-classical School>

33 Alison S. Burke, David Carter, Brian Fedorek, Tiffany Morey, Lore Rutz-Burri, and Shanell Sanchez, Introduction to the American Criminal Justice System Open Oregon Educational Resources <https://openoregon.pressbooks.pub/ccj230/>

However, the American Criminal Code (Acc) has provisions which mitigate the guilt in a criminal case. These provisions are inserted into ACC under the influence of neo-classical theory of criminology. Chapter 1 and 2 of Acc elaborates on defenses and justifications and general principles of excuse to criminal liability.[34] Chapter 3 of the ACC depicts the general principles of justification; Lesser Evils, Execution of public duty, Defense of persons and defense of Property can be proved by the offender and under general principles of excuses, insanity, involuntary intoxication, immaturity, duress, involuntary act or omission, reasonable mistake of law. It clearly depicts from the examples that US law has absorbed the Neo-Classical concepts.

A person is not responsible for criminal conduct "if at the time of such conduct as a result of a mental disease or defect he or she lacks substantial capacity either to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law".[35]

The Comprehensive Crime Control Act (1984) changed the federal rules on the insanity defense, limiting it to those who are unable to understand the wrongfulness of their acts as a result of severe mental disease.[36] This also reveals the influence of Neo-Classical concepts.

As prison populations and incarceration rates in the United States remain among the highest in the world. [37]The country is more inclined to deterrence based community supervision strategies today. For example, they use multiple conditions that emphasize surveillance and control through drug testing, electronic monitoring, curfews, and now social media monitoring.[38] American authorities use electronic monitoring for sex offenders and domestic violence offenders for a lifetime and this is the best example for deterrence theory which classical school observed. Further USA has developed intensive supervision, house arrest and boot camps based on classical assumptions about crime control.

Most Western nations still adhere to most of the Classical inventions under due process of law and the rights of individuals, largely because these concepts are embedded in various constitutions. Two of the major concepts of the Classical School, deterrence and rationality, are still alive and well.[39]

34 Robinson, Kussmaul, Stoddard, Rudyak and Kuersten: The American Criminal Code, Spring 2015: Volume 7, Number 1, Journal of Legal Analysis

35 https://www.cliffsnotes.com/study-guides/criminal-justice/criminal-law/legal-defenses-justifications-for-crimes

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39 Theories of Criminology

The U.S. Supreme Court invented the entrapment doctrine to control outrageous, overreaching police activity that endangers civil liberties and violates fundamental fairness.

CONCLUSION

Classical school of criminology was established in pursuit of the better criminal justice system which changed unjust and cruel punishments that prevailed before the Enlighten period.

The heritages of the Classical school of criminology are Deterrent Punishment methods, Rationality, Hedonism, Due process, Human rights and the Neo-Classical school focuses on individual rights, due process and alternative sentencing, legal rights and retributive punishment methods.

Classical school concentrated on the same kind of punishments for the same kind of offences of similar nature without considering the external factors. However the neo-classical thinking insisted the consideration of external factors in an offence and stated that those factors should mitigate and decide appropriate punishments. This neo-classical view planted seeds for the modern criminal justice system. Many of the rights such as liberty search and seizure, trials, sentencing, self-incrimination, interpreters and imprisonment that can be seen today have derived from this view.

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