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MESSAGE OF HER LADYSHIP THE CHIEF JUSTICE

It is with immense pleasure and pride that I forward this message to be published in the "JSA Law Journal Volume - XI", the annual publication of the Judicial Service Association of Sri Lanka, to be launched at the Annual Judicial Conference 2024.

The JSA Law Journal is the platform through which Judicial Officers serving the length and breadth of this country communicated with their colleagues, member of the profession and counterparts, on issues that concern them during the adjudication process and challenges faced while performing their judicial functions. Thus, over the last decade the JSA Law Journal is considered the communication tool which addresses current topical, legal and judicial issues that are of interest at national, regional and international levels.

I understand that this year's volume will showcase various articles submitted by Judicial Officers for the Justice Amarathunga Memorial Award Competition and also contributions by legal luminaries and academicians on the subjects of contemporaneous importance and relevance, that touch upon the issues related to our justice dispensation system.

While extending my heartiest congratulations and best wishes to the Editorial Board of the JSA Law Journal, I also wish to express my sincere gratitude to all Judicial Officers and court staff for their invaluable contributions in discharging their duties effectively and efficiently to administer justice throughout the entirety of the country.

Mrs. Murdu N. B. Fernando, P.C.
Chief Justice
4th December 2024

MESSAGE OF THE HONARABLE DIRECTOR OF SRI LANKA JUDGES' INSTITUTE

It is with great pleasure and enthusiasm that I pen this message for Volume XI of the JSA Law Journal, marking a significant milestone in the ongoing journey of the Judicial Service Association.

The Judicial Service Association, comprising District Judges and Magistrates, represents the frontline members of our judiciary. These Judges are the first point of contact for citizens seeking justice and are instrumental in shaping public perceptions of the judiciary. They form the backbone of the judiciary and are the future Superior Court Justices, including potential Chief Justices. Their role is critical, as the confidence of the public in the judiciary largely depends on their conduct, decisions, and commitment to justice.

Judicial independence and impartiality are fundamental to the role of a Judge, but these qualities alone do not define excellence. A good Judge must also exhibit deep legal knowledge, sound judgment, efficiency, humility, and the courage to uphold justice in the face of challenges. A passion for continuous learning, coupled with a willingness to engage in the exchange of ideas, is crucial for adapting to the evolving demands of the law and enhancing judicial competence. The JSA Law Journal provides an exceptional platform for this purpose, enabling judges to engage with diverse perspectives, sharpen their legal acumen, and reflect on the increasing complexities of the law, thereby fostering a deeper understanding of the challenges facing the judiciary.

I extend my sincere gratitude to those who contributed articles to this volume. Your dedication to sharing knowledge and insights is commendable and serves as an encouragement to others in the legal fraternity to engage in intellectual discourse.

I also wish to extend my heartfelt congratulations to the Editor of this Journal and his dedicated team for their tireless efforts in bringing this publication to life. Their commitment and attention to detail have greatly enhanced its quality and impact.

May this Journal continue to illuminate the path towards excellence in the legal profession and inspire meaningful dialogue and growth within the judiciary.

Justice Mahinda Samayawardhena
Judge of the Supreme Court
Director of the Sri Lanka Judges' Institute
26th November 2024

MESSAGE OF THE PRESIDENT OF JSA

Dear colleagues,

It is a great honorand pleasure to send this message to you, as the president of Judicial Services Association 2024.

After successful year 2023, we have commenced this year too with many challenges. In respect of judicial independence and the welfare of the members, our team, the Exco has been able to take many steps.

We have commenced the year with a year plan. In January we involved in vehicle issue faced by newly appointed members and sent a letter to Judicial Service Commission. We requested from SriLanka Judges Institute to hold an awareness programme on issues related to caseson Poisons, Opiumand Dangerous DrugsOrdinance.

Several letters were sent to JSC asking to take proper actions regarding false news published in newspapers. As a result of our effort the Judicial Service Commission has taken a decision that public administration circulars are not always applicable for judicial officers.

Report has been handed over regarding salary of Judges. As our salary has not been revised since 2018, we had meeting with the Secretary of finance ministry and that process is to be continued till it becomes reality. Our team has prepared a policy for foreign training and handed over the same to the JSC.

As a result of continuous threat to the independence of the judiciary which later followed by criticism made in the parliament by the minister, we issued a media statement and later we could hold a successful special general meeting on 30.06.2024 at Colombo District Court making it a great achievement of a teamwork. Here I must thank you for the support and courage given to me and the secretary when there was

a threat to summon us before the parliamentary previledge committee. Also, the successful intervention by his lordship the chief justice and the Judicial Service Commission is remembered here with much gratitude.

This year Annual Get Together was successfully held in Laya Leisure Resort – Kukuleganga. I Congratulate our women cricket team who has won the Trophy in the Lawyers Cricket Tournament held in Tangalle. When there were issues relating to process of appointment of a new secretary of JSC during the crucial moment representatives of JSA have met the judicial service commission and the secretary on 22.07.2024 and as a result that process was postponed.

Although we could not continue experience sharing workshops due to lack of funds, a special webinar series was commenced in order to solve practical problems faced by us. Four webinars have been successfully held. In addition to that a special webinar was held for last two batches. With the new development we were able to publish two digital news letters for the first time and the JSA law journal is published as usual.

Steps were taken to lodge a complain in Sri Lanka Press Council against the malicious news reports by Anuradhapura news reporter. It is continued with the appeal case in the Supreme Court against the judgment given in the tax case filed by JSA in the Court of Appeal. Now the judgment is reserved. Very recently some necessary measures have been taken up regarding the appointment of court of appeal judges. It has been decided to bid farewell to his lordship, the former chief justice, Jayantha Jayasuriya, PC on 21.12.2024. After 5 years our talent show Rhythm of Purple is to be held following the Annual Conference. I appreciate the great work of the secretary, office bearers and all Exco members.

Dear colleagues as I mentioned last year, this association should continue its successful journey in a strong manner. Your contribution in an active manner is highly appreciated.

I thank you all for the support and trust you have extended me during my second tenure as the president. I wish you all a happy and successful New Year 2025.

D. M. Ruwan Dhammike Dissanayake
President
Judicial Service Association

EDITOR'S NOTE

It is with immense pride and gratitude the Judicial Service Association (JSA) presents the JSA Law Journal, Volume XI – 2024. This edition has been made possible through the steadfast encouragement and patronage of our esteemed members. With their dedicated and positive responses, we are delighted to publish this journal alongside the prestigious Justice Nimal Gamini Amarathunga Memorial Award competition for the best article.

This journal is structured into two parts; Part I comprises of a collection of 13 scholarly articles authored by distinguished legal personalities, including Honourable Justices of Superior Courts, Honourable High Court Judges, senior members of the unofficial bar, forensic experts and an academic. I extend my heartfelt gratitude to these contributors for their generosity in sharing their expertise and insights without hesitation, and responding promptly to our initial invitations.

Part II consist of 13 articles submitted by the members of the JSA, including entries for the Justice Nimal Gamini Amarathunga Memorial Award competition. These submissions were meticulously reviewed by a panel of Honourable Judges renowned for their practical experience and academic excellence. I am deeply appreciative of their dedicated efforts in selecting the best article and fostering the intellectual growth of the next generation.

It is indeed a privilege to express the sincere gratitude to Her Ladyship Chief Justice Murdu Fernando PC, Justice Jayantha Jayasuriya PC, Former Chief Justice and His Lordship Justice Mahinda Samayawardhena, Judge of the Supreme Court and Director of the Sri Lanka Judges' Institute, for their invaluable encouragement and unwavering support in all academic initiatives of the JSA.

This year marks a significant milestone for the JSA Editorial Committee, as we embrace modernity by publishing our annual newsletters in e-version aligned with international standards. This transition, which enhances cost-effectiveness, accessibility, stability, and environmental sustainability, has garnered widespread appreciation. I owe special thanks to JSA President Mr. Ruwan Dissanayake, Secretary Mr. Isuru Neththikumarage, Treasurer Mr. Sampath Gamage, the Executive Committee and the Editorial Committee for their assistance and guidance in making the JSA e-Newsletters and the JSA Law Journal, Volume XI – 2024 a reality.

The JSA Law Journal, Volume XI is not only rich in academic substance but also exemplifies exceptional printing quality. I am profoundly grateful to Mrs. Amila Sandamali Kannangara and Mola Senevirathne whose unwavering dedication, painstaking editing and creativity ensured the journal's excellence. Their contributions and teamwork were instrumental in bringing this publication to life, and we extend our warm appreciation to both.

Finally, the true success of the JSA Law Journal, Volume XI lies in its ability to enhance members' knowledge and writing skills. We hope this edition fosters intellectual dialogue and contributes to upholding the justice system of our motherland. As we look forward, I warmly invite all JSA members to share their knowledge and experiences to enrich the forthcoming JSA Law Journal, Volume XII.

M. L. Nuwan Kaushalya
Editor
Judicial Service Association

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Part - I

ORDERS MADE BY COURT ON PERMANENT ALIMONY, ALIMONY PENDENTE LITE, COST OF LITIGATION, MAINTENANCE IN MATRIMONIAL ACTIONS

Justice Mahinda Samayawardhena*
Judge of the Supreme Court

In matrimonial cases, District Judges and Magistrates frequently encounter applications for orders on permanent alimony, alimony *pendente lite*, costs of litigation, and maintenance. Given the legal and practical complexities of these orders, it is essential for Judges to have a clear understanding of the principles that guide such decisions. This article aims to provide insight into some of the areas relevant to the subject.

Permanent alimony

Section 615(1)(b) of the Civil Procedure Code empowers the District Court to award alimony after granting the divorce. Section 615 of the Civil Procedure Code as it stands now reads as follows:

> *615 (1) The court may, if it thinks fit, upon pronouncing a decree of divorce or separation, order for the benefit of either spouse or of the children of the marriage or of both, that the other spouse shall do any one or more of the following:-*
>
> (a) *make such conveyance or settlement as the court thinks reasonable of such property or any part thereof as he may be entitled to;*
>
> (b) *pay a gross sum of money;*
>
> (c) *pay annually or monthly such sums of money as the court thinks reasonable;*

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(d) *secure the payment of such sums of money as may be ordered under paragraph (b) or paragraph (c) by the hypothecation of immovable property or by the execution of a bond with or without sureties, or by the purchase of a policy of annuity in an insurance company or other institution approved by court.*

(2) The court may at any stage discharge, modify, temporarily suspend and revive or enhance an order made under subsection.

In terms of section 615(1)(b) of the Civil Procedure Code, the Court may, if it thinks fit, upon pronouncing a decree of divorce, order for the benefit of either spouse that the other spouse shall pay a gross sum of money as permanent alimony. The legislature has not expressly stated matrimonial fault to be a factor in awarding alimony. In terms of this section, alimony can be awarded not only in favour of the wife, but also in favour the husband. This is a clear departure from the earlier position where only the wife could claim for alimony.

Section 615 as it stood before the Civil Procedure Code (Amendment) Law, No. 20 of 1977, read as follows:

615. The court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of separation obtained by the wife, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties.

(2) In every such case the court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the court may think reasonable:

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the court seems fit.

Although the repealed section does not explicitly state that the wife must be the innocent party to be entitled to alimony, Courts have interpreted "*the conduct of the parties*" to mean that only the innocent party is entitled to it. The term "*The court may, if it thinks fit*" found in section 615 also lends support to come to that conclusion. As a result, alimony has been denied when the wife is found to be the guilty party.

Hence, in practical terms, in Sri Lanka, the obligation to pay permanent alimony is tied to the concept of matrimonial fault in divorce proceedings. In Sri Lanka, under section 19(2) of the Marriage Registration Ordinance, No.19 of 1907, as amended, a decree of divorce can be granted on proof of matrimonial fault identified in law, i.e. adultery, malicious desertion and incurable impotency. What is known in some jurisdictions as "no-fault divorce" is, as yet, not part of our law (*Tennekoon v. Tennekoon*[1], *Gomes v. Gomes*[2]). However, the law is expected to be amended soon to accommodate "no-fault divorce" in Sri Lanka. In the meantime, the concept of "irretrievable breakdown of marriage" has significantly influenced judicial decisions in granting divorce on the ground of malicious desertion (*Pathmanayaky v. Mahenthiran*[3], *Kulatunga v. Shiromala*[4]). When both parties clearly agree that the marriage has irretrievably broken down, without a flint of hope for reunion, there is little purpose in confining the marriage to a paper.

In addressing the question of the appropriate stage at which the order for permanent alimony should be made, H.N.G. Fernando, C.J. in *Wellala v. Wellala,*[5] stated:

> *The jurisdiction of the Court under section 615 of the Civil Procedure Code to make an order for permanent alimony becomes exercisable only at the stage when a divorce decree is being or has been made absolute (although, in practice, matters concerning the liability to pay alimony, and the nature quantum of the payment, are investigated at an earlier stage). Accordingly, it is open to the wife to defer her application for permanent alimony to a stage subsequent to the entry of the decree absolute.*

However, in practical terms, Courts would not entertain applications for permanent alimony if made for the first time several years after the decree nisi has been made absolute.

The rejection of a request for maintenance or alimony pendente lite does not affect the application for permanent alimony. The Court has discretion in awarding permanent alimony after the grant of divorce. However, this discretion needs to be exercised judicially, not arbitrarily, leaving aside the personal beliefs, biases and prejudices of the Judge towards the marriage relationship, divorce, and alimony itself.

The underlying principle of ordering permanent alimony is to ensure sufficient support for the former spouse after the divorce. It need not be intended to serve as punishment for the spouse found guilty of matrimonial fault. The order for alimony should be reasonable and realistic.

1 [1986] 1 Sri LR 90
2 SC/APPEAL/123/2014, SC Minutes of 07.06.2018, pages 18-20.
3 [2003] 3 Sri LR 241
4 [2001] 2 Sri LR 108
5 (1970) 73 NLR 505

It is important to note that although alimony ordered after divorce is termed "permanent alimony", it is not truly permanent. Section 615(2) states that the Court may at any stage discharge, modify, temporarily suspend, revive or enhance such an order. Therefore, judicial time need not be unnecessarily spent on deciding the question of alimony in divorce cases. However, applications under this section for variations of previous orders made after *inter partes* inquiries should be discouraged.

In *Buddhadasa Kaluarachchi v. Nilmini Wijewickrama*[6], Senanayake J. (with the agreement of S.N. Silva J.) held that the decree nisi can be made absolute upon the application of either party, and that the Court cannot refuse to make the decree nisi absolute pending the payment of permanent alimony. This is based on the premise that orders for permanent alimony are typically not part of the decree nisi, as they are intended as temporary orders. However, I must clarify that there is no illegality in including permanent alimony orders in the decree nisi and decree absolute. It is necessary for the enforcement of such orders.

When permanent alimony is sought by the innocent spouse from the guilty spouse, the Court needs to consider a variety of factors. The decision regarding the quantum of alimony should depend on the unique facts and circumstances of each individual case.

In addition to the existing financial status of the parties, the Court must consider other factors such as their future earning capacity, the length of the marriage, the reason or reasons for divorce, the standard of living during the marriage, the ages and health of the parties, their station in life or social standing, other financial liabilities and custody arrangements. This is not an exhaustive list.

Although the repealed section 615 contained guidelines for the exercise of discretion in awarding permanent alimony, the new section lacks any such guidelines.

In terms of section 23(1)(c) of the UK Matrimonial Causes Act of 1973, similar to the provisions in Sri Lanka, the Court, upon granting a divorce, has the authority to order the payment of a lump sum. Furthermore, section 25(1) of the Act requires the Court, in determining whether to exercise its powers under this section, to consider "all the circumstances of the case". Additionally, section 25(2) specifies that the Court must particularly consider the following factors:

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

6 [1990] 1 Sri LR 262

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

Although similar factors were proposed by the Law Commission of Sri Lanka in Schedule IV of the draft Matrimonial Causes Act of 2007, these proposals did not lead to the formulation of a new legislation. The grounds of divorce, socio-economic culture, and societal values etc. between the UK and Sri Lanka are incomparable, and therefore we cannot mechanically adopt the criteria formulated for the UK legal system without any modification. However, in exercising discretion, as I held in *Ancy Fernando v. Ranasinghe*[7] that it is not inappropriate for our Courts to consider those factors as guidelines, though not as a rigid checklist. Even under the UK Matrimonial Causes Act, it is not an exhaustive list.

It may be worth considering the adoption of certain standards to guide the exercise of discretion, as this could enhance predictability and deter arbitrariness. However, it is important to ensure that this does not compromise the flexibility inherent in judicial discretion, which is particularly valuable in the determination of alimony.

Alimony pendente lite

Section 614(1) and (2) of the Civil Procedure Code provides for alimony *pendente lite*. It reads as follows:

> *614(1) In any action under this Chapter, whether it be instituted by a husband or a wife, the wife may present a petition for alimony pending the action. Such petition shall be preferred and dealt with as of summary procedure, and the husband shall be made respondent therein; and the court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the action as it may deem just:*

7 SC/APPEAL/31/2018, SC Minutes of 10.05.2024

> *Provided that alimony pending the action shall in no case be less than one-fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.*
>
> *(2) A husband may present a petition for alimony pending the action. The provisions of the preceding subsection shall apply, mutatis mutandis, to such application.*

It may be noted that subsection (2) was introduced by the Civil Procedure (Amendment) Law, No. 20 of 1977.

An order for alimony pendente lite is a temporary order until the decree nisi is made absolute, and therefore Judges should discourage having long-drawn out inquiries on such matters. As a general rule, alimony inquiries must be concluded as early as possible. As the Supreme Court held in *Thamel v. Nawaratne*[8], if the Court thinks that the opposite party is adopting dilatory strategies to frustrate the early conclusion of the inquiry, the Court may, by invoking the inherent powers of the Court referred to in section 839 of the Civil Procedure Code, issue an interim order for alimony, inducing the parties to conclude the inquiry speedily.

There is no need to order alimony when the Magistrate's Court has already issued a maintenance order that the respondent is paying accordingly. Likewise, if the District Court has made an alimony order, which the respondent is fulfilling, the Magistrate's Court need not issue a separate maintenance order, as both aim to achieve the same objective. The respondent should not be burdened twice.

In *Aslin Nona v. Peter Perera*[9] the Supreme Court held that non-compliance with an order of Court in divorce proceedings to pay alimony pendente lite amounts to contempt of Court. In such a case the Court may in its discretion stay proceedings until the alimony due is paid.

In an alimony inquiry, the Court is not required to go into the merits of the main case. As S.N. Silva J. (as he then was) stated in *Edirippuli v. Wickramasinghe*[10]:

> *The merits of the action and the question of matrimonial fault are not gone into at an inquiry into an application for alimony and costs made under Section 614. If the merits are gone into at this stage it would result in the question of matrimonial fault being determined prior to even the pleadings are completed. The only matters at issue in an application for alimony pendente lite are the need for financial support on the part of the applicant spouse, that stems from the lack of his or her income and income of the respondent spouse.*

8 SC/APPEAL/153/2019, SC Minutes of 28.02.2024

9 (1945) 46 NLR 109

10 [1995] 2 Sri LR 22 at 24

Under section 614(1), in an application for alimony pendente lite, the procedure to be adopted is summary procedure where, upon issuance of order *nisi*, the respondent spouse is required to show cause against making it absolute.

In *Thamel v. Nawaratne*[11] the applicability of the proviso to section 614(1) was in issue. According to the proviso, "*alimony pending the action shall in no case be less than one-fifth of the husband's average net income for the three years next preceding the date of the order*". The argument of the appellant's counsel before the Supreme Court was that the impugned order delivered over eleven years after the application was filed, without any evidence being produced pertaining to the plaintiff's net income for the three years preceding the date of the impugned order was fatally bad and defective for non-compliance with the proviso to section 614(1). The counsel's argument was that the documents marked by the defendant at the inquiry were all beyond three years from the date of the order and therefore could not have been taken into consideration in deciding the quantum of alimony. This argument was not accepted by the Supreme Court. In the judgment delivered by me, the applicability of the proviso was explained as follows:

> *The proviso to section 614(1) is not against the wife but in favour of her. It does not impose any condition on her but rather facilitates her in obtaining a sufficient amount as alimony from her husband. What does this proviso say? It says alimony "shall in no case be less than one-fifth of the husband's average net income for the three years next preceding the date of the order". This means, the alimony order* ***must exceed*** *one-fifth of the husband's* ***average*** *net income for the three years preceding the date of the order. This does not imply that the evidence related to income must be limited to the earnings for the three years immediately preceding the date of the order. If sufficient evidence has not been presented regarding the average net income of the husband for the three years next preceding the date of the order, the Court does not lack jurisdiction to make an order for alimony, but the applicant is not guaranteed a minimum amount.*

For instance, if the plaintiff states in evidence that his monthly average net income was Rs. 75,000 and if it was accepted by Court, the Court can order him to pay more than Rs. 15,000 as alimony to the wife, if the order was delivered within three years. Assuming the defendant claims that his income later decreased to Rs. 25,000, then he would still be required to pay more than Rs. 5,000 as alimony. Notably, the Rs. 15,000 and Rs. 5,000 mentioned above represent the minimum payment, not the maximum. The precise amount to be paid shall be determined by assessing the evidence led at the inquiry in its overall context.

11 SC/APPEAL/153/2019, SC Minutes of 28.02.2024

In any event, even if that argument was accepted, if the alimony order could not have been made within three years from the conclusion of the evidence due to no fault of the party applying for alimony, the Court can invoke legal maxims such as *lex non cogit ad impossibilia* (the law does not compel the performance of what is impossible) and *actus curiae neminem gravabit* (the act of the Court shall prejudice no man) to prevent injustice to that party.

In reference to the proviso to section 614(1), Dr. Shirani Ponnambalam in her book titled *Law and the Marriage Relationship in Sri Lanka*, 2nd Edition (1987), page 401 states:

> *When quantifying alimony pendente lite the Sri Lankan law, following early English law practice, ensures that the alimony awarded is in no case "less than one-fifth of the husband's average net income for the three years next preceding the date of the order". This rule has been abolished in the English law. See P.M. Bromley, Family Law (5th ed. London 1976) p.529, note 1.*

The statute does not provide for guidelines to decide the quantum of alimony. It is hard to lay down fixed criteria in the determination of the quantum of alimony pending action. The decision shall depend on the unique facts and circumstances of each case.

The Court of Appeal in *Anulawathie v. Gunapala and Another*[12] stated that "*the sole criterion upon which alimony should be quantified is the financial status of the defendant*". However, in *Thamel v. Nawaratne* the Supreme Court held that it does not represent the correct position of the law. The financial status of the respondent cannot be the only criterion. Other relevant factors include the financial status of the applicant, the other obligations of the respondent such as payment of maintenance to children, the heath condition of the respondent. This should not be taken to mean that if the wife has some income, she must use it for her survival pending action, and that in such circumstances, the Court lacks the power to order alimony against the husband.

In *Jeffery v. Jeffery*[13], the High Court of Australia stated:

> *It would be wrong to lay down a rule that as long as a wife had any means whatever she could not obtain an order for alimony pendente lite. She is not bound to exhaust the whole of a small capital in order to maintain herself during the pendency of a suit. Each case must be considered in all its circumstances and particularly with regard to the station in life and the financial position of each of the parties.*

Cost of litigation

It is a well-established principle that financially weaker spouses, irrespective of the matrimonial fault which is to be decided at the trial, are entitled to seek contribution

12 [1998] 1 Sri LR 63 at 67

13 [1949] HCA 28 at 581

from their financially stronger spouses for legal costs in matrimonial matters. This entitlement originated from the Roman-Dutch law duty of support between spouses. If the defendant has sufficient means while the plaintiff lacks them, the plaintiff is entitled to adequate support from the defendant to ensure the plaintiff can effectively present his or her case. Ensuring that both parties have an equal footing in presenting their cases is essential for the fair application of the law, which aligns with the fundamental right to equality under Article 12(1) of our Constitution.

Section 614 (3) of the Civil Procedure Code provides for the recovery of costs of litigation in a pending divorce action. This section reads as follows:

> *Where one of the spouses is not possessed of sufficient income or means to defray the cost of litigation, the court may at any stage of the action order the spouse who is possessed of sufficient income or means to pay to the other spouse such sum on account of costs as it considers reasonable.*

According to this section, either party—whether husband or wife—can make an application seeking costs of litigation at any stage of the case. There is no requirement to make the application at the commencement of the case or at the commencement of the trial. Once the application is made, after an inquiry, the Court can order the spouse who is possessed of sufficient income or means to pay to the other spouse such sum on account of costs. The Court has the discretion to order a sum which it considers reasonable.

In *Sanjeewa Jayawardene v. Harshani Karunasinghe*[14] it was emphasized that at such inquiry the Court should not consider the merits of the case, which should be considered at the trial. In *Edirippuli v. Wickramasinghe*[15], S.N. Silva J. (as he then was) expressed the same.

What the Court should consider in deciding the quantum of costs of litigation was discussed by Tilakawardane J. in the case of *Abeysinghe v Perera*[16]:

> *The payment of costs of an action was recognized to be a matter of public policy, the assumption being that it was clearly in the public interest, that the needy spouse had access to court. (Abeygooneskera v. Abeygooneskera (1910) 12 NLR 95)*
>
> *In 1979, Nestadt, J. in Chamani 1974 (4) SA 804 (W) stated that there was no doubt that a husband's obligation to contribute towards his wife's matrimonial costs is based on his duty to support. This was subsequently confirmed in the case of Van Oudenhove de St. Sery v. Gruber 1981 (3) E. CD.*
>
> *The law as it stands today is that the purpose of this award of costs is for the wife, who has no income of her own to "be able to present her case adequately before the*

14 [2005] 2 Sri LR 203
15 [1995] 2 Sri L.R. 22, 24
16 [1999] 1 Sri LR 78 at 80-81

court" – Van Rippen 1949 (4) SA 634. The accepted rationale is that if a reasonable financial viability is not afforded to the spouse without an income, undue restrictions in presenting his or her case may facilitate a divorce on unjustifiable grounds.

In assessing the quantum of the award, the resources of the respondent spouse and the scale on which he or she is likely to litigate are relevant considerations. It is relevant in assessing the quantum that, already, even before the trial has commenced, the case has been taken up on 22 dates of court hearing. This does not include the drafting and the filing of the papers. The connected application for maintenance by the defendant-petitioner-respondent had resulted in an order, against which the plaintiff spouse had preferred an appeal which was subsequently withdrawn. So the likelihood of long-drawn litigation in this case is a probable likelihood.

Furthermore, just as support for maintenance must be rendered on a scale commensurate with the social position, lifestyle and financial resources of the parties, similarly, litigation costs must be ordered at a level commensurate with the resources of the spouses. The fact of the total lack of any earning capacity of one spouse and the earned income of the other are both relevant and important considerations for the court.

Maintenance

Under section 2 of the Maintenance Ordinance No. 19 of 1889, only the wife could make an application for maintenance against the husband. The Maintenance Ordinance was repealed by the Maintenance Act No. 37 of 1999. The Maintenance Act adopts a gender-neutral stance by using the term *spouse* instead of *wife*, as was used in the Maintenance Ordinance. The term *spouse* is used to describe a person's husband or wife. Section 2(1) of the Act reads as follows:

Where any person having sufficient means, neglects or unreasonably refuses to maintain such person's spouse who is unable to maintain himself or herself, the Magistrate may, upon an application being made for maintenance, and upon proof of such neglect or unreasonable refusal order such person to make a monthly allowance for the maintenance of such spouse at such monthly rate as the Magistrate thinks fit having regard to the income of such person and the means and circumstances of such spouse:

Provided however, that no such order shall be made if the applicant spouse is living in adultery or both the spouses are living separately by, mutual consent.

According to section 2(1) of the Maintenance Act, the applicant, the husband or wife as the case may be, can make an application to the Magistrate's Court for maintenance

on the grounds that:

(a) he or she is unable to maintenance himself or herself;

(b) his or her spouse neglects or unreasonably refuses to maintain;

(c) his or her spouse possesses sufficient means.

Section 11 of the Maintenance Act outlines the procedure to be followed prior to making an order to allow or refuse a maintenance application.

> *11(1) Every application for an order of maintenance or to enforce an order of maintenance shall be supported by an affidavit stating the facts in support of the application, and the Magistrate shall, if satisfied that the facts set out in the affidavit are sufficient, issue a summons together with a copy of such affidavit, on the person against whom the application is made to appear and to show cause why the application should not be granted:*
>
> *Provided however the Magistrate may in his discretion at any time make an interim order for the payment of a monthly allowance which shall remain operative until an order on the application is made, unless such interim order is earlier varied or revoked, and such interim order shall have effect from the date of the application or from such later date as the Magistrate may fix.*
>
> *(2) The Magistrate shall, after such inquiry as he may consider necessary, make order allowing or refusing the application, and if necessary, may make an order under section 5 or section 6:*
>
> *Provided however, an application under this Act shall not be rejected on account of any error, omission or irregularity in the application, or affidavit required to be filed in terms of subsection (1) of this section, or in the summons issued thereunder, or in other proceedings before, or, during, an inquiry under this Act, unless such error, omission or irregularity has caused material prejudice to a party.*

The application needs to be supported by one or more affidavits, together with supporting documents, addressing the three matters averred in the application, which I mentioned above. When a maintenance application is filed, the Magistrate shall not mechanically issue summons on the respondent. The Magistrate shall issue summons on the respondent only if he is satisfied on *prima facie* basis that what the applicant has stated in the application is true and acceptable. If necessary, the Magistrate can call for more supporting material before issuance of summons. However, as stated in the proviso to section 11(2), the Magistrate cannot dismiss maintenance applications on technical grounds. Notwithstanding the fact that there was no similar provision in the

Maintenance Ordinance, G.P.S. de Silva C.J. in *Seneviratne Banda v. Chandrawathie*[17], a case decided under the repealed Maintenance Ordinance, took the same view. The summons must be accompanied by a copy of the petitioner's application and should require the respondent to appear before the Court to show cause as to why the application for maintenance should not be granted. At the inquiry the burden is on the respondent to satisfy Court that:

(a) the applicant can maintain himself or herself;

(b) he or she has not neglected or unreasonably refused to maintain the applicant;

(c) he or she has no sufficient means to pay maintenance to the applicant.

This is not a new provision. Even under the Maintenance Ordinance the procedure was the same. Section 14(1) of the Maintenance Ordinance read as follows:

> *Every application for an order of maintenance or to enforce an order of maintenance shall be supported by an affidavit stating the facts in support of the application and the Judge of the Family Court shall, if satisfied that the facts set out in the affidavit are sufficient, issue a summons on the defendant to appear and to show cause why the application should not be granted.*

The phrase "having sufficient means" in section 2(1) should encompass not only tangible assets, such as real property or stable employment, but also the individual's capacity to earn income. The respondent cannot be unemployed voluntarily and say that he or she does not have sufficient income to pay maintenance. Basnayake J. (as he then was) in *Rasamany v. Subramaniam*[18], stated that the word 'means' must be construed to "include capacity to earn money".

In *Karunapala v Liyanage*[19], Justice Aluwihare took a similar view when he stated:

> *The learned Magistrate had been of the opinion that even though he has lost his employment, as a mechanical engineer he would have no difficulty finding new employment. In fact, he had admitted in evidence, that he has the potential to find work. According to his evidence, he had been involved in developing 'memory chips' for computers. It is common knowledge that there is a great demand for experts in the field of Information Technology (IT) in Sri Lanka, and the learned Magistrate, in my view, was justified in drawing such an inference in terms of Section 112 of the Evidence Ordinance.*

In the Supreme Court case of *Pushpa Rajani v. Sirisena*[20], Wanasundera J. observed:

17 [1997] 1 Sri LR 12

18 (1948) 50 NLR 84 at 86

19 [2019] 3 Sri LR 361 at 371

20 SC/APPEAL/117/2010, SC Minutes of 08.05.2013

> *When an application for maintenance is made before the Magistrate with an affidavit by the Applicant, from there onwards, the Magistrate is bound to act on the evidence before Court sworn in the affidavit. If what is said on oath in the affidavit by the Applicant is satisfactory and sufficient to create a prima-facie case to be tried by the Magistrate, it is only then that the Magistrate sends the summons. The summons tells the Respondent "to show cause why the application should not be granted". In any civil case the summons issued directs the receiver only to file in Court the answer to the plaint therewith and not to show cause.*

Her Ladyship then concluded:

> *Therefore as it is mentioned in Section 11 of the Act, in the Magistrate's Court the Respondent has to show cause why the application should not be granted. The burden of proof of his income is cast on the Respondent and not the Applicant in such an instance.*

Another matter which needs attention is how to decide the quantum of maintenance. There are no guidelines given in the Maintenance Act. The Magistrate is given the discretion to decide on the matter depending on the facts of the case. Some jurisdictions have set out guidelines to decide on the quantum of maintenance. The Magistrates may consider similar factors, as mentioned for permanent alimony and alimony pendente lite, when deciding the quantum of maintenance.

However, a maintenance order must be reasonable and not excessive. It should, among other things, be commensurate with the respondent's income and earning capacity and should not be treated as a form of punishment.

The Court can make an interim order for maintenance under the proviso to section 11(1) until conclusion of the inquiry. Although there was no express provision in the Maintenance Ordinance to make such interim orders, Magistrates used to do so by invoking inherent powers of the Court.

The Court may inform the parties that there is no purpose of protracting the inquiry as the order is made from the date of the application, not from the date of the order. Section 2(5) of the Maintenance Act reads as follows:

> *Where an order is made by a Magistrate for the payment of an allowance pursuant to an application made under subsection (1) or (2) or (3) or (4), such allowance shall be payable from the date on which the application for maintenance was made to such court, unless the Magistrate, for good reasons to be recorded, orders payment from any other date.*

It is also pertinent to note that maintenance orders may be modified upon a change in circumstances. Section 8 of the Maintenance Act provides for it:

> *On the application of any person receiving or ordered to pay a monthly allowance under the provisions of this Act and on proof of a change in the circumstances of any person for whose benefit or against whom an order for maintenance has been made under this Act, the Magistrate may either cancel such order or make such alteration in the allowance ordered as he deems fit:*
>
> *Provided that such cancellation or alteration shall take effect from the date on which the application for cancellation or alteration was made to such Court, unless the Magistrate for good reasons to be recorded, orders otherwise.*

It is also important to understand that, although maintenance cases are filed in the Magistrates' Courts, they are not criminal cases. The liability to pay maintenance is a civil liability, and the Maintenance Ordinance provides a simpler, speedier, and less expensive remedy for enforcing this obligation. (*Eina v. Eraneris*[21], *Subaliya v. Kannangara*[22], *Seneviratne Banda v. Chandrawathie*[23]) In the Maintenance Ordinance the word used is not *the accused*, but *the defendant*. According to section 12 of the Maintenance Ordinance the person applying for an order of maintenance or the person against whom such order is applied for, could either appear personally or by pleader, unless the Magistrate requires his or her personal attendance. Although this provision is not in the Maintenance Act, section 13 of the Maintenance Act states that all evidence taken by a Magistrate under the Act shall be taken in the presence of the person against whom the application is made or, when his personal attendance is not required by the Magistrate, in the presence of his Attorney-at-Law. This means, the Magistrate can dispense with the personal attendance of the respondent.

Some spouses misuse the Maintenance Act as a means to harass or humiliate the other spouse, often taking advantage of the tendency among Magistrates to treat respondents in maintenance cases as if they were accused persons. When they learn that the spouse is planning to go abroad, they hurriedly file a maintenance case and obtain a "travel ban" to prevent the spouse from leaving at the airport to take revenge. Magistrates should remain vigilant against such abuses of the legal process.

When a maintenance order is made, there is no need for the Court to compel the respondent to enter the dock and make the payment in open Court. The law allows for payments to be made by depositing the money ordered by Court in the applicant's bank account or at the post office. Additionally, payments may be facilitated through other means, such as through the Grama Niladhari.

21 (1900) 4 NLR 4
22 (1899) 4 NLR 121
23 [1997] 1 Sri LR 12

Section 7(1) of the Maintenance Act (which is similar to section 8B of the Maintenance Ordinance) reads as follows:

> *7(1) Where an order for maintenance is made under the provisions of this Act, the Magistrate may direct the respondent, that the amount of the payment due under such order shall be deposited each month on or behalf such date as may be specified in such order in favour of the person entitled to such payment, at such post office or a bank as may be specified in such order, and the amount so deposited may be drawn by such person from such post office or bank. It shall be the duty of such officer for the time being in charge of such post office or bank to pay that amount to the person entitled thereto upon application made in that behalf.*
>
> *(2) Where a direction has been made under subsection (1) of this section and there has been default in the deposit of payments as specified in such direction, the person entitled to receive payment may report such default to the Court, and the Magistrate may in such event, notice the respondent to show cause why he should not be dealt with for such default, and if satisfied after due inquiry that there has been any default, impose such punishment as is provided for by this Act for such default.*

Matrimonial Fault and Maintenance

The proviso to section 2(1) of the Maintenance Act enacts that "*no such [maintenance] order shall be made if the applicant spouse is living in adultery or both the spouses are living separately by mutual consent*."

In *Weerasinghe v. Renuka*[24], H.N.J. Perera J. (as he then was) stressed that our Courts have consistently interpreted the term "living in adultery" strictly:

> *The main issue before this Court in this appeal is the interpretation of the phrase "living in adultery" contained in Section 2(1) of the Maintenance Act No. 37 of 1999. The Sri Lanka Courts have interpreted "living in adultery" literally, and held that it is not sufficient that the wife had lived in adultery before the application, but that the applicant must be proved to be "living in adultery" at the time the application is made. Thus the burden is cast upon the person alleging immorality to prove it since the law presupposes the wife is leading a chaste life.*

In *Chandrakanthi v. K.M. Gamini Kumara*[25] the Supreme Court stated that living in adultery" means the applicant at the time of making the application was cohabiting with a person other than his or her spouse or "living a life of promiscuous immorality" as a continuing act, as distinguished from one or two lapses of virtue (*Wijeysinghe v.*

24 [2016] 1 Sri LR 57 at 61

25 SC/APPEAL/127/2019, SC Minutes of 20.05.2022

Josi Nona[26]*, Pushpawathy v. Santhirasegarampillai*[27]*).* But in my judgment, I stated that this interpretation should not be viewed unrealistically:

> *However, in order to prove "living in adultery", the Respondent spouse need not prove that the Applicant was living in adultery on the date of filing the application. The words "living in adultery" means the Applicant shall be living in adultery at or about the time of filing the application. No rule of thumb can be laid down in deciding what constitutes "at or about the time". It shall be decided on the unique facts and circumstances of each individual case.*

When maintenance is contested on the ground of adultery, Magistrates must refrain from transforming the maintenance inquiry into a divorce trial where adultery is alleged as the basis for seeking or resisting the divorce.

Conclusion

In matrimonial cases, the Court bears the solemn duty to explore the possibility of settlement, thereby upholding the institution of marriage. Article 27(12) of our Constitution, as part of the Directive Principles of State Policy, affirms that "*The State shall recognize and protect the family as the basic unit of society*." Especially where children are involved, a resolution between parents serves their best interests and helps preserve family stability.

However, it is generally not advisable for Judges to be personally involved in settling matrimonial disputes, as this can lead to unintended complications and sometimes allegations. A more appropriate approach is to facilitate settlements during pre-trial hearings, with both parties and their legal representatives present. Such discussions can take place in open Court, but not in front of other litigants, to maintain the dignity of the parties involved. In terms of Article 106(1) of the Constitution, the sittings of every Court shall be held in public, and all persons are entitled to attend such sittings. However, Article 106(2) provides the Judge with the discretion to exclude other persons from proceedings involving family or sexual matters. Preservation of human dignity is the first priority—it runs as the golden thread throughout the entire spectrum of the administration of justice. In the discharge of their judicial duties, judges must remember to treat everyone with dignity at all times, whether they are accused persons in criminal cases, defendants in civil cases, witnesses, prosecutors, or lawyers.

In support of the settlement process, the Court shall refer parties to the Family Counsellor, a trained official equipped to assist in these sensitive matters. After the

26 (1936) 38 NLR 375

27 (1971) 75 NLR 353

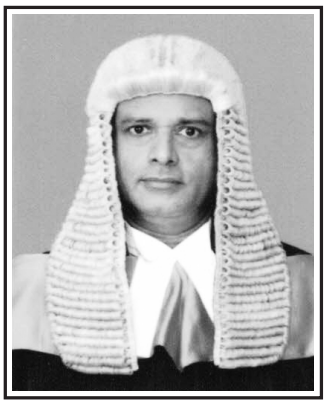
Judicature (Amendment) Act No. 34 of 2022, unless any party to the action expresses in writing a desire to the contrary, it is mandatory to refer the dispute to the Family Counsellor for settlement. This is applicable to divorce cases as well as maintenance cases. Section 26(5) of the Judicature Act enacts *"No District Judge, Judge of a Family Court or Magistrate shall hold any inquiry or trial in respect of any dispute, until such dispute is referred to him by the Family Counsellor under subsection (4)."* Importantly, if no settlement is reached, any information disclosed during such counselling cannot be led in evidence. Regulation 11 of the Family Courts Regulations, issued by the Minister of Justice under section 61, read with section 29 of the Judicature Act and published in the Gazette Extraordinary dated 02.07.1979, states: "*Any information given before the Family Counsellor shall not be used in evidence at any party or trial before any Court or tribunal, nor shall any party or person be entitled to obtain an extract of such information*."

Orders related to permanent alimony, alimony pendente lite, costs of litigation, and maintenance are secondary to the primary issue in matrimonial cases, which is often the question of divorce. The Court should make parties aware that any interim orders it issues regarding these matters are temporary. In the absence of settlement, the Court must conclude the main trial as expeditiously as possible so that the parties can, if they so wish, rebuild their life.

Although "irretrievable breakdown of marriage" is not currently a statutory ground for divorce, it often serves as the practical basis for findings of malicious desertion by the guilty spouse. Forcing an unwilling marriage to continue solely out of a desire for retaliation can cause enduring harm to both parties. Matrimonial actions should not be turned into money-recovery actions or used as a means of taking revenge against the guilty spouse. The Court must facilitate a fair resolution that respects the dignity and well-being of all involved, but within the framework of the law.

Domestic Violence in Sri Lanka: A Comprehensive Analysis of the Legal Framework and Regional Context

Justice M. Sampath K. B. Wijeratne*
Judge of the Court of Appeal



Introduction

The United Nations defines domestic violence as "intimate partner violence," which occurs when one person in a relationship uses threats, mental abuse, manipulation, physical harm, injury, or financial abuse to control the other. Victims of domestic violence can be of any age, gender, race, sexual orientation, class, or belief.

Walker in '*Psychology and Domestic Violence Around the World*'[1], states that domestic violence is a "pattern of abusive behaviors including a wide range of physical, sexual, and psychological maltreatment used by one person in an intimate relationship against another to unfairly gain power, control, and authority." Further, Walker states that when one form of family violence appears, it can often escalate into other aggressive acts both within and outside the family.

Domestic violence is a serious societal issue affecting individuals of all ages and genders, manifesting in various forms and intensities, including physical, sexual, emotional, and psychological abuse. It involves acts of dominance intended to exert control over victims, often resulting in significant harm. This article examines Sri Lankan laws related to domestic violence, particularly the Prevention of Domestic Violence Act No. 34 of 2005, the Constitution, and other relevant legislation. It also discusses responses to domestic violence within the broader South Asian context and provides recommendations for addressing this pressing issue.

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1 < Psychology and domestic violence around the world (researchgate.net)>

Historical and Cultural Context

In Sri Lanka, early efforts to address domestic violence in the 1980s were dismissed as a foreign concept seen as disruptive to stable family structures. This resistance stemmed from a broader reluctance to view domestic violence as a serious issue. However, awareness has gradually increased, prompting both support groups and the legal system to take more proactive measures. Despite these advancements, strong cultural norms and values still perpetuate the abuse of women, as social expectations around marriage often pressure victims to remain in abusive relationships. Reports from health agencies reveal that, most domestic violence victims are women, though around 10% of victims are men.

The high prevalence of domestic violence continues to impact quality of life, physical integrity, and mental health. The increasing number of people reporting domestic violence suggests a growing public awareness and concern regarding the issue.

Legal Framework in Sri Lanka

1. Prevention of Domestic Violence Act No. 34 of 2005 (PDVA)

The PDVA is Sri Lanka's primary legislation for addressing domestic violence, offering protections regardless of gender and specifically addressing violence against women and children. Unlike jurisdictions that criminalize domestic violence, the PDVA provides civil remedies aimed at preventing and eliminating abusive practices.

The Act's preamble states its purpose as follows: "FOR THE PREVENTION OF ANY ACT OF DOMESTIC VIOLENCE AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO." According to section 23 (the interpretation section) of PDVA, domestic violence is defined as

> "(a) an act which constitutes an offence specified in Schedule I;
>
> (b) any emotional abuse, committed or caused by a relevant person within the environment of the home or outside and arising out of the personal relationship between the aggrieved person and the relevant person."

This definition encompasses both physical and emotional harm inflicted by a spouse, ex-spouse, or cohabiting partner.

Schedule I of the PDVA outlines offenses commonly associated with domestic violence. It might be beneficial if this list were non-exhaustive, allowing courts the discretion to identify other behaviors also as domestic violence. These offenses, which can lead to the issuance of a protection order, also constitute criminal offenses under the Penal Code. Thus, the aggrieved person has the right to pursue separate criminal proceedings or a civil action.

Section 2 of the Act allows an aggrieved party to seek a Protection Order from a Magistrate's Court. Initially, the court can grant an Interim Protection Order for 14 days, which, upon review, may be extended to a full Protection Order valid for up to 12 months.

An Interim Protection Order is a temporary measure designed to prevent further violence by restraining the offender. It remains in effect until a permanent Protection Order is issued. This order may include provisions that prohibit the respondent from entering the victim's home, workplace, or school or from contacting the victim and their family and friends. Both interim and permanent Protection Orders are binding Court orders, and any violation of these orders constitutes a criminal offense. In cases of non-compliance, the court may impose a fine of up to ten thousand rupees (Rs 10,000) and/or a sentence of up to one year.

These provisions serve to deter further violence and provide a measure of safety for the victim. If either party is dissatisfied with the learned Magistrate's decision, they have the right to appeal to the High Court.

Constitutional Provisions

Sri Lanka's 1978 Constitution, while not explicitly addressing domestic violence, includes provisions that are relevant to the issue:

Article 11 prohibits torture and cruel, inhuman, or degrading treatment, which can be interpreted to include certain forms of domestic violence.

Article 27 mandates the State to protect the interests of children and youth, ensuring their safety from exploitation and discrimination.

These constitutional provisions align with international human rights standards and strengthen the legal framework for addressing domestic violence.

Assistance to and Protection of Victims of Crime and Witnesses Act No. 4 of 2015

This Act complements the PDVA by focusing on the rights of crime victims, including those affected by domestic violence. It establishes mechanisms for victim protection and enforcement, thereby providing essential support and assistance throughout the legal process. The PDVA includes a unique provision making it a punishable offense to print or publish information that discloses the identity of any party involved in a domestic violence case, thus safeguarding the privacy of sensitive domestic matters. However, this restriction does not apply to published judgments of the Supreme Court and Court of Appeal, though it does apply to judgments of Courts below. Similar privacy protections could be beneficial if applied to other laws, such as the Maintenance Act, Adoption of Children Ordinance, and matters under Chapter XLII of the Civil Procedure Code.

Human Rights and International Conventions

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention):

Sri Lanka has not ratified the Istanbul Convention, which focuses on preventing violence against women and domestic violence.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):

Sri Lanka ratified CEDAW in 1981. The National Action Plan, developed in 2016, takes a multisectoral approach to addressing women's issues, though challenges in implementation persist.

Challenges in Implementation

Limited Case Law:

Estimates suggest that less than 1% of women subjected to domestic violence in Sri Lanka utilize the protections afforded by the PDVA. This low percentage reflects a broader societal reluctance to seek help due to social stigma, fear of retaliation, and doubts regarding the effectiveness of legal remedies. Additionally, the lack of extensive case law under the PDVA complicates application and enforcement.

Court System:

The Magistrate Court is responsible for handling domestic violence cases through the issuance of protection orders. However, this system often suffers from resource limitations, administrative inefficiencies, and challenges in reaching rural areas. The effectiveness of enforcing protection orders is frequently hindered by practical constraints that compromise justice delivery.

Comparative Regional Context

Domestic violence laws in South Asia present a varied landscape, shaped by different legal frameworks and cultural contexts across the region. According to the Union Health Ministry's National Family Health Survey (NFHS-4), one in three women in India faces some form of domestic abuse from the age of fifteen[2]. The survey also indicates that 31% of married women have endured physical, sexual, or emotional abuse at the hands of their partners. In response to this, India introduced the Protection of Women from Domestic Violence Act, 2005, which provides comprehensive civil remedies, including protection orders, residence orders, and financial relief. The Act allows women to seek immediate protection from domestic violence, offering access to shelter and medical facilities.

2 < http://rchiips.org/nfhs/pdf/NFHS4/India.pdf>

Furthermore, it defines domestic violence broadly, recognizing physical, emotional, and economic abuse. Under Section 3 of the Act, any act or omission by the respondent that causes physical, sexual, verbal, or economic harm qualifies as domestic violence.

In addition, the Protection of Women from Domestic Violence Act, 2005, passed by the Indian Parliament, prohibits a wide range of physical, sexual, emotional, and financial abuse against women. The law applies not only to women married to men but also to women in live-in relationships and other female family members, such as grandmothers and mothers.

The Dowry Prohibition Act of 1961 addresses another significant issue in India, where a bride is often expected to provide a dowry to the groom's family. While this problem persists in rural areas, it is less common in urban settings due to increasing education and awareness among the younger generation. The Dowry Prohibition Act criminalizes the giving and receiving of dowry, imposing penalties of up to six months imprisonment or a fine of Rs.5,000 for violators. Introducing a similar law in Sri Lanka could benefit traditional, economically disadvantaged families.

In the landmark case of *Lalita Toppo v. the State of Jharkhand*[3], the Supreme Court of India addressed whether a live-in partner could seek maintenance under the Protection of Women from Domestic Violence Act, 2005. The complainant, who was not the respondent's legally wedded wife, sought maintenance under the Domestic Violence Act, assuming she would not be entitled to it under Section 125 of the Code of Criminal Procedure, 1973. The appellant, having been in a live-in relationship with the respondent, with whom she had a child, sought support after their separation. The Gumla Family Court granted her Rs. 2000 per month for herself and Rs. 1000 for the child. However, the High Court overturned this decision, ruling in favor of the respondent. The appellant then appealed to the Supreme Court.

The main issue in this case was whether a live-in partner could seek maintenance under the Domestic Violence Act, 2005. The Supreme Court of India, led by a three-judge bench including Chief Justice Ranjan Gogoi, Justices U.U. Lalit, and K.M. Joseph, ruled that a live-in partner is entitled to even more relief than what is provided under Section 125 of the Code of Criminal Procedure, 1973. The Court emphasized that under the Domestic Violence Act, the petitioner could seek maintenance despite not being legally married to the respondent. The judgment also highlighted that domestic violence includes economic abuse as defined in the Domestic Violence Act.

This case marks a significant development in Indian law, particularly in the protection of women's rights in non-traditional relationships. Even though the complainant was not the respondent's legally wedded wife, the law extended protection to her, reinforcing the

3 NO(S). 1656/2015

inclusive nature of the Domestic Violence Act, 2005. This ruling reflects the progressive approach of the Indian judiciary in ensuring that women in live-in relationships are not left vulnerable without legal recourse.

I strongly believe that if a similar case were to arise in Sri Lanka, our courts would also take a positive stance in protecting victims, especially given the judiciary's commitment to ensuring justice and safeguarding individuals from domestic violence. Sri Lankan courts have increasingly shown a tendency to prioritize the welfare of victims in cases involving domestic and family issues, aligning with the global movement towards protecting vulnerable individuals, regardless of the nature of their relationship.

In the case of *Ajay Kumar v. Lata @ Sharuti*[4], the appellant, Ajay Kumar, was the brother-in-law of the respondent, Lata, who was his brother's widow. They lived together in a Hindu joint family property. The key issue in this case was whether the brother-in-law fell under the definition of "respondent" under Section 2(q) of the Domestic Violence Act, thus being liable to provide maintenance. Lata claimed that after her husband's death, she and her child were evicted from their matrimonial home, leaving them without financial support. She sought relief under Section 12(1) of the Domestic Violence Act, which allows individuals to approach a Magistrate for relief or financial compensation for losses sustained due to domestic violence.

The Supreme Court of India ultimately ruled that a brother-in-law could be held responsible for providing maintenance to his widow sister-in-law under the Domestic Violence Act. The Court dismissed the appellant's argument that Section 2(q) of the Act only refers to an adult male who is or has been in a domestic relationship with the complainant. The Court concluded that the relationship between the brother-in-law and the widow constituted a domestic relationship under the Act, as they lived in a joint family. Therefore, the appellant was ordered to provide maintenance to the respondent.

In Pakistan, domestic violence is considered a private matter, as it occurs in the family, and therefore, not an appropriate focus for assessment, intervention or policy changes[5]. Women must face discrimination and violence daily due to the cultural and religious norms that Pakistani society embraces. According to an estimate, approximately 70% to 90% of Pakistani women are subjected to domestic violence. Despite clear Constitutional provisions guaranteeing equal rights and opportunities to all citizens, many obstacles hinder women's access to justice, including lack of awareness, expensive legal processes, and gender-biased approach. Although Pakistan has ratified the Convention on the

4 2019 SCC OnLine SC 726

5 Fikree FF, Bhatti LI. Domestic violence and health of Pakistani women. International J Gynaecol Obstet 1999; 65:195-201.

Elimination of All Forms of Discrimination Against Women (CEDAW) in 1996, and made attempts to address domestic violence, progress remains slow due to these challenges.

The Pakistan Penal Code does not specifically address domestic violence, though related issues like miscarriage, child abandonment, and causing physical harm are covered under various sections. Additionally, sexual violence laws are primarily governed by the Hudood Ordinances of 1979, which often victimize women rather than protect them. In 2006, the Protection of Women (Criminal Laws Amendment) Act was passed, amending the Pakistan Penal Code and Criminal Procedure Code to address sexual assaults on women and reform the Zina Offense[6]. Other legal provisions, such as Section 174-A of the Code of Criminal Procedure (CrPC) of Pakistan, aimed at preventing dowry-related violence, were introduced, but implementation remains weak.

The National Assembly passed the Domestic Violence Bill in 2009, which outlines protections for victims, monetary compensation, and penalties for violators of protection orders. Additionally, the National Commission on the Status of Women (NCSW) was established in 2000 to promote gender equality and review women's rights legislation. However, the gap between law and practice continues to leave many women vulnerable. In 2016, Pakistan passed provincial laws like the Punjab Protection of Women Against Violence Act, which offers protection orders, residence orders, and legal aid. This law also includes mechanisms such as women's police stations to increase accessibility for victims, although enforcement varies by province.

Two thirds of women in Bangladesh, around 66%, have been victims of domestic violence and 72.7% of them never disclosed their experience to others[7]. The Domestic Violence (Prevention and Protection) Act, 2010, in Bangladesh provides protection orders, legal aid, and counseling, while mandating the creation of a database to track incidents of domestic violence. The law also requires police and social workers to assist victims. Bangladesh has additional laws aimed at protecting women, such as the Dowry Prohibition Act, 1980, the Family Court Ordinance, 1985, and *the Nari O Shishu Nirjatan Daman Ain*, 2000 (Women and Children Repression Act, 2000), which was amended in 2003. Despite these frameworks, violence against women remains a widespread issue. The Supreme Court of Bangladesh, in the case of *Bangladesh National Women Lawyers Association vs. Bangladesh & Others*[8], established guidelines to prevent sexual harassment. However, these laws and international commitments have yet to fully address the issue.

6 The main category of such crimes is zina, defined as any act of illicit sexual intercourse between a man and woman.

7 < https://www.dhakatribune.com/bang>

8 814 BLC(2009) 694

Child marriage is another pervasive problem in Bangladesh. Despite the existence of the Child Marriage Restraint Act, 1983, the practice continues, especially among uneducated communities. Poverty and societal pressures contribute to child marriage, as a girl child is often considered a burden to poor families. Younger brides tend to require less dowry, and parents, fearing for their daughters' security, often marry them off early. The fear of social condemnation and *fatwas*[9] in cases of pregnancy out of wedlock further incentivizes early marriage. Although laws are in place, the state has taken minimal steps to address the underlying cultural norms that drive child marriage. Activists argue that early marriage, often between ages 12-19, along with significant age gaps between spouses, fosters unequal relationships and leads to marital discord.

In contrast, child marriages are not as common in Sri Lanka as in Bangladesh or India. While Sri Lanka does not have a specific Act addressing child marriage, the absence of widespread child marriages reflects a more progressive stance on the issue compared to other South Asian countries.

Role of Law Enforcement

The most important authority in the enforcement of protection orders and victim protection involves law enforcement; the Sri Lankan Police Department plays an important role. According to the Police Ordinance, police officers are obliged to avert crimes, preserve peace, and bring offenders to justice. Training and awareness programs for police personnel on issues of gender and domestic violence are highly important for enhancing the effectiveness of police responses.

Challenges faced by judges in Asian Countries

The work of the judges reflects the typical problems expected of an Asian nation as they negotiate the changes coming through dynamics of culture, society, social morals and law. These challenges are fundamentally rooted in the influence of cultural and societal norms, which can deeply affect critical areas such as justice in cases of domestic violence, gender equality, and human rights.

The underreporting and reluctance of witnesses to testify are especially common in most Asian countries where cultural conservative values encourage many victims not to seek justice through formal legal channels. The reluctance created by the culture sets an environment where judges cannot be able to access evidence that will enable them to make equitable decisions. Further, lack of resources, support structures such as legal assistance, or protection for victims also commonly occur.

9 fatwa, in Islam, a formal ruling or interpretation on a point of Islamic law given by a qualified legal scholar (known as a mufti).

Changes in the law are moving so fast with globalization and the emergence of new areas, that it becomes rather challenging for judges to keep up to date with the legal updates and to handle the situations thrown at them. This puts judges at the juncture of treading the fine line of balancing old, conservative legal concepts with innovative approaches without undermining judicial independence and perceived fairness. Thus, the nature of the work environment that characterizes how judges do their jobs within the Asian jurisdictions faces tension between tradition in adherence to cultural values and modernity in the practice of law.

Currently in Sri Lanka, despite these challenges, judges are delivering progressive judgments in domestic violence cases. Much like in India, we are aligning with progressive legal approaches, and as judges, we continue to uphold and elevate our legal system in Sri Lanka.

Areas for Improvement

1. Control of Alcohol and Narcotics: Enforce stricter regulations on alcohol and other narcotic substances due to their well-documented link to domestic violence incidents. Reducing accessibility to these substances can mitigate significant risk factors associated with abuse.
2. Accountability of Police Officers: Improve police accountability in handling domestic violence cases. This involves establishing clear training protocols and accountability measures, ensuring that officers are well-prepared and responsible in managing sensitive family disputes.
3. Family Courts in Every District: Establish dedicated family courts across districts to handle cases related to divorce, maintenance, child custody, and domestic violence efficiently. Specialized family courts would accelerate case processing, allowing families quicker and more focused access to justice.
4. Judicial Training on Domestic Violence: Enhance judicial training programs to promote consistency and coherence in domestic violence case law, ensuring that judgments reflect a well-rounded and progressive understanding of domestic issues.
5. Accountability Mechanisms for Family Counselors: Provide targeted training for family counselors and implement accountability frameworks to ensure professional standards. Introducing sanctions for negligence or misconduct will encourage vigilance and responsibility.
6. Expanding Grounds for Divorce: Broaden the legal grounds for divorce to encompass a wider range of circumstances contributing to marital breakdown. This expanded scope allows individuals greater flexibility in pursuing lawful separation.

7. Improving Implementation of Legal Remedies: Strengthen access to legal remedies, especially in rural and underserved areas, to improve implementation of protective measures. Public awareness campaigns can also address stigma and encourage more victims to seek protection under the Prevention of Domestic Violence Act (PDVA).
8. Enhancing Support Systems for Victims: Invest in comprehensive support networks, including shelters, counseling, and legal aid services, to ensure victims receive accessible and well-funded assistance tailored to their needs.
9. Specialized Domestic Violence Units within Police Divisions: Establish specialized units within police divisions dedicated to handling domestic violence cases. These units can provide advice to personnel at the "Bureau for the Prevention of Abuse of Children and Women" within the police divisions, promoting more effective case management and enhanced support for victims.
10. Addressing Social and Cultural Barriers: Promote a shift in social attitudes toward domestic violence and advocate for gender equality. Community leaders and local stakeholders can play a crucial role in fostering attitudes that support victims and reduce stigma.
11. Regional Cooperation in South Asia: Enhance collaboration with South Asian neighbors for resource-sharing and best practices in combating domestic violence. Such regional cooperation could lead to improved strategies and outcomes across borders.
12. Integrating International Standards: Incorporate international standards, such as those outlined in the Istanbul Convention, into domestic law. This integration could bolster existing protections and uplift policies, creating a stronger legal framework for victim protection.

Conclusion

Much more, however, needs to be done to further strengthen the legal framework for addressing domestic violence in Sri Lanka beyond the current Prevention of Domestic Violence Act No. 34 of 2005. Although the Act provides essential civil remedies, limited case law, resource constraints, and deep-rooted social stigma contribute to hindering their effectiveness. This will involve multi-layered efforts: enhancing judicial training to harmonize case law, strengthening victim support, and offering targeted training and comprehensive guidelines to ensure that the Police effectively handle domestic violence complaints. In developing a unified strategy to protect and support victims of domestic violence, strong regional cooperation among South Asian countries, combined with respect for international standards, is important. Comparative analysis of how domestic

violence is responded to in other South Asian countries pinpoints both achievements and concerns, thus placing further demands on Sri Lanka to improve its legal and support mechanisms. It will also cover activities that raise more awareness among the public and make the communities aware of the rights of victims and the consequences of domestic violence, other than dismantling cultural and societal norms that legitimize the stigma. Sri Lanka may develop a sounder and more inclusive framework, enabling the country to protect the rights and wellbeing of those who have been subjected to domestic violence and enable justice not only to be served but seen to be served.

CHILDREN AS VICTIMS AND WITNESSES: A CRITICAL ANALYSIS OF THE CRIMINAL JUSTICE SYSTEM OF SRI LANKA

Justice P. Kumararatnam*
Judge of the Court of Appeal

Introduction

Due to their vulnerability children need special care and protection. The family, the society and the State have a duty to protect children from any harm and abuse. Yet it is quite disturbing that thousands of children are still subjected to harassment, physical, mental and various forms of sexual abuse. The past decade saw a tremendous increase in the incidents of child abuse in Sri Lanka. On another front, children are neglected and abandoned causing sufferings and injuries to health and well-being; abused, and intimidated; subject to worst form of cruelty resulting in physical pain and trauma. Physical abuse includes murder, grievous hurt, cruelty, abandonment, child labour, intimidation and kidnapping. Sexual abuse includes sexual harassment, grave sexual abuse, rape, incest, unnatural offences, sexual exploitation, child prostitution and trafficking. Children are used in and exposed to obscene, vulgar and pornographic materials; used as pimps in brothels and for prostitution; used for distribution of illicit liquor and drugs; used for begging or street trading; and employed as child laborers in domestic service and elsewhere. The increased sexual abuse of children caused serious concern not only to the State and society but also to the international community. The thriving of tourism industry is another crucial factor for the increased sexual offences committed against children in the country.

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Studies also recognized that a significant minority of young children remains the victims of sexual abuse and, in keeping with this, the analysis made by Bunting has found out that one in five sexual offences were committed against children under the age of ten[1].

Statistics shows that reporting of offences committed against children are at a very low rate in Sri Lanka. This is due to family concerns, threats, social stigma influenced by local culture. During the period of internal armed conflict in the country a few years back, many people got displaced and became vulnerable. Children in the affected areas were subjected to abuse by many including by members of the security forces. It is pathetic to note that incidents of abuse of children taking place in schools, religious institutions and children's homes are not often complained to relevant authorities. Since these institutions are mostly run by influential people who enjoy political patronage, even if information provided to the authorities concerned by the victims and others against these unscrupulous people, no action is taken against them.

The phenomenon of delayed reporting of sexual abuse and other violence against minors has been the real obstacle in seeking justice for such violations. Many children do not disclose abuse during childhood and, even in adulthood; some may never tell. This is not surprising given that 'family members or those with a caretaking relationship are likely to be the primary offenders for younger age groups. Their developing sense of good and right in the world will surely be warped given that they have been abused and misused by the very people that they hold in the highest regards especially when it comes to trust, love and care. This delay directly affects the ability of child victims getting access to justice[2].

Sri Lanka has ratified the UN Convention on the Rights of the Child[3] (hereinafter referred to as the CRC) in July 1991 and undertaken obligations to take appropriate legislative, administrative, social and educational measures to protect the children.[4] Sri Lanka underwent difficulties in dealing with delinquents of child rights as there were no special penal laws to deal with them. To address this issue, legal reformative measures were taken that includes amendments to the Penal Code, Evidence Ordinance, and the Code of Criminal Procedure Act. Further, the National Child Protection Authority was established under the National Child Protection Authority Act,[5] with statutory powers to deal with matters relating to violation of children's rights.

1 Bunting, L. (2013). "*Invisible Victims: Recorded Crime and Children in the UK"* in **Child Abuse Review**, *vol.* 23(3), 200–213.

2 Bunting, L. (2013). "Invisible Victims: Recorded Crime and Children in the UK" in **Child Abuse Review**, 23(3), 200–213.

3 Adopted by UN General Assembly, Resolution 44/25 of 20.11.1989

4 Article 19 of CRC

5 No.50 of 1998

In order to fight against child abuse, it is important to create an awareness of child's rights among parents, public and authorities responsible for dealing with children. It is in this context, it has become necessary to identify the reasons for violations of child rights and take necessary action accordingly when children are brought under the criminal justice system of the country as victims and witnesses.

Definition of Child

Article 1 of the Convention on the Rights of the Child (CRC) defines that:

> *for the purpose of the present convention, a Child means every human being below the age of 18 years, unless, under the law applicable to the child, majority is attained earlier.*

In Sri Lanka, according to the Age of Majority Ordinance[6] the age of majority is 18 years. However, different upper age limits are set out in different statutes for varying purposes. The age of capacity to contract a marriage is 18 years. Whilst the Penal Code of Sri Lanka, 1883 sets the age of capacity to express consent to sexual intercourse as 16 years, the age of secondary education has been fixed at 16 years.

Personal Laws of Muslims have created a situation where different legal norms apply to Muslims in certain matters such as early marriage, statutory rape, sexual abuse, maintenance and inheritance. Muslim Law indicates a lower age limit for the purpose of marriage. According to Muslim Law, a child attains full majority on reaching the age of puberty. In an old Indian case,[7] it was held that a Muslim female is presumed to have reached the age of majority at 9 and male at 12 years. In Sri Lanka, a Muslim girl's marriage can be registered even if she is below the age of 12 years if it is with the authority of the Quazi, depending on the religious sect she belongs to.[8]

For the purpose of employment, the age limits set by the relevant statutes depends on the nature of employment.

The Employment of Women, Young Persons and Children Act [9] defines a "child" as a person who is under 14 years of age whilst persons between 14 and 18 years of age are defined as young persons. Regulations made under Section 14 (1) of this Act stipulate different age limits for different occupations for Children.[10]

6 Section 2, The Age of Majority (Amendment) Act No.17 of 1989.
7 Sadiq Ali vs. Jai Kishori (1928) AIR (PC) p.152
8 Section 23, The Muslim Marriage and Divorce Act No.13 of 1951 (as amended)
9 No. 47 of 1956 (as amended), Section 34 (1)
10 For Industrial undertakings (Private & Public) – 14 years; employment at sea 15 years; Performing endangering life and limb acts-16 years, Night work-18 years.

In 1997, a regulation issued by the Minister of Education and Higher Education made attendance to school compulsory for children between the age of 5 and 14 years.[11] At present, by a gazette notification the upper age limit for compulsory education has been increased up to 16 years.[12]

The Children's Charter adopted by Sri Lanka in1992 proclaims that the State shall provide compulsory education to children from the age of six to sixteen years,[13] whereas the CRC requires the State parties to make primary and secondary education compulsory to all children below the age of 18 years.[14] Hence it is obvious that the said Compulsory Education Regulation is not consistent with the Children's Charter and the CRC.

Furthermore, Article 1 of the CRC and the Children's Charter of Sri Lanka defines that a child means every human being below the age of 18 years. However, these standard setting norms are not taken into account when it comes to dealing with child victims. Stringent application coupled with narrow interpretation of the Penal Code, in many an occasion, jeopardizes the safety and wellbeing of children.

Article 34 of the CRC requires the State parties to take all appropriate measures to protect children from all forms of sexual exploitations and sexual abuse.

When children between the age of 16 and 18 years are not protected from violence in the form of sexual abuse by the Penal Code provisions, it is a clear indication that Sri Lanka has failed to fulfill its obligation undertaken as a State party to international human rights instruments including the CRC. Further, consent given by a child between 16 and 18 years of age can be used as defence by the offender under provisions relating to rape and grave sexual abuse. This is a loophole, and unless the age limit for giving consent to have sexual intercourse is increased to 18 years, the safe guard would not be effective in the case of children between the age of 16 years and 18 years.

General Marriage Registration Ordinance[15] and the Kandyan Marriages and Divorce Act[16] have been amended increasing the marriageable age to 18 years for both men and women.

But, in the case of Kandyan marriages, S.4 (2) and 4(3) of the Kandyan Marriages and Divorce Act still remain problematic. According to these two provisions, notwithstanding anything in subsection (1) (which lays down the lawful age of marriage for a Kandyan as 18 years and states that no Kandyan marriage shall be valid if, at the time of marriage, one or both parties are under the lawful age of marriage), a Kandyan marriage shall not be deemed to be invalid by reason of one or both parties thereto being, at the time of

11 The Compulsory Attendance to School Regulation No. 1 of 1997 under Education Ordinance No.31 of 1939

12 The Gazette of Democratic Socialist Republic of Sri Lanka No. 1963/30 dated 20/04/2016

13 Article 28 (1) Children's Charter

14 Article 28 of CRC

15 General Marriages Ordinance No.19 of 1907 as amended by Act No.18 of 1995 and Act No.12 of 1997

16 Kandyan Marriages and Divorce Act No. 44 of 1952 as amended by Act No.19 of 1995

marriage, under the lawful age of marriage; (a) if the parties cohabit as husband and wife for a period of one year after they attained the lawful age of marriage; or (b) if a child is born of the marriage before both or either of them have attained the lawful age of marriage.

According to Section 75 of the Penal Code, 'nothing is an offence which is done by a child under 12 years of age. In the case of children between 12 and 14 years, nothing done by a child of that age will be considered an offence unless the child has attained sufficient maturity of understanding to judge the nature and the consequences of his conduct on that occasion.[17] It is not clear who will decide whether a child has attained sufficient maturity of such understanding. It has to be ultimately decided by court, and the police left with no alternative but to take the child into custody and produce him in Court. Further, a child under 18 years of age cannot be sentenced to death.[18]

In the case of children above 14 years of age, they can be charged with criminal liability whether they have attained sufficient maturity to understand the nature and consequences of their conduct. Where a child is found guilty of any offence by any court, the court, in any case in which it is of the opinion that it is not necessary or expedient to deal with the child under sections 25 to 29 of the the Children's Ordinance (hereinafter referred to as CO), may after due admonition discharge the child.[19] There is, however, an irrebuttable presumption that a child under 12 years cannot commit rape.[20] Again the contradictory positions become very much evident in these provisions.

Juvenile Justice System and its Development in Sri Lanka

The CO is the main enactment making provisions for juvenile justice in Sri Lanka. For the purpose of juvenile justice, child means a person under the age of 18 years[21].

The CO has made provisions for the establishment of Juvenile Courts with jurisdiction to deal with cases involving children and young persons. Juvenile Court has an extensive jurisdiction covering all cases of children in need of care and protection and any criminal charges against them other than scheduled offences. Scheduled offences are murder, culpable homicide, attempted murder and robbery.

There are only three juvenile courts in Sri Lanka and they sit in Colombo, Anuradhapura and Jaffna. Though the law makes provisions for the appointment of Juvenile or Children's Magistrate's Courts, no such special appointments have been made. Magistrate's Courts and Primary Courts, while exercising their normal jurisdiction, dispense with juvenile justice as well.

17 S.76 of Penal Code of Sri Lanka
18 S.53 of Penal Code of Sri Lanka
19 S.30 of the Children's Ordinance
20 S.113 of Evidence Ordinance
21 S.88 of the Children's Ordinance as amended by Act. No. 39 of 2022

When considering the administration of juvenile justice by the Juvenile Court and the Magistrate's Courts exercising juvenile justice, one can clearly see that the non-establishment of Juvenile Courts has adversely affected the dispensation of juvenile justice. In the Juvenile Court, there is a more child friendly atmosphere which is lacking in the Magistrate's Courts. Due to the heavy workload in the Magistrate's Courts, dispensing juvenile justice takes a longer time. Magistrates lack training and as a result they are less sensitized to the need of complying with the provisions of the CRC.

The Juvenile Courts also possess primary jurisdiction over those children who are "in need of care and protection". The definition of the 'need for care and protection' is rather loose. In essence, the need can be triggered and the court's intervention can take place under one of four distinct circumstances (or, any combination thereof):

i. *the breakdown of familial or other support mechanism for the child—for example, the breakdown of support mechanism for a child may occur because there is no parent/guardian or the parent/guardian is unfit to exercise due care;*

ii. *the committing of an offence upon a child – this covers both violent and sexual acts;*

iii. *child's own misbehavior—this could mean falling into bad associations, exposure to moral danger, which is defined as begging and loitering, or the child being beyond control; and,*

iv. *the placement of a child in a situation which may cause him/her danger—for example, a girl child living in a household in which two members cohabit in breach of the prohibitions imposed by the Marriage Registration Ordinance.*

Generally, a court dispensing juvenile justice is required to sit in a different building or room from that in which its normal sittings are held. Due to practical difficulties, this is not complied with in Sri Lanka. A Magistrate's Court uses the same building and staff when it sits as Juvenile Court as well. No separate Juvenile Court sessions are conducted. Further, cases involving children are also taken up in open court together with that of the adults. A child witness is treated in the same manner as an adult witness. Sometimes, cases are taken up for hearing in the Chambers of the Magistrate, which is hardly spacious enough to accommodate all the persons allowed in at a hearing before a Magistrate. As Vijaya Samaraweera observes in his Report on the Abused Child and Judicial Process in Sri Lanka, 'in this confining space, the formalism of the judicial process trends to be magnified, and the hostility directed towards the victim by the accused becomes all the more evident'.[22]

22 Vijaya Samaraweera- Report on the abused child and the Legal Process of Sri Lanka, at p.24

Jill Grime observes in his report[23] that "there are two major elements in the provisions on children in conflict with law contained in the Convention, the Children's Charter and Sri Lankan legislation. One element is treatment of child in the court… In this section of the report the main focus is on the protection afforded to children through the judicial process. In the context of children in conflict with law, this relates to the other major element contained in the legislative provisions-the way that children are treated after sentence is passed. The treatment afforded to such children has particular significant in the Sri Lankan situation since it has influenced the way that all children, victims and offenders alike are treated."

The law requires that no person other than the members and officers of the court, parties to the case before the court, their attorneys-at-law and witnesses and other persons directly concerned in that case and such other persons as the court may specially authorized to be present shall be present at the sittings of Juvenile Courts.[24]

The CO requires that children to be removed from court during the trial of any other person charged with an offence unless his presence is required as a witness in the case or for the purpose of justice.[25]

The same statute prohibits the publication of any report of the proceedings in any court, other than a Juvenile Court, arising out of any offence against, or any conduct contrary to, decency or morality, picture of a child concerned in the proceeding, in any newspaper of journal leading the identification of the child or young person.[26]

A pertinent comment on the CO is made by Professor Sharya Scharenguivel in her book[27] where she states that,

> *'(I)n Sri Lanka; there has been concern about the criminal justice system relating to children for a considerable period of time. This has resulted in official committee reports and the reports of concerned individuals on the subject. Thus far, however, the outcome has been disappointing. The basic statutory framework for the juvenile justice system remains the Children and Young Persons Ordinance, a law formulated in 1939, which has been amended from time to time. Undoubtedly, the Ordinance was an advanced piece of legislation at the time it was enacted. It does not, however, live up to the expectations of what a juvenile justice system should represent in the twenty first century.'*

23 JILL GRIME-AN INVESTIGATION INTO CHILDREN'S ROGHTS IN SRI LANKA-Report Commissioned by SIDA, March 1994.

24 S.7(2) of the Children's Ordinance.

25 S.18 of the Children's Ordinance.

26 S.20 of the Children's Ordinance.

27 Sharya Schareguivel, PARENTAL AND STATE RESPONSIBILTY FOR CHILDREN, A Stamford Lake Publication, 2005, p.447

Protection of Children under Sri Lankan Law

A government's paramount duty is to enact necessary laws to protect its citizens which include children as well. Most of the time, children brought before the criminal justice system are either as victims or/and witnesses. This is due to violations committed against child victims in various forms.

The UNICEF defines sexual abuse as 'sexual contact between adult and sexually immature child for purposes of the adult's sexual gratification' and also 'exchange of sexual activity or access to a child for purely economic or monetary gain including sexual exploitation or pornography'.[28]

Before the enactment of the Penal Code (Amendment) Act No. 22 of 1995, there were no adequate provisions in our penal law to deal with different kinds of offences committed against children, who more often come before criminal justice system as victims and/or witnesses. There was no law specifically meant for punishing sexual abuse of children. All sexual offences committed against children were also dealt with under ordinary criminal law of the country. At that time law made no distinction between the adult and child victim.

Sexual Harassment

The amended section 345 of the Penal Code (1995) deals with sexual harassment. The amended provision explains the scope of this offence and includes the use of mere words which could be considered as sexual annoyance. The Criminal Procedure Code Amendment (CPC) Act No. 28 of 1998 has amended Section 2 of the CPC by adding a definition of "child abuse". Child Abuse is defined to mean an offence under Sections, 286A, 288, 288 A, 288 B, 308 A, 360 A, 360 B, 360 C, 363, 364 A, 365, 365 A, or 365 B of the Penal Code when committed against children. Section 345 of the Penal Code dealing with sexual harassment is not included in this definition. Therefore, sexual harassment of children is not covered by this definition and is not considered as child abuse. Children should be protected from sexual harassment and for that definition 'child abuse' should be redefined to include Section 345 of the Penal Code as well. Although hundreds of children are sexually harassed in their schools, workplaces and at homes, very rarely these incidents are reported to the authorities. Further, for a decent society, it is imperative that those who commit sexual harassment of children should be dealt with stringent punishment with due deterrent effect.

28 Brita Ostberg, Resident Representative- UNICEF- 'Sexual Abuse of Children' Some Expert Analyses in Sri Lanka the Sexual Exploitation of Children. P.E.A.C.E. (Protecting Environment and Children Everywhere) (1996), p.10

Rape

Section 363 of the Penal Code, as amended in 1995, defines the circumstances under which sexual intercourse of a man with a woman would amount to Rape. Section 363 (e) of the Penal Code states 'that a man will be committing rape if he has sexual intercourse with a woman with or without consent when she is under 16 years of age'.

It implies that, if a girl child who is above 16 years of age gives her consent to the person who commits the offence, it would be a defence for the accused. Since the girl child who is above 16 years and below 18 years of age, is considered a child whether she is capable of giving consent remains a valid legal question.

The amendment brought to the General Marriage Ordinance No. 19 of 1907 too creates a similar problem. The Marriage Registration Ordinance (Amendment) Act No. 18 of 1995 amended Section 15 of the General Marriage Ordinance by increasing the age of marriage to 18 years of age. As the age of marriage has been increased to 18 years, parental consent cannot validate a marriage of person below 18 years of age.

Under these circumstances, although the amendments made to the Penal Code and the General Marriage Ordinance to protect children's rights, there is a possibility of perpetrators to take advantage of these provisions for their benefit against the interest of children.

Grave Sexual Abuse

In 1995, the Amendment to Penal Code of Sri Lanka introduced 'grave sexual abuse' as a new offence. Section 365 B of the Penal Code sets out the circumstances under which an act which does not amount to rape would be considered as a grave sexual abuse. Section 365 B (1) (aa) states that 'grave sexual abuse is committed by any person who, for sexual gratification, does any act … with or without the consent of the other person who is below sixteen years of age'. Therefore, if the same act is committed against a child of 17 years of age with consent, that does not amount to an offence.

Creation of this new offence is very important as it covers both male and female children. Further, a distinction has been made between the punishment for committing grave sexual abuse against a person above 18 years of age and children below 18 years of age. Under the 1995 Amendment, a minimum of 7 years imprisonment is stipulated for this offence when it is committed against a person above 18 years of age, and it has been increased to 10 years in the case of children below 18 years of age. Unfortunately, the minimum sentences to both categories have been reduced to 5 years and 7 years respectively by Amendment to the Penal Code Act No. 16 of 2006.

Unnatural Offence

Section 365 of the Penal Code states that having sexual intercourse with a man, woman or animal against the order of nature is an offence. According to the 1995 Amendment, a minimum of 10 years imprisonment is stipulated for a person over 18 years of age committing this offence against a child below 16 years of age. The offender shall also be ordered to pay compensation to the victim.

Gross Indecency

Section 365 A of the Penal Code states that 'any person who, in public or private, commits, or is a party to the commission of …any act of gross indecency with another person shall be guilty…' Homo-sexual conduct is also punishable under this provision. The Penal Code also provides for an enhanced jail term of 10 years if the offence is committed by a person above18 years of age on a child below 16 years of age. Since there is a possibility for the Police to charge a person who is a party to the commission of this offence, a child who is a victim has often been charged under this section and treated as a suspect. Hence necessary amendments need to be made to this section to protect children between 16 and 18 years of age.

Sexual Exploitation

The 1995 Amendment to the Penal Code also introduced sexual exploitation of children as a new offence. Section 365 B of the Penal Code stipulates the circumstances where the offence of sexual exploitation of children takes place.

Since the consent given by a child between 16 and 18 years of age can be used as a defence by an offender under the provisions relating to rape and grave sexual abuse, the offenders of sexual exploitation of children between the age of 16 and 18 years of age could argue that they cannot be charged under those provisions as they had the consent of the children.

Incest

Incest is a sexual relationship between people prohibited from marrying because of closeness of their blood relationship. This has a scientific reason as well. By the newly introduced Section 364 A of the Penal Code, 1995, incest has been made an offence punishable under our law. This section of the Penal Code covers offences that may be committed against children in the form of incest. It addresses the issue of prohibited relationship of children who may become vulnerable in the hands of the close family members.

Protection from Cruelty, Abuse and Neglect

Before the Amendment to the Penal Code in 1995, there was no legal provision in Sri Lankan law to deal with cruelty to children. Though there was a provision in Section 71 (in Part V) of the CO to deal with cruelty to children, due to unknown reasons, Part V of the Ordinance was never brought into operation.

By a new amendment, Section 71 (1) of the CO has been reintroduced with an enhanced sentence as the new S.308 A of the Penal Code. According to Section 308 A, whoever having custody, charge or care of a person under 18 years of age, willfully assaults, ill-treats, neglects or abandons such person or cause him to be assaulted etc., in a manner likely to cause him suffering or injury to health commits the offence of cruelty of children.

Child Pornography

Under the newly introduced Section 286 A of the Penal Code, (a) employing, using or inducing a child to appear in obscene or indecent exhibition, show, photograph or film; or, (b) selling, distributing or having in possession of such photographic or film of children, or (c) allowing such children to appear in any such exhibition, show, photograph or film; or (d) advertising or publishing such photograph or publication is an offence punishable with imprisonment for a term not less than 2 years and not exceeding 10 years and a fine. For the purpose of this Section, film includes any form of video recording. The Penal Code was further amended to require developers of photographs and films to inform the police if they discover any indecent or obscene photograph or film of a child.[29]

Until 1995, there were no penal provisions regarding child pornography in Sri Lanka. Obscene Publication Ordinance[30] is used to charge the Newspaper vendors and Video parlour owners for selling obscene literature where the offenders can go free after paying a fine as they are not sentenced to jail.

The Children and Young Persons (Harmful Publication) Act No.48 of 1956, does not apply to pornographic literature. It only deals with publications portraying commission of crimes or acts of violence or cruelty or incidents of a repulsive or horrible nature.

Further, the Penal Code of Sri Lanka was again amended by Act No. 16 of 2006 and recognized certain new offences in respect of children. Any person to be subjected to debt bondage or serfdom, forced or compulsory labour, slavery and recruitment of children for use in armed conflict shall be an offence with enhanced punishment.[31] Trafficking of children[32] and soliciting a child[33] shall also be an offence under the Penal Code.

29 Section 286 A (1) & (2) of The Penal Code (Amended) by Act No.22of 1995 and No. 29 of 1998.

30 Act No. 4 of 1927

31 Section 358 A (1) of the Penal Code (Amended) by Act No. 16 of 2006

32 Section 360 C (1) of the Penal Code (Amended) by Act No. 16 of 2006

33 Section 360 E (1) of the Penal Code (Amended) by Act No. 16 of 2006

Article 34 of the CRC requires the State parties to take all appropriate measures to protect children from all forms of sexual exploitation and sexual abuse. But, as of now, the rights of children between 16 and 18 years of age are not safeguarded by the Penal Code of Sri Lanka.

Protection of Child Victims and Witnesses in Criminal Cases

In an adversarial system, a victim of crime is merely a witness. A child who had been subjected to violence is invariably subjected to extensive questioning by both the prosecutor and the defence counsel. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000), provides in article 8, paragraph 4, that 'States parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol.'

As per the United Nations Guidelines for Action on Children in the Criminal Justice System (resolution 1997/30),

> *"(A)ll persons having contact with, or being responsible for children in the criminal justice system should receive education and training in human rights, the principles and provisions of the Convention on the Rights of the Child and other United Nations standards and norms in juvenile justice as an integral part of their training programmes. Such persons include police and other law enforcement officials ..."*

At times, the witness is humiliated and does not express himself/ herself clearly. He/she is intimidated by the formality in the court. Some children could be naturally inclined towards suggestibility and or false memory as a consequence of their very young age, making them quite unreliable as witnesses. Suggestibility refers to children's susceptibility to suggestions about non-existent details of events that were actually witnessed. False memory refers to children's development of a memory for an entirely new event that never occurred.[34]

Her/his right to ensure that he/she received justice and the offenders punished gradually diminishes in this process. Yet, the victim has a constitutional protection and it is up to the prosecutor to ensure that justice is done to the victim. Article 106(2) of the Constitution of Sri Lanka confers discretion on a court, inter alia, in proceedings relating to sexual matters to exclude from court such person as is not directly interested in the proceedings. Even though this Article confers a discretionary power on the judge, in every case of sexual violence against a child, the prosecutor must ensure that this provision is invoked. Other than the judge and the required staffs, counsel appearing in the case, the victim (witness) and the accused, every other person including the members

34 https://www.taylorfrancis.com/chapters/edit/10.4324/9781315805702-6/interviewing-child-victim-witnesses-ask-get-nancy-walker-jennifer-hunt

of the Bar should be regarded as persons not directly interested in the case, should be required by the judge to leave the court. In addition, the judge should ensure that the victim's identity is not disclosed through the media. The electronic media also act with a sense of responsibility and ensure that publicity is not given to such cases.

Analysis of the Nature of Protection under the Children's Ordinance No. 48 of 1939 (as amended).

Section 34 (1) of the Children's Ordinance (CO) enables Juvenile Court to make an order in respect of children, 'in need of care or protection.' Children found on streets, abandoned, victims of cruelty, used for child labour and sexual abuse are produced in court under this provision. This provision is used by the police to arrest street children. They arrest street children as children in need care or protection and produce them in courts.

Section 34 (1) the CO defines a 'child need of care or protection'. Only those who come under this definition can be taken charge and produced in court to be dealt with according to this Section. There are three categories of children coming under this definition.[35]

The Court can make an order only in respect of a child coming under one of these categories. Before making an order, the Court sits as a Juvenile Court and hold an inquiry to ascertain whether the child is a child 'in need of care and protection' as defined in Section 34 of the CO. The Court should not simply act on the report of the police or the probation officer.

As far as the placement of a child is concerned, the CO does not make much of a difference between a child victim (a child in need of a care or protection) and a child offender. Any order other than one month's detention in a remand home, conditional discharge, discharge after due admonition, corporal punishment or imposition of a fine, any of the orders applicable to child offenders can be made in respect of a child in need of care and protection, including detention in a certified or approved school for a period of three years.[36] However, this section should be read with the Constitution and other later legislation prohibiting cruel, inhuman or degrading treatment or punishment to any individual. Children cannot be exempted from this protection as well.

When a child gives evidence in any proceedings in relation to an offence against decency or morality, the Court may clear the courthouse of all persons not concerned in the case. It is left to the discretion of the Court.[37]

35 Section 34(1) of the Children's Ordinance.
36 Section 27(1) (b) of the Children's Ordinance.
37 Section 7(2) of the Children's Ordinance.

Law prohibits the publication of any report of the proceedings in any court, other than a Juvenile Court, arising out of any offence against, or any conduct contrary to, decency or morality, or a picture of a child concerned in the proceeding, in any newspaper or journal leading to the identification of the child.[38]

As regards to the procedure in juvenile courts is concerned, theoretically Sri Lankan law conforms to the requirements of Article 40 (2) of the CRC.

Article 12(2) of the CRC lays down the right of children belonging to the second and third categories (children in need of care or protection and victims of child abuse) 'to be heard in any judicial or administrative proceeding affecting him either directly or through a representative or an appropriate body, in a manner consistent with procedural rules of national law'.

Generally, though parents may be present in Court being noticed to be present, they rarely obtain the services of a lawyer, being too poor to do so. But, a Court may allow a lawyer to represent such a child in Court 'as an aggrieved party'.

Under this Ordinance, the provision of care and protection for children is the subject for the Department of Probation and Child Care Services. The CO provides for the establishment of remand homes, certified schools and approved homes for the purpose of detention of children and young persons, when necessary.

Safeguards Extended to Children under the Penal Code and other Statutes

Section 365 C of the Penal Code as amended by Act No.22 of 1995, prohibits publishing the name or any manner leading to the identity of the victims of sexual offences. The name or any matter leading to the identity of the victim can only be published: -

a. by or under the order of the Officer-in-Charge of the Police investigating into the offence;

b. with written authorisation of the victim;

c. with written authorisation of the parent or guardian of the victim.

Section 286A (2) of Penal Code, as amended by Act No.29 of 1998 stipulates the legal duty on developers of photographs or film, to inform Officer-in-Charge of the nearest police station upon detection of an indecent or obscene photograph or a film of a child.

Section 286B of the Penal Code, as amended by Act No. 16 of 2006, stipulates the legal duty of a person providing service by computer to prevent sexual abuse of a child.

Section 286C of the Penal Code stipulates the legal duty of a person having the charge, care, control or possession of any premises being used for child abuse activity shall inform the nearest police station.

38 Section 20 of the Children's Ordinance.

Evidence (Special Provisions) Act[39] brought an important change where the video recording of a preliminary interview of a child witness has been made admissible in a proceeding of an offence relating to child abuse.[40]

When a child has to repeat his/her horrendous experience several times for medical examination and in judicial proceedings, the child undergoes the same bitter experience which affects him/her psychologically. Although this Amendment improved the situation to a certain extent where the child's recorded evidence can be used for examination in chief, it requires the child to be cross examined. Unless the child is available for cross-examination, such recorded evidence would not be accepted by court.

Conclusion

Although the Sri Lankan Government has taken some meaningful measures to protect child victims and witnesses, the implementation of the same needs some urgent attention on the part of the authorities. Sri Lanka, after ratifying the CRC in July 1991, attempted to make a number of legal reformative measures to minimize the harm that may be caused to children when they are brought before courts as victims and witnesses.

Due to social and cultural set up, full implementation of such reformative measures continuously faces several setbacks. Major problems in dealing with child victims and witnesses in criminal justice system seem to be lack of awareness of child's rights among parents, public authorities and those responsible for taking care of children. Further non-reporting of incidents of child abuse takes place because of family influence, social stigma induced by cultural believes and fear among family members. These barriers need to be overcome for effectively dealing with offences committed against children. This situation is further worsened due to political influence some of the perpetrators used to enjoy.

Though several amendments have been introduced to the Penal Code, the Criminal Procedure Code and the Evidence Ordinance after 1995, the country is still struggling to fully implement these statutory provisions in a meaningful manner. The lack of understanding of law by the law enforcement agencies in the country is seems to be the major obstacle in this regard. Due to this reason, some important cases got crashed before courts and as a result the offenders have gone scot-free.

Inconsistent legal interpretation of different provisions in the country has caused much of a confusion in implementing the reforms through the amended provisions of some of the legislation. Notably, different age limits have been set up for different offences in the Sri Lankan criminal justice system to safeguard children's rights when they come as victims and witnesses.

39 No.32 of 1999

40 Section 163 A (1)

With growth of tourism industry in the 1980's, Sri Lanka has been geared to attract large number of tourists, mainly from the Western Countries. This has caused the increase of child abuse cases in the country. Although this is not the only reason, but due to combination of economic, social, financial and cultural factors with the incoming of tourists in large numbers has definitely altered the life pattern of the lower middle-class people in the society. It has caused not only violence but also child abuse in many families.

Sri Lanka has a fairly well-developed legal system coupled with laws to protect children who come before criminal justice system as victims and witnesses. However, when it comes to implementation, it is identified that lack of legal awareness and understanding of law by the law enforcement officers and judiciary who are supposed to play a constructive role in the process has caused much confusion.

"Let us sacrifice our today so that our children can have a better tomorrow" [41]

41 A.P.J. Abdul Kalamhttp://WWW.brainyquote.com/quotes/a/apjabdul178504.html?src=t_children

ASSESSMENT OF DAMAGES IN PERSONAL INJURY CASES: MOVING FROM THEORY TO PRACTICE

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"However difficult life may seem, there is always something you can do and succeed at."

– Stephen Hawking -

1. Introduction

The calculation of damages for bodily injury presents the court with a challenge nearly as complex as determining a sentence in a criminal case. This in turn makes it equally difficult for legal practitioners to predict the court's decision. The specific categories of damages such as general damages, special damages, and future loss of earnings were often unclear, making it difficult for both the plaintiff and the defendant to understand the basis upon which damages would be calculated.

Therefore, this article seeks to introduce the reader to the specific categories of damages identified in both Sri Lankan and foreign judgments which have dealt with the subject whilst exploring the challenges involved in calculating damages in personal injury cases. In doing so, I will discuss the most effective approach for assessing damages.

The law of personal injury claims

The law of personal injury claims is based on the basic principle that if one person is injured as a result of another's actions, the responsible party should be held accountable for rectifying the situation.

✶ LL.M. (London).

The core function of awarding damages in personal injury claims is succinctly stated by Lord Blackburn in ***Livingstone v Rawyards Coal Co***[1] as follows:

"Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong …"

There is no globally accepted method or mathematical formula to quantify the pain and suffering, loss of ability to function, diminished quality of life, and disability experienced by an injured person in monetary terms. Consequently, awarding damages for these conditions is more speculative than realistic. This was further elaborated in following authorities.

In ***Heil v Rankin*** [2] the following has been said:

"There is no simple formula for converting the pain and suffering, the loss of function, the loss of amenity and disability which an injured person has sustained, into monetary terms. Any process of conversion must be essentially artificial."

Lord Pearce emphasized on the above in ***H. West & Son Ltd v Shephard***[3] when he said "[t]he court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum. It does not look beyond the judgment to the spending of the damages."

The main focus in tort law has always been compensation. But to gain a better understanding of this vital aspect, it is important to explain the various categories of damages that exist under the Common Law system in relation to personal injury.

In the case of ***H. West & Son Ltd. v. Shepard,***[4] Lord Morris said, "in the process of assessing damages judges endeavor to take into account all the relevant changes in a claimant's circumstances which have been caused by the tortfeasor. These are often conveniently described as 'heads of damages."

Before delving further in the details of the heads of damages, it is appropriate to define the term "damages".

Lord Blackburn in the ***Livingstone v. Rawyards Coal Co.***[5] defines damages as "[t]hat sum of money which will put the party who has been injured, or who has suffered, in

1 (1880) 5 App Cas 25 at 39
2 [2000] EWCA Civ 84, para 23
3 [1964] AC 326, 364
4 ibid
5 Supra (n 1)

the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

Thus, it could be stated that the intention of awarding damages is to restore the plaintiff to the position he/she would have been in had the tort not occurred. In other words, an injured plaintiff is entitled to compensation for the past, present and future losses that are consequential on his or her actionable personal injury. Consequently, the court's ultimate goal is to reinstate the plaintiff as closely as possible to his/her previous state. To achieve this, the trial judge must evaluate the entire case and assess it under distinct categories of damages.

II. Heads of damages

Listed below are the heads under which damages are claimed and the proceeding parts of this article seeks to examine each of the following heads in greater detail:

a. General damages.
b. Special damages.
c. Loss of wages.
d. Interest.

➢ **General damages**

A personal injury claim encompasses compensation for the injury one has suffered. If one's claim is successful, he/she will receive compensation, legally referred to as "damages," for pain and suffering, emotional distress, loss of enjoyment of life, and any long-term consequences of the injury. This means that he/she will be compensated for the physical pain of the injury, and its impact on his/her daily life.

This type of compensation is known as "general damages." General damages are not easily quantifiable through a mathematical formula.

In other words, general damages in a personal injury claim refer to compensation for non-economic losses resulting from the injury. In contrast to special damages, which are specific and quantifiable (such as medical expenses and lost wages), general damages are more subjective and seek to capture the overall effect of the injury on the person's life.

Assessing damages for non-pecuniary loss is fraught with difficulties. This issue was discussed by Earl of Halsbury LC in ***The Mediana***[6] in the following manner:

"You very often cannot even lay down any principle upon which you can give damages; nevertheless, it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in money shall be given for what is a wrongful act. Take the most familiar and ordinary case: how is anybody to measure pain and suffering in moneys

6 (1970) AC 113 at 116 & 117

counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person had undergone by reason of an accident. In truth, I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly mind cares about pain and suffering that is past? But nevertheless, the law recognizes that as a topic upon which damages may be given".

The difficulty of assessing damages in personal injury claims was articulated by Lord Pearce in ***H. West & Son Ltd & Another vs Shephard***[7]***,*** as follows:

"The court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum. It does not look beyond the judgment to the spending of the damages".

In the same case, Lord Morris stated that "… money cannot renew a physical frame that has been battered and shattered. All the judges and courts can do is to award sums which must be regarded as giving reasonable compensation … as far as possible comparable injuries should be compensated by comparable awards . ."

In assessing general damages, it is important to consider the disability in its entirety. In this regard, the following passage by Townley J. in ***Fowler v Punter*** [8] is highly relevant.

"I deprecate any suggestion that one may take a list of physical injuries and, from previous awards, assign an amount of each injury and thus arrive at a total. That process may, and perhaps necessarily would, result in the duplication of some elements, particularly with respect to the restriction on future activities, economic and social. In regard to those latter aspects of damage it seems to me that it is the totality of disability which has to be considered and that will seldom, if ever, be the equivalent of the sum of separate disabilities individually assessed".

Lord Donaldson in the foreword to the first edition of the ***Judicial Studies Board Guidelines***, states that general damages are made up of two elements: a subjective one being pain and suffering and an objective one being the loss of amenity. He observes that this head incorporates both physical and psychiatric injury in respect of past, present and future loss.

It is important to emphasize that when awarding general damages, the judge must consider the severity of the injuries, their duration, and their overall impact on the individual's life.

In assessing the loss of amenities, the court should take into account the degree of incapacity, the plaintiff's age, the loss of enjoyment of hobbies, the potential impact on

7 Supra (n 3), 326

8 (1959) Q d R 510 (FC), 526

marriage prospects if the plaintiff is young, and the loss of any other aspects of life. The court should also consider the length of time the plaintiff has been deprived of these amenities and whether the deprivation is permanent.

As Lord Pearce stated in ***H. West and Son Ltd & Another vs Shephard***[9] "loss of amenities includes the physical and social limitation inherent in the injury itself, but it extends also to the loss of amenities which are peculiar to the particular plaintiff, such as no longer being able to engage in pre-accident hobbies or interests."

Impairment of any one or more of the 5 senses is a matter which clearly falls under this head. Loss of taste and smell was held to be loss of amenities[10].

Burchell in ***Principles of Delict, Cape Town, Juta & Co.***[11], states the following on loss of amenities of life:

"The legal concept of amenities of life comprises all the factors which go to make up an enjoyable human life."

In this regard McKerron in ***The Law of Delict***[12] has stated that "[t]he damages recoverable under second head (disfigurement, pain and suffering loss of general health and the amenities of life) cannot be assessed on any arithmetical or logical basis. There are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The usual method adopted is to take all the circumstances into consideration and award substantially an arbitrary sum."

As stated in ***Kemp & Kemp***[13] "... the court must take into account, in making its assessment in the case of any particular plaintiff, the pain which he actually suffered and will suffer and the suffering which he has undergone and will undergo. Pain and suffering are not measurable by any absolute standard and it is not easy, if indeed possible other than in the most general way, to compare the degree of pain and suffering experienced by different people, however, the individual circumstances of particular plaintiffs clearly have a significant effect upon the assessment of damages".

It must be emphasised that in assessing damages for pain and suffering, court must take into account not only the suffering which the plaintiff had suffered immediately after the accident**,** but also the future suffering that he/she would have to endure throughout his/her life.

9 Supra (n 3), 326
10 Cook v J. L. Kier & Company Ltd [1970] 1 WLR 774
11 (1993), 136
12 114
13 vol. 1, P 2-007-2-010

The following passage from the judgment of Lord Denning M.R in ***Lim Poh Choo v. Camden And Islington Area Health Authority*** [14] would be of much assistance in assessing damages in a personal injury claim.

"In considering damages in personal injury cases, it is often said "[t]he defendants are wrongdoers. So make them pay up in full. They do not deserve any consideration." That is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error such as may befall anyone of us. I stress this so as to remove the misappropriation-so often repeated-that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is, in all the circumstances, a fair compensation-fair both to her and to the defendants. The defendants are not wrong doers. They are simply the people who have to foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay. It is worth recording the wise words of Parke B. over a century ago; "Scarcely any sum could compensate a labouring man for the loss of a limb, yet you don't in such a case give him enough to maintain him for life ... you are not to consider the value of his existence as if you were bargaining with an annuity office ... I therefore advise you to take a reasonable view of the case and give what you consider a fair compensation"[15]

In ***Kemp & Kemp, The Quantum of Damages***[16] the loss of amenities is explained as follows;

"There is a head of damage which is sometimes called the loss of amenities; the man made blind by the accident will no longer be able to see the familiar things he has seen all his life, the man who has had both legs removed and will never again go upon his walking excursions-things of that kind-loss of amenities."

This was further enunciated by *Birkett L J* in ***Manley v Rugby Portland Cement Co. Ltd***[17] as follows;

"This head embraces everything which reduces the plaintiff's enjoyment of life considered apart from any material or pecuniary loss which may be attendant upon the loss of amenity. What matters is the fact of deprivation of an amenity or amenities, not whether the injured person is aware of such deprivation...."

Claassen J in ***Reyneke v Mutual and Federal Insurance Co. Ltd*** [18] was acutely aware of the difficult task a court faces in assessing damages. He states:

14 [1979] 1 Q.B.196 at 215

15 See Armsworth v. South-Eastern Railway Co (1847) 11 Jurist 758, 760, quoted in Rowley v. London and North Western Railway Co. (1873) L.R. 8 Ex. 221, 230.

16 Supra (n 13), 1009-1-008

17 [1951] C.A.No 286

18 1991 (3) SA 412 (W)

"... loss of amenities of life has been defined as 'a diminution in the full pleasure of living' see H West & Son Ltd and another v Shephard [1963] 2 All ER 625 (HL) at 636G-H . The amenities of life flow from the blessings of an unclouded mind, a healthy body, sound limbs and the ability to conduct unaided the basic functions of life such as running, eating, reading, dressing and controlling one's bladder and bowels."

In ***Mahipala and Others vs. Martin Singho***[19], it was held inter alia that in an action for personal injuries the plaintiff is entitled to claim compensation for

(1) actual expenditure and pecuniary loss,

(2) disfigurement, pain and suffering and loss of health and amenities of life, and

(3) future expenses and loss of earning capacity.

(4) The trial Judge is not wrong in awarding a lump sum of Rs. 300,000 as damages to the plaintiff. Damages awarded will have to be increased taking into account the inflation in the economy and the depreciation of the Sri Lankan currency. Thus, legal interest should be added to the lump sum awarded from the date of judgment till payment in full.

(5) The damages to be awarded is calculated on the assumed loss to the victim in monetary terms at the time of the trial, but the monetary loss will increase with inflation as inflation leads to an increase in wage levels.

In respect of pain and suffering and loss of amenities in personal injury cases, it was explained by the Court of Appeal in ***Heil v Rankin***[20] that the scale of values represents what the judges consider to be the fair, just and reasonable sums to award for pain and suffering and loss of amenities. The determination of what is fair, just and reasonable takes into account the interests of claimants, defendants and society as a whole. The Court of Appeal also made clear the fact that, although compensation for pain and suffering and loss of amenities can never be precise, the aim is to provide full compensation.

Where a number of injuries are sustained, there will frequently be an overlap in the various symptoms such that a simple aggregation of the individual injuries would amount to overcompensation. The approach in such circumstances was identified by Pitchford LJ in ***Sadler v Filipiak*** [21] in the following manner:

"It is in my judgment always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or from the JSB guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect

19 [2006] (2) Sri. L R 272

20 Supra (n 2)

21 [2011] EWCA Civ 1728

of all the injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary."

Loss of future income is one of the most challenging elements to determine due to the lack of any definitive evidence. It can be challenging to predict the future earnings of the injured party, especially if his or her present earnings or salaries are not straightforward.

If the injured party has lost his employment as a result of the injuries sustained, what criteria would the court use to determine the loss of future income?

In **Southern Assurance Association Ltd v Bailey** [22] Nicholas JA stated as follows:

"Any enquiry into damages for loss of earning capacity is of its nature speculative because it involves predictions as to the future. All that the Court can do is make an estimate of the present value of the loss. It has open to it two possible approaches. One is for the judge to make a round estimate of an amount that seems to him to be fair and reasonable. This is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. There are cases where the assessment by the court is little more than an estimate; but even so, if it is certain that pecuniary loss has been suffered, the court is bound to award damages."

In addition to the above, the manner in which the loss of future income should be determined is satisfactorily stated by Brown LJ in ***Moeliker v. A. Reyrolled & Co. Ltd*** [23] as follows:

"it was suggested in the course of the argument that whenever a plaintiff establishes a claim under this head the damages must be considerable, and that it can never be right to award only a few hundred pounds damages. I do not agree. Each case must, of course, depend on its own facts, but if the court decides that the risks of the plaintiff losing his present job, or of his being unable to get another job or an equally good job, or both, are only slight, a low award is right ....."

22 1984 (1) SA 98 (A) at 113

23 [1977] 1 All E.R. 9 at 17

Additionally, at page 19 Stephenson LJ said:

"In assessing damages under this head, the judge has to engage in a double speculation to measure, first, the plaintiff's chances of losing his job, and then his chances, if he loses it, of getting other employment. It is rather like the serious risk of slight injury or the slight risk of serious injury which the prudent employer has reasonably to foresee and to measure so as to decide what precautions are reasonably necessary to meet him. He has to turn his assessment of the two risks into appropriate action 'on the ground' (or the floor); but the judge has to turn his into a suitable number of pounds sterling 'plucked from air.' The extent of each risk varies with the circumstances of every case. If (as will be rare) both are negligible or fanciful (I avoid 'speculative' because this head of damages can really be nothing else), no award should be made; Browne v. James Broadely Ltd, an unreported decision of Crichton J at Manchester. If one or both are really substantial, but neither is serious, the award should not be a token or derisory award, but should generally be in hundreds of pounds: Robert v. Heavy Transport (EEC) Ltd, a decision of this court referred to by Brown LJ. The risk of a plaintiff's falling out of his present job may be serious or slight and so may be the risk of his losing much or little if he does fall out of it, because he may be expected to have little or much difficulty in getting equally or less well-paid work. If both risks are serious, the compensation should generally be in thousands of pounds."

The future prospects during the course of employment, particularly potential promotions and salary increments in line with inflation, are the most difficult to predict due to their speculative nature.

Assessing an individual's earning capacity before and after an injury often involves subjective judgments. Factors such as the injured party's ability to work in different fields, adapt to new roles, or pursue alternative careers may be considered but are difficult to quantify.

The cost of future nursing care and treatment ought to be treated with some degree of certainty. Not all personal injury victims will receive this compensation therefore those claiming this head of damages ought to plead it and provide evidence in support of this claim.

The authors of ***Kemp and Kemp***[24] had this to say with respect to potential future surgeries:

"Difficulties may arise, however, where the effect of the medical evidence is that there is a chance that the claimant will require future medical treatment at some time in the future ... In such cases, it is suggested that the correct approach is first to ascertain (at present day value) the cost to the claimant of such an operation. That cost needs to be discounted twice, first to take account of the chance that the operation will not be required, and

24 Supra (n 13)

secondly to take account of the accelerated receipt. Thus, if the medical evidence is to the effect that there is a 75 per cent chance that the claimant will require the operation in 10 years' time, and that the present cost of the operation is £10,000, then the sum to be awarded would be £5,859, namely £7,500 (£10,000 x 75%) x 0.7812, the appropriate discount for an acceleration of 10 years at a discount rate of 2.5 per cent. It is more difficult when the medical evidence gives a range, or uses the expression "within 10 years". In such circumstances, practitioners are advised to ask the medical expert to be more precise so that the necessary evidence is available in order to allow the calculation to be made. Failing that, a more rough and ready method of assessment may be required..".

In assessing the cost of future medical treatment and care the following passage of Lord Scarman in ***Lim Poh Choo v. Camden and Islington Area Health Authority*** [25] is of much assistance.

"The true principle, as counsel for the respondent conceded, is that the estimate of damages under this head must proceed on the basis that resort will have to be capital as well as income to meet the expenditure; in other words, the cost of care, having been assessed, must be met by an award calculated on an annuity basis."

In cases of severe injury resulting in partial or total incapacity, predicting life expectancy and potential health complications become a critical issue. Ongoing medical conditions further complicate the calculation of future income loss. While a shorter life expectancy may reduce the projected losses, medical complications could increase the complexity of the assessment.

This task becomes more difficult and complicated in cases where the injuries sustained are progressive in nature and require ongoing review and treatments. For instance, consider a ten-year-old child who sustained spinal injuries and underwent a lower limb amputation as a result of a road traffic accident. The child has been fitted with prosthesis. As time goes on, these injuries are likely to progress, necessitating further medical attention to address emerging issues. Additionally, the prosthesis will need to be replaced periodically to accommodate the child's growth.

In such a scenario, calculating future medical expenses becomes an inevitably difficult task, as the court must account for inflation and the likely increase in the cost of artificial limbs. Furthermore, the costs of drugs and other medical equipment necessary for the victim's ongoing care cannot be overlooked when quantifying damages.

Therefore, it is incumbent upon the trial judge to analytically consider all of the aforementioned factors when determining future income loss. It is important to emphasize that the evaluation of evidence must be conducted within the specific context of each case.

25 (1979) 2 AER 910 at 922

Hence, it is advisable to have the following factors in mind when assessing general damages.

(i) the nature and extent of the injuries sustained,

(ii) the nature and gravity of the resulting physical disability,

(iii) the pain and suffering which had been endured,

(iv) how the injuries have curtailed his or her day-to-day activities, social engagements, and education,

(v) the loss of amenities suffered: and,

(vi) the extent to which, consequently the injured person's pecuniary prospects have been materially affected.

The next important question is the mode of calculating the quantum of damages.

While non-pecuniary losses cannot be compensated precisely, courts frequently weigh the possibility of awarding fair and reasonable compensation, considering the social, economic, and industrial conditions of the society.

In ***Phillips vs London & South Western Railway***[26]**,** it is stated that a non-pecuniary loss cannot be compensated in a precise or literal sense, the courts have often talked in this context of awarding fair and reasonable compensation. What is fair and reasonable is to be assessed in the context of the social, economic and industrial conditions which prevail in England and Wales.

In ***Jug Singh vs Toong Fong Omnibus Company***[27] the Privy Council said that the appropriate level of award for non-pecuniary loss may vary in differing social and economic conditions in different parts of the world.

In ***Attorney General of St Helena v. AB*** [28] Lord Briggs said that "an important part of the purpose of PSLA damages is that they should reflect what society as a whole considers to be fair and reasonable compensation for the victim".

Sir Thomas Bingham MR's observation in ***John v MGN Ltd*** [29], that:

"Any legal process should yield a successful plaintiff appropriate compensation, that is, compensation which is neither too much nor too little. That is so whether the award is made by judge or jury … Nor is it healthy if any legal process fails to command the respect of lawyer and layman alike …"

It is not the practice to quantify damages separately under each of these heads or to disclose the build-up of the global award. But it is critical to keep these heads firmly in

26 (1879) 4 QBD 406 at 407
27 [1964] 1 WLR 1382
28 [2020] UKPC 1 at 23
29 [1997] QB 586, 611, 614

mind and make a conscious, even if undisclosed, quantification under each of them in order to arrive at an approximate final figure. Hence, the practice is to grant a global sum for general damages for pain and suffering and loss of amenities to be considered against the backdrop of the nature and extent of the injuries sustained and the nature and gravity of the resulting physical disability.

Sometimes, courts rely on previously decided cases of a similar nature to determine the range of damages that can be awarded. Although this approach provides consistency and predictability in awards, it is not advisable to place sole reliance on these past cases, as the facts and circumstances of a particular case may differ from those of previously decided cases. In regard to reliance on prior cases, the following observations by Jenkins LJ in ***Waldon v. War Office*** [30] are important and therefore should be kept in mind.

"I think that counsel can be trusted only to refer to other cases very sparingly, bearing in mind that each case depends upon its own facts, and only rarely can another case be of real assistance to the judge. And secondly, I think that the discretion must always be on the judge himself to decide whether in his view the reference to such other cases would or would not assist him."

A very helpful restatement of the proper approach to be taken is to be found at paragraph 94 in the judgment of Lloyd Jones J, as he then was, in ***A v Powys Health Board*** [31]:

"The basis of assessment is the test of reasonableness as stated in *Rialis v Mitchell*, (Court of Appeal, 6th July 1984) and *Sowden v Lodge* [1 [2005 WLR 2129. The Claimant is entitled to damages to meet her reasonable requirements and reasonable needs arising from her injuries. In deciding what is reasonable it is necessary to consider first whether the provision chosen and claimed is reasonable and not whether, objectively, it is reasonable or whether other provision would be reasonable. Accordingly, if the treatment claimed by the Claimant is reasonable it is no answer for the defendant to point to cheaper treatment which is also reasonable. *Rialis* and *Sowden* were concerned with the appropriate care regime. However, the principles stated in those cases apply equally to the assessment of damages in respect of aids and equipment. In determining what is required to meet the Claimant's reasonable needs it is necessary to make findings as to the nature and extent of the Claimant›s needs and then to consider whether what is proposed by the Claimant is reasonable having regard to those needs.(*Massey v Tameside and Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB), *per* Teare J. at para. 59; *Taylor v Chesworth and* MIB [2007] EWHC 1001 (QB), *per* Ramsay J. at para 84.)"

30 [1956] 1 W.L.R. 51 at 57

31 [2007] EWHC 2996

➢ **Special damages**

Special damages are accrued and ascertained financial loss which the plaintiffs have incurred.

Consider for instance a claim for loss of earnings. If a person is required to take time off work due to an injury caused by an accident for which he/she was not at fault, such a person may be entitled to claim for lost wages. Direct financial losses could be claimed pertaining to the accident, as long as such losses are reasonable. Therefore, it could be stated that a claim for special damages could be quantified mathematically.

However, it is imperative for the plaintiff to discharge the onus of proving on a balance of probabilities that such loss has indeed occurred. This does not necessarily mean that the plaintiff is required to prove the loss with mathematical precision, but that the plaintiff is required to place before the court all evidence reasonably available to enable the court to quantify the damages and to make an appropriate award.

A party claiming for special damages must produce sufficient evidence to prove the quantum of the special damages claimed. Documents such as invoices pertaining to transport, medicine and other medical equipment needed for the injured party, purchase orders, invoices pertaining to attend clinical sessions, physiotherapy or rehabilitation programs and payments made to caregivers or helpers, etc. would be useful in proving losses incurred. Apart from that, a party claiming for special damages should also prove that such damages are not too remote.

Per Edmund Davies LJ in *Cutler vs Vauxhall Motors* [32]:

"Damages under this head can be quantified in monetary terms or specifically proven, such as medical expenses, property damage costs, injury-related expenses like the cost of medical treatment, rehabilitation or physical therapy, compensation for lost wages if the injuries prevent the plaintiff from working, and the cost of household assistance required due to the plaintiff's injury."

As held in ***Jefford v Gee***[33], special damages mean the actual pecuniary loss suffered by the plaintiff, up to the date of trial owing to the wrongful act of the defendant.

In ***British Transport Commission v Gourley***[34] Lord Goddard stated***:***

"Special damage has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation."

32 (1971) 1 Q.B. 418 at 426
33 [1970] 2 W. L. R 702
34 [1956] AC 185

In ***Fletcher v Autocar & Transporters Ltd*** [35] Denning M.R. said:

"The plaintiff should be compensated for his special damages to the date of trial and for all expenses to which he will be put by reason of the accident, including the cost of extra help in the house while he is at home ..."

Initially, courts could only award lump sum payments at the time of judgment. This posed challenges for claimants with medical conditions that could improve or worsen, as their prognoses were often uncertain. To address this issue, the United Kingdom introduced The Damages (Variation of Periodical Payments) Order 2005, allowing courts to determine that damages should be paid in installments and reviewed based on changes in the claimant's injury over time.

Under these new provisions, Courts in the UK were given the power to order that damages for future pecuniary loss in personal injury actions should take the form wholly or partly of periodical payments (Periodical Payments Orders) irrespective of whether the parties agree or not. The legislation imposes a duty upon the Court to consider whether to make a Periodical Payments Order in each case that comes before it.

This approach certainly helps courts award damages in a fair and reasonable manner, particularly when determining costs for future medical care. More importantly, it allows courts to avoid awarding compensation based on speculation regarding future medical needs. By permitting periodic payment orders, the law enables courts to address the evolving health issues of the victim over time.

- **Interest**

It was held in ***Pickett and British Rail Engineering Ltd***[36]**,** which was a case of personal injuries, that, "interest on general damages was awarded for the purpose of compensating a plaintiff for being kept out of the capital sum between the date of service of the writ and judgment ..."

As for interest on special damages it was held in ***Jefford v Gee*** [37] that "in general interest should be allowed on special damages from the date of accident to the date of trial at half the appropriate rate."

In Sri Lanka, it is the legal interest that the court often imposes on damages. It may vary in accordance with the guidelines issued by the Central Bank of Sri Lanka periodically. Thus, it is appropriate to calculate the interest in line with the guidelines set out by the Central bank of Sri Lanka.

35 (1968) 2 Q B 322 at 323
36 (1980) H.L. 136 at 137
37 Supra (n 33), 703

III. Conclusion

By now it is clear that the task of awarding damages is an artificial one. In a context where "there is no simple formula for converting the pain and suffering and the loss of function, the loss of amenity and disability which an injured person has sustained into monetary terms"[38], it becomes all the more important for the Court to ensure that the basic principle upon which the law of personal injury is based lies at the heart of any award of damages to an aggrieved party. However, this cannot be done without a clear understanding of all the heads of damages or rather the relevant changes in a claimant's circumstances which have been caused by the tortfeasor and the specific factors which ought to be considered under each head. Whilst the numerous authorities cited above provide the theoretical framework within which damages ought to be assessed in a personal injury case, it would be of utmost importance for the Court to be sensitive to the varied circumstances and nuances unique to each case in their the application.

38 Supra (n 2)

Judicial ethics & independence-with special reference to Bangalore Principles

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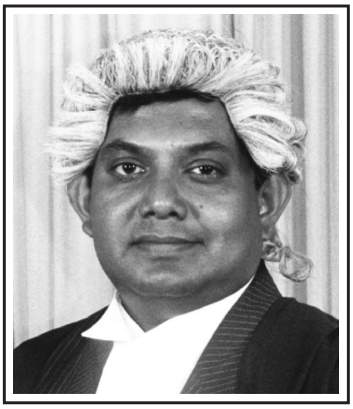

"*Judges are mere mortals, but they are asked to perform a function that is truly divine*"[1]

"*The Judicial power of the people has to be exercised both independent of the political authorities and also without partiality. Otherwise we, as citizens, are left without equal protection of the law, particularly against violations of our democratic freedoms and rights by political authorities. We need to do all we can to safeguard judicial authority and independence.[2]*"

As above notes, the judges, act as deities, are come and raise from the society but isolated and cornered in the name of people, to protect their judicial authority. It should be noted, as judges, they live in an open prison, that they cannot do things as their wishes and fancies. This article discusses the judicial ethics and independence, with regard to Bangalore principles.

History

The concept of judicial independence has dated back to 1985. By UN Resolution 40/32 of 29/11/1985 and 40/146 -13 December 1985, gathered for Congress on Prevention of Crimes endorsed the Basic Principles on the independence of judiciary.

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1 D Pannick, Judges (Oxford University Press, 1987, P 17.)

2 a Statement issued in October 2012 (vide Daily FT 11.10.2012– part of "O-1") by Jayantha Dhanapala, former Under-Secretary General, United Nations, and Prof. Savitri Goonesekere, Senior Professor of Law, University of Colombo, on "Judicial Independence", on behalf of a Forum comprising eminent persons, referred to as the "Friday Forum":

In that Resolution, out of Articles 20, Article 1 notes that;

> ***"The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."***

Ensuring the integrity of the global judiciary, an informal group of Chief Justices and Superior Court Judges around the world in 2000 took a task to draft principles with their experiences and skills with also sense of dedication for integrity of the judiciary to enhance globally.

The draft of Bangalore Principles was tabled in meeting of the Judicial Integrity Group was held in Bangalore, India, on 24, 25 and 26 February 2001. Then, it went through consultation process. A revised version of the Bangalore Principles Draft was next placed before a Round-Table Meeting of Chief Justices on 25 and 26 November 2002 in The Hague, Netherlands. The Bangalore Principles of Judicial Conduct adopted from that meeting. The core values recognized in Bangalore Principles are Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence.

It is to be noted that United Nations Social and Economic Council, by resolution 2006/23, has invited member States to encourage their judiciaries to take into consideration the Bangalore Principles in respect to the professional and ethical conduct of the members of the judiciary[3]. Thus, the Bangalore Principles lay for firm foundations for a global judiciary of unimpeachable integrity.

Judicial Office

Some of you as judges, would recall, the day you were called to the judiciary. The author was appointed as a judicial officer in Sri Lanka 26 years back, on 01/07/1998 and after six months of extensive training by the Sri Lanka Judges Institute, that was headed by Hon. Justice J.F.A. Soza, the Director, Retired Judge of the Supreme Court and Hon. Justice Douglas Wijeratne; Retired Judge of the Court of Appeal, the Deputy Director.

The author can still remember, before the batch of ten judges was be scattered island wide, the Hon. Chief Justice, then, His Lordship G.P.S. De Silva Esq. addressed and stressed us that we should uphold the image of judiciary to the maximum, the icon of the judiciary is for peasant villagers is the local judge, thus, the image should not be tarnished at any cost by the local judge of the area.

In this regard, it is to be noteworthy to consider Hon. Sir Gerard Brennan, AC KBE, Chief Justice of Australia addressed which was delivered to newly inducted judges on

3 Article1 of Resolution 2006/23 Strengthening basic principles of judicial conduct (https://www.refworld.org/legal/resolution/ecosoc/2006/en/47016, accessed on 13/09/2024)

"*THE ROLE OF THE JUDGE*". He noted;

> *"A judge's role is to serve the community in the pivotal role of administering justice according to law. Your office gives you that opportunity and that is a privilege. Your office requires you to serve, and that is a duty. No doubt there were a number of other reasons, personal and professional, for accepting appointment, but the judge will not succeed and will not find satisfaction in his or her duties unless there is continual realization of the importance of the community service that is rendered…*
>
> *…You are privileged to discharge the responsibilities of office and you are obliged to leave it unsullied when the time comes to lay it down. What you say and what you do, in public and to some extent, in private, will affect the public appreciation of your office and the respect which it ought to command…*
>
> *… The standards of Caesar's wife are the standards that others will rightly apply to what you say and do and, having a high conceit of your judicial office, they are the standards you will apply to yourself. These standards apply to matters great and small…*
>
> *You have joined or you are joining that elite – an elite of service, not of social grandeur – and your membership of it can be a source of great personal satisfaction and no little pride. You will not grow affluent on the remuneration that you will receive; you will work harder and longer than most of your non-judicial friends; your every judicial word and action and some other words and actions as well will be open to public criticism and the public esteem of the judiciary may be eroded by attacks that are both unjustified and unanswered. But if, at the end of the day, you share with my colleagues whom you highly esteem a sense of service to the community by administering justice according to law, you will have a life of enormous satisfaction. Be of good and honourable heart, and all will be well"*[4]

It should be noted several definitions have been given in the Bangalore Principles and followings are to be specially noted. As individual judge not only you as the judge but also as immediate staff member or family member should observe the Bangalore Principles with some extent in secure independence of the judiciary. Those definitions are;

> *"**Court staff**" includes the personal staff of the judge, including law clerks;*
>
> *"**Judge**" means any person exercising judicial power, however designated;*
>
> *"**Judge's family**" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household;*

4 NATIONAL JUDICIAL ORIENTATION PROGRAMME, held in NOVOTEL NORTHBEACH, WOLLONGONG on 13 October 1996, full text can be accessed by https://www.hcourt.gov.au/assets/publications/speeches/former justices/brennanj/brennanj_wollong.htm (Accessed on 13/09/2024)

> *"**Judge's spouse**" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.*

Thus, you should instruct your spouse, family members, staff members the responsibility to be shouldered by them in keeping independence of the judiciary. The independence of judiciary deals with the independence and impartiality of individual judges in relation to the appointment, tenure, payment of salaries and procedures for removal from office, in broader sense it is about the collective independence of the institution of judiciary from the interference by the executive."[5]

Judicial Oath

In Sri Lanka, there is no specific judicial oath, to be taken when appoint to the judicial office. However, it is to be noted all public servants take two oaths, one to perform duties in accordance with the law and the Constitution and you will be faithful to the Republic. [6]

The other oath is to be taken under 6th Amendment and the Seventh Schedule refers to Oath/ affirmation to be taken or subscribed under Article 157A and article 161(d) (iii) of the Sixth Amendment to the Constitution. [7]

Core Principles

As a judge, you should possess values which are tended to be firmly held and guided your actions well and the judicial conduct. These values are deep rooted and permanent.

On the other hand, you should possess good attitudes for fruitful output of your job. It encompasses the way of responding people and situation you handle as a judge. It entangles with values you hold. Attitudes can be changed with time and your learning thrives.

In a judicial training followings are listed for top 10 as values and attitudes[8] by the judges.

> **Values**; Honesty, Fairness, Justice, Balance, Competency, Knowledge, Wisdom, Trustworthiness, Leadership and Determination
>
> **Attitudes**; Patience, Open-Mindedness, Self-Discipline, Confidence, Tolerance, Diligence, Integrity, Conscientiousness, Adaptability

5 Nanayakkara, Kirtichandra. "Judiciary." In Search of a New Sri Lankan Constitution. Pannipitiya, Sri Lanka: Stamford Lake, 2012. 298. Print.

6 Official oath or affirmation."I ..... do solemnly declare and affirm /swear that I will uphold and defend the Constitution of the Democratic Socialist Republic of Sri Lanka."

7 It reads thus: " I ……do solemnly declare and affirm/swear that I will uphold and defend the Constitution of the Democratic Socialist Republic of Sri Lanka and that I will not, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka.

8 "Judicial Ethics Train the Trainer Workshop", from June 7 to 9 2024, Galadarai Hotel, Colombo, Sri Lanka, Author was a participant.

The Bangalore Principles expect to inculcate following values by every judge for themselves for upholding the judicial integrity. Followings are the six core principles.

1. Indepencence

"Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects."[9]

Article 19 of the Universal Declaration of Human Rights (UDHR), which was proclaimed by the United Nations General Assembly on 10th December 1948, provides that:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

Hence, the trial judge's first duty in criminal and civil litigations is to ensure a fair trial. Trial judges retain a residual background jurisdiction to prevent or correct injustices for which there would otherwise be no remedy.

It should be noted that judicial independence is not a private right or a principle for the benefit of judges as individuals, but the cornerstone of impartiality and a constitutional right of every member of the public. Independence is both individual and collective or institutional[10] Further, Judicial Conduct is to be assessed objectively through the eyes of the reasonable person[11] being a judge does not give any special privilege. As Thomas Fuller (1654-1734) noted;

> *"A judge should at all times comply with the laws of the land- 'Magistrates are to obey as well as execute laws"[12].*

There are 6 sub principles in judicial independence which will be dealt with in detail elsewhere in this article.

2. Impartiality

> *"**Impartiality is essential to the proper discharge of the judicial office**. It applies not only to the decision itself but also to the process by which the decision is made."[13]*

9 "COMMENTARY ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT", THE JUDICIAL INTEGRITY GROUP March 2007, Page 39, https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf {accessed on 19/09/2024)

10 1996 Australian Law Journal 126

11 https://vula.uct.ac.za/access/content/group/9bd11bce-1f06-4178-86d8962580ee400d/CodesofConduct/CodesOfConductPrint.pdf (accessed on 19/09/2024)

12 Code of Conduct for Magistrates 5

13 "COMMENTARY ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT", THE JUDICIAL INTEGRITY GROUP March 2007, Page 57, https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf {accessed on 19/09/2024)

The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance through a perceived conflict of interest, the judge's behaviour on the bench, or his or her associations and activities outside the court.

Impartiality could be subdivided to followings;[14]

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

2.5.1 The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 The judge previously served as a lawyer or was a material witness in the matter in controversy;

2.5.3 The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy;

One must not be a judge in his or her own cause since the judge's real or perceived partiality does not normally benefit him or her but another person.[15]

Further in ***R. V. Sussex Justices, ex–parte McCarthy***[16] Lord Hewart, says how impartiality should be as;

14 https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf, P3, (accessed on 26/09/2024)

15 ***R v. Bow Street Stipendiary Magistrate, Ex parte Augusto Pinochet Ugarte (No.2***), House of Lords, United Kingdom, [1999] 1 LRC 1.

16 [1924] 1 KB 256

> ***"It is not merely of some importance, but it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done"***.

It should be said, as a judge you should never make any comment in public relates to a case and it might show absence of impartiality to a certain party. As Justice Soza taught us, a waging tongue is a sinister for a judge. If you speak on the bench, party may prejudge you. Prejudging on your consistently is allowed. You cannot be unpredictable. As an example, if you are equally act on bail matters, one will predict that he will be getting the same results. That shows your equality. But you talk too much on the bench; a party may guise the outcome of the case. That should not be allowed.

Further, it is a settle norm that bias kills impartiality. The judge's body language may reflect bias. It is prohibited private communication with legal representatives, any witness or juror even though trial is concluded. His reason for judgment should be in plain text in written form and he has no duty to defend his decision to anybody as he is the sole adjudicator, if decision is wrong, it is a matter for appellate forum.

Moreover, the political activities and association in public taint the image of impartiality. It should be always remembered that you are a judge for 24 x 7 (24 hours for seven days). I still can remember, when I was the Magistrate of Elpitiya in 1999, I was requested to perform a scene visit by Mr. D. Premaratne, Head Quarters Inspector (HQI) of Elpitiya Police Station on the deaths of five children age around 10 years. This was made around 9.45pm, night. As judges, you do not do scene visits after dark hours, as it hinders your observations. The deaths were due to an explosion of a hand grenade. Since, it was a homicide; the HQI produced a white paper before me to begin with the investigations. The boys were playing cricket in the bank of Bentota River and cricket ball went to a bush adjacent to the bank. In searching of the cricket ball, one boy found odd shape ball like a rugby ball. Five boys were curious about the ball and due to the curiosity, one was pulled the pin and bomb was exploded killing all 5 boys. The incident was happened around 5.30pm, and no one knows that dead bodies were lying at the river bank. The bodies were recovered by their parents around 7pm in searching of missing kids. The first complain was made after an hour later. Normally, Police put guards to protect dead bodies till the next morning. I was informed that alligators from river had come to eat dead bodies, thus inquest preferably be stared in the night itself. After, facts were reported I proceeded to the scene in the dark and concluded scene visit. I wore a causal wear as I should go to the river bank with mud. Normally, in the inquest you should wear normal attire without the cloak.

Thus, as Magistrate, you are on call for 24 hours. You cannot leave the station without putting acting appointment. The rule of law of your area is on your hand. On the other

hand, as a civil judge, you take case briefs to your home to be prepared for judgments. You search case laws, go through evidence, and make judgments. Thus, unlike other jobs, it is twenty four hours duty every day.

Impartiality of a judge was considered in ***Locabail (UK) Ltd. v. Bayfield Properties Ltd***:[17] where it was held that;

> *"--- if, before he begins, the judge is alerted 10 some mailer that might, depending on the full facts throw doubt on his fitness to sit, he should inquire into the full facts, so far as (hey are ascertainable, and make appropriate disclosure. If (he mailer only emerges during the hearing, he is obliged to disclose what he then knows. He is not bound to fill gaps in his knowledge, which if filled might provide stronger grounds for objection, but if he does make further inquiry and discovers further relevant facts, he is bound to disclose them. However, it is generally undesirable that hearings be aborted unless the reality or appearance of justice require such a step."*

In ***Dr. Karunaratne v. Attorney General and another***[18] Gunersekera J. held, at page 302,

> *"in regard to the application of the* ***test of reasonable suspicion of bias it must be shown that the suspicion is based on reasonable grounds*** *which would appeal to* ***the reasonable right thinking man****, it can never be based on conjecture or on flimsy insubstantial grounds" and further that "there must be material which shows a tendency to favour one side unfairly at the expense of the other"*

It should further be noted that there may be real likelihood of bias where there is, for example; personal friendship or hostility, family or other close relationship with a party[19] (Not the counsel). Some judges puzzled whether on what ground to be recused form the case. As noted, before the elevation of judicial office, every judge has undergone an apprenticeship or worked with a senior, and if senior appears before you, should he recuse from the case. It is my view since you do not have personal interest to the case, you should not recuse from the case. If spouse of the other fellow judge appears before you, you should treat them in equal manner on the merits of the each case. It is heard since spouse of the fellow judge appears the negative orders have always been made to show impartiality, is misnomer. It is heard, a judge who worked in a bank previously, before elevation to judicial office, had recused every case when particular bank was a party to the action, is also a misnomer. If all judges recuse on the same basis, separate court has to be set up. The real impartiality should be considered by the very own judge whether he can act with impartiality. In this regard, biases are subtle and can be identified in many forms.

17 (2000) Q.B. 451, CA (Civ. Div.),

18 [1995] 2 SLR 298

19 Vide De Smith, Judicial Review of Administrative Action 2nd Edition, pages, 246-252

Unconscious bias/implicit bias refers to a prejudice or stereotype an individual may hold about a particular group of people that they aren't fully aware of. Also known as implicit bias, this bias can be directed toward people of certain races, gender identities, sexual orientations, physical abilities or even personal traits.[20]

Another form of bias is cognitive bias. It is a systematic error in thinking that occurs when people process and interpret information in their surroundings, influencing their decisions and judgment. [21]

There are other forms of biases such as Affinity Bias, Framing bias, Gender bias. As a judge you should minimize and understand these biases and pitfalls when judging.

3. Intergirty

"Integrity is essential to the proper discharge of the judicial office."

To be a judge, he or she should have integrity. It is sine qua non for proper discharge of judicial office. The components of integrity are honesty and judicial morality. A judge should always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office; be free from fraud, deceit and falsehood; and be good and virtuous in behaviour and in character. There are no degrees of integrity as so defined. Integrity is absolute. In the judiciary, integrity is more than a virtue; it is a necessity.[22] A judge with integrity is honest and possesses high principles that are strong and does not bend in the breeze. He does not surrender his integrity at any cost. Integrity is subdivided in following manner.

3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.[23]

Thus, it is important that a judge should maintain high standards in his private and public life.

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.[24]

It is a famous notion that a judge, like Caesar's wife, must be above suspicion," thus, is behavior must be exemplary.

20 https://builtin.com/diversity-inclusion/unconscious-bias-examples (Accessed on 26/09/2024)

21 Kahneman D., Slovic P., Tversky A. (eds.). (1982). Judgment Under Uncertainty: Heuristics and Biases. New York, NY: Cambridge University Press. (https://www.verywellmind.com/what-is-a-cognitive-bias-2794963 accessed on 26/09/2024)

22 Ibid 13, Page 79

23 Ibid 13, Page 80

24 Ibid 13, page 83

In ***Muzaffar Hussain v. State of Uttar Pradesh,*** [2022 SCC On Line SC 567, decided on 06.05.2022][25] Indian Supreme Court, in a case where a Judge was accused of misconduct, the bench of Dr. DY Chandrachud and Bela M. Trivedi, JJ, has held that showing undue favour to a party under the guise of passing judicial orders is the worst kind of judicial dishonesty and misconduct. The extraneous consideration for showing favour need not always be a monetary consideration. The bench further noted;

> *"It is often said that "**the public servants are like fish in the water, none can say when and how a fish drank the water"**. A judge must decide the case on the basis of the facts on record and the law applicable to the case. If he decides a case for extraneous reasons, then he is not performing his duties in accordance with law. **As often quoted, a judge, like Caesar's wife, must be above suspicion.**"...*
>
> *"There was enough evidence and material to show that the appellant had misconducted himself while discharging his duties as a judicial officer, and had passed the judicial orders in utter disregard of the specific provisions of law, to unduly favour the subsequent purchasers of the acquired lands who had no right to claim compensation, and that such orders were actuated by corrupt motive. Under the circumstances, the High Court was perfectly justified in exercising its supervisory jurisdiction under Article 235 of the Constitution."*

4. Propriety

> *"Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge."*[26]

Propriety and the appearance of propriety, both professional and personal, are essential elements of a judge's life.

Since the public expects a high standard of conduct from a judge, he or she must, when in doubt about attending an event or receiving a gift, however small, ask the question, "*How might this look in the eyes of the public?*"

Following are subdivisions of propriety;

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.[27]

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen

25 https://www.scconline.com/blog/post/2022/05/09/judges-undue-favour-judicial-misconduct-dishonesty-supreme-court-judgment-legal-law-updates-research-news/ (Accessed on 26/09/2024)

26 Ibid 13, Page 85

27 Ibid 13, Page 86

and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

A judge is required to live an exemplary life off the bench as on it. A judge must behave in public with the sensitivity and self-control demanded of judicial office, because a display of injudicious temperament is demeaning to the processes of justice and inconsistent with the dignity of judicial office.[28]

4.3 A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.[29]

A judge is ordinarily required to recuse himself or herself if any member of the judge's family (including a fiancé or fiancée) has participated or has entered an appearance as counsel.

4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case[30].

4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.[31]

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.[32]

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.[33]

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.[34]

28 Ibid 13, Page 87
29 Ibid 13, Page 89
30 Ibid 13, Page 92
31 Ibid 13, Page 94
32 Ibid 13, Page 95
33 Ibid 13, Page 98
34 Ibid 13, Page 99

A judge will need to take special care to ensure that his or her judicial conduct or judgment is not even sub-consciously influenced by these relationships. Unconscious bias.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.[35]

4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.[36]

4.11 Subject to the proper performance of judicial duties, a judge may:

4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters; [37]

4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;[38]

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge;[39]

4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.[40]

A judge may engage in appropriate extra-judicial activities so as not to become isolated from the community. A judge may, therefore, write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such activities do not detract from the dignity of the judge's office or interfere with the performance of the judge's judicial duties. If a judge does not know the grievances of the public, he came to the world with a golden spoon in the mouth; such a judge cannot be treated as well acquainted judge and give sound judgment. Judge should know the smell of the public.

35 Ibid 13, Page 100
36 Ibid 13, Page 104
37 Ibid 13, Page 105
38 Ibid 13, Page 106
39 Ibid 13, Page 107
40 Ibid 13, Page 111

4.12 A judge shall not practise law whilst the holder of judicial office.[41]

A judge has the right to act in the protection of his or her rights and interests, including by litigating in the courts. However, a judge should be circumspect about becoming involved in personal litigation. As a litigant, a judge runs the risk of giving the impression that he or she is taking advantage of his or her office. The judge also risks having his or her credibility adversely affected by the findings of judicial colleagues. Recently, several judges have recused from hearing as the accused was a colleagues of them.

4.13 A judge may form or join associations of judges or participate in other organizations representing the interests of judges.[42]

4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.[43]

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.[44]

It should be gathered that a judge is under constant public scrutiny and comment. Though, judges are humans, have basic rights like others, they should accept restrictions on his or her activates. It is to be said one of my colleague who sat every Friday nights to ease his work pressure and had his whiskey alone while watching movie since he cannot move with his friends or go to a pub to ease his pressure. You may see what a burdensome and cumbersome these limitations, yet, you abdicate your rights in the name of judicial office.

As a judge, you must minimize social contact. As a judge you should avoid social hospitality. When attending social events, you must consider, your independence, integrity, impartiality and dignity would be compromised in attending such event. Further, when

41 Ibid 13, Page 114
42 Ibid 13, Page 116
43 Ibid 13, Page 117
44 Ibid 13, Page 119

attending such event, your relationship with the host and length of relationship, size of gathering, was it pre-arranged or spontaneous, any attendee has a case before you, your attendance will lead public criticism must be considered. Years back, incident took place in the Central Province, a High Court Judge had attended on the invitation in a zonal cricket tournament as chief guest which was arranged by the District Judge and the court staff. At the main function, he was asked to cut a cake to mark the occasion which other judges and some Bar Association members were also present and surrounded by him at the time. The High Court Judge was totally new to the station without knowing he participated the event as it was a judicial matter of fellow officers, but it was surprised when online web criticized the High Court Judge that he posed a photo with an accused. It was just to tarnish the image of the judge and the judiciary. However, it was later realized the accused was the Mayor of the area who has cases in the Magistrate Court not before the judge, as friend of the President of local Bar Association he (the accused) was invited to the main event. It is true, that you cannot remember every case, every suspect, and every litigant. But, in this incident, the damage had been done. On the other hand, you cannot reply to the public. Thus, no replying cannot be treated as an admission of allegation. Hence, when attending public events, posing photos, you should be extra careful.

Using social media also another aspect is to be considered. It is not prohibited to maintain a Face Book Account as a judge. But posting on the time line or uploading photos should not be avail for public criticism. However, there is circular of Judicial Service Commission on dealing with Social Media that no post which creates a public criticism or inappropriate should not published by the judge and which creates a serious misconduct[45].

Some suggested that Face Book or Social Media Accounts should be in fake name and judges should not put their real names. I do not think that is a good idea as you may guilty for cyber crimes and offence of impersonation. When accepting friends request is also be seriously considered. Some party litigant may send a request, if you do not know the person personally; you should never accept a request. Accepting friends requests from lawyers appear before you are also questionable. If that lawyer is not honorable he or she may misuse your friendship in Face Book.

It is heard when one litigant went for consultation with a counsel then, he was asked the court which the case is to be called. When, he mentioned the court, the counsel opened his Face Book and showed a photo where judge was a Face Book friend of him and asked

45 Circulars issued by the Judicial Service Commission on September 1, 2010, and another by the then-Chief Justice on September 30, 2016, which directed District Judges, Magistrates, and High Court Judges to refrain from making public statements to the media. Vide; https://english.newsfirst.lk/2024/06/25/wijeyadasa-challenges-jsa-statement-as-parliamentary-privilege-violation , (accessed on 04/10/2024)

is she the judge? Mentioning, that judge is a friend of him. This could be happened to any judge. Thus, if you accept a friendship, that friendship should be come from honorable friend.

In ***SANDRA CHACE vs ROBERT LOISEL, JR.,*** IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT, Case No. 5D13-4449, January 24, 2014, COHEN, J.[46] has decided, though, there is no prohibition to accept friendship request, if the relationship of judge so close with litigant or attorney he should recuse from hearing; he noted;

> *"In Domville v. State, 103 So. 3d 184 (Fla. 4th DCA 2012), rev. denied, State v. Domville, 110 So. 3d 441 (Fla. 2013), the Fourth District addressed a Facebook issue with regard to judges "friending" attorneys through social media. That court determined that a judge's social networking "friendship" with the prosecutor of the underlying criminal case was sufficient to create a well-founded fear of not receiving a fair and impartial trial in a reasonably prudent person. Id. We have serious reservations about the court's rationale in Domville. The word "friend" on Facebook is a term of art. A number of words or phrases could more aptly describe the concept, including acquaintance and, sometimes, virtual stranger.* ***A Facebook friendship does not necessarily signify the existence of a close relationship. Other than the public nature of the internet, there is no difference between a Facebook "friend" and any other friendship a judge might have****. Domville's logic would require disqualification in cases involving an acquaintance of a judge. Particularly in smaller counties, where everyone in the legal community knows each other, this requirement is unworkable and unnecessary.(2 Of course, there are situations in which* ***a relationship between a judge and a litigant or attorney is so close that a judge should recuse himself or herself.*** *Most judges have standing orders of recusal in such circumstances, or absent such an order, can be subject to a motion to disqualify) Requiring disqualification in such cases does not reflect the true nature of a Facebook friendship and casts a large net in an effort to catch a minnow."*

However, no communication relating to a ended or pending case should not be discussed with a litigant or attorney by a judge in any form of social media, such as Face Book, Whatsapp, Messenger etc... Further, it is to be said that no legal advice would be given in any form of social media to an attorney or a litigant as judge bending before you or elsewhere. The danger of giving advice is that person may quote you or print your advise which may not perfect in legal sound or influence their attorney or litigant or opposite party, which you may get into a peril. By doing so, your propriety may be deteriorated.

46 https://5dca.flcourts.gov/content/download/509208/opinion/Opinion_13-4449.pdf (accessed on 27/09/2024

So, never say ‘Hi’ to young attorneys appear before you, they might show it to others and laugh at your behind. Recently, a police complain was made against a judge by a husband of young lady lawyer frequently appearing before judge for taking calls at odd times. You should never, popular or unpopular in your station and should maintain the neutrality when behaving.

When considering Propriety further, dealing with staff members professionally is necessary. If you are a male judge your relationship with female subordinate officer must be cautious and they should be treated with dignity. If you share with your meal with a subordinate lady officer, it leads to gossiping around and dilute the judicial office. Developing unbecoming relationship with a female or male member in the staff or in a legal fraternity would deteriorate your personal image as an honorable man or woman. Remember, you do not urinate on your doorstep. If you do this in your office, it has the similar effect. You should treat them all equal and be avail for their grievances. Recommending for promotion or increments, you should never gain personal favors in any form gratification such as sextortion (sexual bribes).

If you are a party animal, you should not be a drunkard in public. As I noted judge above, if you want to drink, drink alone, avoid parties, if you are compelled to go for a party don’t go early go in the middle and leave after major event. Don’t booze amidst the party.

Moreover, dealing with Police Officer, including your personal security officer (PSO) must be cautious. They were appointed by the Government that you to be protected and it is their duty. If something happened to you, they will immediately be interdicted and charge sheeted. Thus, they will come behind you like dog chain where ever you go. Hence, if you do not want their protection ask them to put a note in their note book to be on the safe side for them. If you take them in a public, ask them to come behind you without any hindrance to the public. Further, never take them inside to a shopping malls, banks, schools etc…and not with weapons.

Since, you are given a driver’s allowance, you cannot deploy a police officer as driver and it is prohibited by a circular. Once you seated in the driving seat, you are a driver, not the judge. You should obey road rules. With regard to subordinate staff, they should be educated their responsibilities and to protect dignity and gain public confidence.

It is to be advisable not to criticize legal counsels, litigants, and court staff in public. If you want to blame them, get them with President of Bar Association or with a senior member and show their weaknesses and warn them. You should always remember, before you become a judge, you were a member of the Bar, and if you were dismissed, you should go again and join with them. Thus, due respect should always given to the legal profession by a judge. Whether, senior or junior member of the Bar, if the application is right,

you should allow them. As a judge you must act judiciously not maliciously. If you act with malice, you ceased to be a judge. Although you have given judicial discretion, it should be applied judiciously. In ***Dharmaratne v Dassanaike*** [2006] 3 SLR 130 His Lordship Andrew Somawansa (P/CA) clarified the judicial discretion as;

> *"Discretion given to a judge must be exercised according to the rules of reason and justice, not according to private opinion, according to law and not humour, its exercise must be uninfluenced by irrelevant consideration* ***must not be arbitrary****, vague and fanciful* ***but legal and regular****, and it must be exercised within the limit to which* ***an honest man competent to discharge his office ought to confine himself****"*

Finally, you must remember you cannot demand the respect but you can earn it. Don't be a boss, be a leader.

5. Equality

> "*Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office."*[47]

A judge should be familiar with the international and regional instruments that prohibit discrimination against vulnerable groups in the community, such as the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Convention on the Elimination of All Forms of Discrimination against Women (1979), the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (1981), and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992). Equally, a judge must recognize article 14, paragraph 1, of the International Covenant on Civil and Political Rights, which guarantees that "*All persons are equal before the courts*", and article 2, paragraph 1 of the Covenant which - read with article 14, paragraph 1 - recognizes the right of every individual to a fair trial without any distinction whatsoever as regards race, colour, sex, language, religion, political or other convictions, national or social origin, means, status or other circumstances. The phrase "other circumstances" (or "other status") has been interpreted to include, for example, illegitimacy, sexual orientation, economic status, disability, and HIV status.

It is, therefore, the duty of a judge to discharge his or her judicial functions with due respect for the principle of equal treatment of parties by avoiding any bias or discrimination and by maintaining a balance between the parties and ensuring that each receives a fair hearing. Judge must avoid stereotyping. Fair and equal treatments have long been regarded as essential attributes of justice. Equality according to law is not

47 Ibid 13, Page 121

only fundamental to justice, but is a feature of judicial performance strongly linked to judicial impartiality. The equality is enshrined in Sri Lankan Constitution under Article 12. [48] Thus, every judge is bound to give equality to the parties.

The equality has been divided into following subheads;

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").[49]

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.[50]

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.[51]

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned in a matter before the judge on any irrelevant ground.[52]

The first contact that a member of the public has with the judicial system is often with court staff. It is therefore especially important that the judge ensure, to the fullest extent within his or her power, that the conduct of court personnel subject to the judge's direction and control, is consistent with the foregoing standards of conduct. Such conduct should always be beyond reproach and, in particular, court staff should refrain from gender insensitive language, as well as behaviour that could be regarded as abusive, offensive, menacing, overly familiar, or otherwise inappropriate.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.[53]

48 12. (1) *All persons are equal before the law and are entitled to the equal protection of the law.*
(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds:

49 Ibid 13, Page 123

50 Ibid 13, Page 124

51 Ibid 13, Page 125

52 Ibid 13, page 126

53 Ibid 13, page 127

Thus, a judge should be equal in every manner without considering race, colour, sex, religion, national, origin, caste, disability, age, marital status, sexual orientation, social and economic status. The lady justice is blind folded for maintain the equality. In putting a legal argument, whether a counsel made maiden appearance against the President Counsel or senior member of the Bar, the judge should act in favour for young counsel on merits, if the contention is right.

A judge should not pass remarks by words or conduct or indication, manifest bias or prejudice towards any person, group, makes derogatory comment based on ethnic, cultural, sexual or improper, insulting remarks towards litigants, counsels or a witness. He should not be gender bias.

6. Competence & Diligence

"*Competence and diligence are prerequisites to the due performance of judicial office.*"[54]

A judge to be competence in the performance of judicial duties should require legal knowledge, skill, thoroughness and preparation. A judge's professional competence should be evident in the discharge of his or her duties.

It is said that the judicial competence may be diminished and compromised when a judge is impaired by drugs, alcohol or other mental or physical impairments.

In some cases, it may be a product of inadequate experience, problems of personality and temperament, and the appointment to judicial office of a person who is unsuitable to exercise it and demonstrates that unsuitability in the performance of the judicial office.

In some cases, this may be the product of the incapacity or disability, for which the only solution, an extreme one, may be constitutional removal from office.[55]

The author was a Resident Magistrate for some times in Fiji Islands. In that, to hear family court cases, the Chief Magistrate should issue a letter of competency to handle family matters. In issuing, they consider the marital status of the judge, if he or she married and having kids, it is an additional qualification that judge knows and experienced the married life in considering divorce, custody and maintenance cases. I see which is very practical. In some jurisdictions, there are sprinters and bachelors are handling family matters and this aspect is a matter for concern. It is a valid point to be considered, in judging, if you should have swam the married lake, it easier to understand their problems and litigations. Thereby you can produce balance judgments. Thus, it is high time to be got married, if you are not married as a judge.

54 Ibid 13, Page 129

55 https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf page 129 (accessed on 27/09/2024)

In considering diligence, to consider soberly, to decide impartially, and to act expeditiously are all aspects of judicial diligence. Diligence also includes striving for the impartial and even-handed application of the law, and the prevention of the abuse of process. The ability to exhibit diligence in the performance of judicial duties may depend on the burden of work, the adequacy of resources (including the provision of support staff and technical assistance), and time for research, deliberation, writing and judicial duties other than sitting in court.

It should be said, since lack of trained English stenographers and typists, the author himself types his judgments and do independent research in delivering judgments. If judge can work without dependent, knows his Microsoft Office, knows research method, his judicial performance and diligence is drastically enhanced. The author learnt Microsoft at the age of 35 years. I hope, nowadays, all judges have computer literacy and more familiar with internet.

The following subdivisions are to be considered in competence and diligence.

6.1 The judicial duties of a judge take precedence over all other activities.[56]

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.[57]

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.[58]

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.[59]

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.[60]

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official

56 Ibid13, page131
57 Ibid13, page 132
58 Ibid 13, page 134
59 Ibid13, page 137
60 Ibid13, page 138

capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.[61]

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.[62]

In ***Jones v. National Coal Board***, Court of Appeal of England and Wales [1957] 2 QB p.55 at p.64, Lord Denning had this to say about role of judge;

"The judge's part . . . is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure, to see that the advocates behave themselves seemly and keep to the rules laid down by law, to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. . . Such are our standards."

In concern this value, the judicial duties must be given first place all over the other activities. The judge must perform all judicial duties, including delivering judgements and orders, efficiently, fairly with reasonable promptness.

In ***Jinadasa and Another v. Sam Silva and Others***, [1994] 1 SLR 232, in the Supreme Court of Sri Lanka, AMERASINGHE, J. held as to due diligence of judge;

> *"**A judge must ensure a prompt disposition of cases**, emphasizing that dates given by the court, including dates set out in lists published by a court's registry, for hearing or other purposes, must be regarded by the parties and their counsel as definite court appointments. **No postponements must be granted, or absence excused**, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot be otherwise provided for."*

In the court room, judge should control the proceedings within the legal framework and maintain the decorum of the court. In behaving the bench, it is important to note that you are always highlighted by the litigants, lawyers, police and prison officers. A judge on probation was dismissed by Judicial Service Commission in using vulgar, improper language in open court. Another judge was also interdicted using vulgar language in replying to Face Book comment which was made against his own post. If you use vulgar language in open court, it is amount to contempt of your own court. Whether, judge, lawyer or litigant, the contempt of court procedure is laid down, thus, you should well

61 Ibid13, page 140

62 Ibid 13, page 142

acquaint those procedures. In this regard the **Act No 8 of 2024-Contempt of a Court, Tribunal or Institution Act**, is the vital legislation. As Evidence Ordinance enacts, you should note allow scandalous question to be asked by a counsel.[63]

In enhancing the competence and diligence of the judge, on 8th of November 2017, the International Organization for Judicial Training (IOJI) introduced Judicial Training Principles. They identified that judicial training is a fundamental to judicial independence, the rule of law and the protection of the rights of all people. In general, the government should fund the judicial training and all members of the judiciary upon the appointment and during the tenure of the office must be given and undergone judicial righting for quality dispense of justice. Lamentably, it is to be noted slender vote have been given in the budgetary allocation for the judicial training and for the Sri Lanka Judges' Institute.

The training should be multidisciplinary and include training in law, non-legal knowledge, skits, social context, values and ethics. None other than any profession legal profession called learned profession. In that, you find learned trial judge, learned counsel, learned State Counsel. You cannot find learned Doctor, learned Engineer, learned Accountant in any profession, other than this, this is just because, to be a judge, counsel, prosecutor, you should learn all above subjects, hence, your knowledge should go beyond legal subjects. Be that as it may; to adjudicate a medical issue, judge should know the medical subject. For more or less, you, as judge must be thorough in subjects relating to each case. That is why profession called learned, in every sense. Thus, judicial training is sine qua non and at the end of the day, it gives quality production. It should be noted that the quantity of the judgments is not the case the quality of the judgments matters.

The above shows the judge's role in plain text.

Now I turn to the judicial independence, which is more important subject and first value of the Bangalore Principles. This principle is interwoven with above all principles.

What is independence?

In simple way, it can be said that independence is making decision without depending on anything, when a judge makes judicial decisions. Thus, the judge does not rely on any extra forces apart from oral and documentary evidence. A judge should make decisions without any fear or influence. It should be noted that the influence may come from his inside (inner mind) or it could be influenced from outside.

63 Vide section 149,150 and 151 of Evidence Ordinance.

R v Beauregard, Supreme Court of Canada, [1987] LRC (Const) 180 at 188, per Dickson CJ interpreted judicial independence as follows;

> *"**Judicial independence is not a privilege or prerogative of the individual judge. It is the responsibility imposed on each judge to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone.** The core of the principle of judicial independence is the **complete liberty of the judge to hear and decide** the cases that come before the court; **no outsider – be it government, pressure group, individual or even another judge should interfere, or attempt to interfere**, with the way in which a judge conducts a case and makes a decision."*

The **Article 10** of the Universal Declaration of Human Rights enunciates;

> *"Everyone is entitled in **full equality to a fair, and public hearing by an independent and impartial tribunal**, in the determination of his rights and obligations and of any criminal charge against him."*

Judicial independence

Bangalore Principle No 1 is concerned the judicial independence. The Principle says;

> *"Judicial independence is a **pre-requisite to the rule of law** and **a fundamental guarantee of a fair trial.** A judge shall therefore uphold and exemplify (show) judicial independence in both its individual and institutional aspects."*

When concern the rule of law, it is a political ideal that all citizens and institutions within a country, state, or community are accountable to the same laws, including lawmakers and leaders[64]. It is sometimes stated simply as "*no one is above the law*".

What is the foundation of rule of Law?

The Magna Carta is considered to be the first declaration in Western History to impose the rule of law. By signing Magna Carta, King John conceded that he as King of England was subject to the laws of the realm like every other citizen.

Famous clauses of Magna Carta are 39 and 40. Those are directly connected with rule of law;

> *39 "No free man shall be seized, imprisoned, dispossessed, outlawed, exiled or ruined in any way, nor in any way proceeded against, except by the lawful judgement of his peers and the law of the land."*

64 https://en.wikipedia.org/wiki/Rule_of_law#:~:text=The%20rule%20of%20law%20is,constitutionalism%20as%20well%20as%20Rechtsstaat. (Accessed on 03/10/2024)

40 "To no one will we sell; to no one will we deny or delay right or justice."

In ***VASUDEVA NANAYAKKARA vs. CHOKSY*** [2008] 1 SLR 134 at p 180-181]. S.N. Silva CJ held, that,

> *"…the Rule of Law is the basis of our Constitution as affirmatively laid down in the decision of this Court in Visuvalingam v Liyanage and Premachandra v Jayawickrema and consistently followed in several subsequent decisions.* ***The Rule of Law "postulates the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness, of prerogative or wide discretionary authority*** *on the art of the Government" (vide: Law of the Constitution by A. Dicey - page 202)."*

On the other hand, in relation to fair trial principle, it is mostly guaranteed under our Constitutional and the ICCPR Act. The salient constitutional provisions relating to fair trial are as below;

> *Article: 3. 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.*

Article 4: The Sovereignty of the People[65] shall be exercised and enjoyed in the following manner:–

> *(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;*
>
> *12. (1) All persons are equal before the law and are entitled to the equal protection of the law.*
>
> *Article 13(3) recognises the entitlement of a person charged with an offence to a "fair trial",*

It should be noted, in ***Attorney-General v. Segulebbe Latheef and Another*** (2008) 1 SLR 225, JAN De Silva (As he then was) adopted the fair trial principle in criminal matter to be paramount in every sense.

65 In Re The Nineteenth Amendment to The Constitution [2002] 3 SLR 85, it was held "This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People"

Further, International Covenant on Civil and Political Rights (ICCPR) Act No. 56 0f 2007, the section 4(1) of the Act enacts following fair trial principles;

> *"A person charged of a criminal offence under any written law, shall be entitled—*
>
> *(a) to be afforded an opportunity of being* ***tried in his presence***
>
> *(b) to defend himself in person or through* ***legal assistance of his own choosing*** *and where he does not have any such assistance, to be informed of that right;*
>
> *(c) to have* ***legal assistance assigned to him*** *in appropriate cases where the interest of justice so requires and* ***without any payment by him****, where he does not have sufficient means to pay for such assistance:*
>
> *(d) to examine or* ***to have examined the witnesses against him*** *and to obtain the attendance of witnesses on his behalf, under the same conditions as witnesses called against him;*
>
> *(e) to have the assistance of an interpreter where such person cannot understand or speak the language in which the trial is being conducted; and*
>
> *(f) not to be compelled to testify against himself or to confess guilt."* ***(right to be silence)***

It is a famous notion that justice delayed justice denied, justice hurried, justice buried or miscarried. In line with above notion, in ***Dietrich v The Queen***[66] in 1992, High Court of Australia established that a person accused of serious criminal charges must be granted an adjournment until appropriate legal representation is provided if they are unrepresented through no fault of their own and proceeding would result in the trial being unfair. Thus, as a judge you should always provide fair and considerable time to litigants to prepare their cases.

On the other hand in the case of ***Sheela Barse vs. Union of India,*** 1986 3 SCR 562, Indian Supreme Court has held that the right to speedy trial is a fundamental right. Further, it was stated that the consequence of violation of the fundamental right to speedy trial would be that the prosecution itself would be liable to be quashed on the ground that it is in breach of fundamental right.

Role of the Judge

It should be noted that in ***Sugath Karunarathne vs Hon. Attorney General,*** SC Appeal 32/2020, Decided on: 20.10.2020, His Lordship Aluwihare PC J. has mentioned the role of a judge as follows;

> *"I am mindful of the fact that the judges in* ***criminal courts are burdened with a heavy case load.*** *That, however,* ***does not excuse the trial judge to not follow the***

66 ***Dietrich v The Queen*** [1992] HCA 57; 177 CLR 292; 67 ALJR 1; 109 ALR 385; 62 A Crim R 176

procedural steps stipulated by law or to disregard the need to ensure that the Accused is accorded a fair trial, guaranteed by the Constitutional provisions and other laws.

Judges have a duty and are required to control the proceedings *adhering to the aforesaid requirements, and to* ***intervene where necessary to ensure the proceedings are conducted in a fair manner to all parties concerned****. In this respect the judges need to follow the proceedings closely and should be alive to the events unfolding before them*"

Judicial-Characteristics

I now consider the Establishment of judicial office and Security of tenure of office.

The Apex courts were established under Article 105 of the Constitution of Sri Lanka. It enacts;

> *105. (1) Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be –*
>
> *(a) the* ***Supreme Court*** *of the Republic of Sri Lanka,*
>
> *(b) the* ***Court of Appeal*** *of the Republic of Sri Lanka,*
>
> *(c) the* ***High Court of the Republic of Sri Lanka*** *and such other Courts of First Instance, tribunals or such institutions as Parliament may from time to time ordain and establish.*
>
> *(2) All courts, tribunals and institutions created and established by existing written law for the administration of justice and for the adjudication and settlement of industrial and other disputes*

Moreover, the Article 107 deals with appointments and removal of Judges of the Supreme Court and Court of Appeal. It enacts;

> *"107. (1) The Chief Justice, the President of the Court of Appeal and every other* ***judge of the Supreme Court and the Court of Appeal shall be appointed by the President 94[subject to the approval of the Constitutional Council****,] by warrant under his hand.*
>
> *(2) Every such Judge* ***shall hold office during good behaviour*** *and* ***shall not be removed*** *except by* ***an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity****:*

> *Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such* ***resolution is signed by not less than one-third of the total number of Members of Parliament*** *and sets out full particulars of the alleged misbehaviour or incapacity.*

Thus, there is separate procedure to be followed when removing an apex court judge. When tenure of office concerned article107 (5) enacts;

> *"The* ***age of retirement of Judges of the Supreme Court shall be Sixty-five years and of Judges of the Court of Appeal shall be Sixty-three years****."*

In ***EDWARD SILVA vs. BANDARANYAKE*** [1997] 1 SLR 92 at p. 95] Fernando J, referring to the President's power of appointing Judges of the Supreme Court stated;

> *"The learned Attorney-General submitted that the President in exercising the power conferred by Article 107 had a "sole discretion". I agree with this view. This means that the eventual act of appointment is performed by the President and concludes the process of selection. It also means that the power is neither untrammelled nor unrestrained, and ought to be exercised within limits, for, as the learned Attorney-General said,* ***the power is discretionary and not absolute. This is obvious****. If, for instance, the President were to appoint a person who, it is later found, had passed the age of retirement laid down in Article 107(5), undoubtedly the appointment would be flawed:* ***because it is the will of the People, which that provision manifests, that such a person cannot hold that office****. Article 125 would then require this Court, in appropriate proceedings, to exercise its judicial power in order to determine those questions of age and ineligibility. Other instances which readily come to mind are the appointment of a non-citizen, a minor, a bankrupt, a person of unsound mind, a person who is not an Attorney-at-Law or who has been disbarred, or a person convicted of an offence involving moral turpitude."*

At present, the President's power to appoint apex court judges is part with Constitutional Council. On the recommendation of the CC, the appointment has to be made.

In ***PREMACHANDRA vs. MAJOR MONTAGUE JAYAWICKREMA*** [1994] 2 SLR 90, at p. 102] Supreme Court stated;

> *"When considering whether the exercise of a statutory power or discretion, especially one conferred by our Constitution, is subject to review by the judiciary,* ***certain fundamental principles can never be overlooked****.* ***The first is that our Constitution and system of government are founded on the Rule of Law****; and to prevent the erosion of that foundation is the primary function of an independent Judiciary."*

In relation of power of Judicial Service Commission (JSC), following article is vital. Article 111H enacts.

> *"(1) The Judicial Service Commission is hereby vested with the Power to -*
>
> ***(a) Transfer judges of the High Court;***
>
> ***(b) Appoint, promote, transfer, exercise disciplinary control and dismiss judicial officers and scheduled public officers."***

If any complain made against a judicial officer, an observation was asked from said officer at the first instance. After the observation, if JSC further thinks, an explanation was called from the judicial officer. If the explanation was not satisfactorily, if the officer is in permanent cadre, charge sheet is to be issued and formal inquiry would be held by senior judge under the command of JSC. If judge is convicted for charges at the inquiry, he be dismissed, demoted or increment be withheld by the JSC on the recommendation of the tribunal.

In establishing, other courts were established under the section 2 of Judicature Act, No 2 of 1978. The Section 2 says;

> *"2. The Courts of **First Instance for the administration of justice** in the Republic of Sri Lanka shall be-*
>
> *(a) the High Court of the Republic of Sri Lanka;*
>
> *(b) the District Courts;*
>
> *(c) the Small Claims Courts;*
>
> *(d) the Magistrates' Courts;"*

The appointments of the minor judiciary as done by section 6 of the Judicature Act. It says;

> *"Every District Judge, Judge of the Small Claims Court and Magistrate and all such Additional Judges and Magistrates of such courts **shall be appointed to their offices by the Judicial Service Commission**.*
>
> *(1) Every person appointed to be or to act as a Judge or Magistrate, as the case may be, of a Court of First Instance shall before he enters upon his office take and subscribe or make and subscribe the **oath or affirmation of office prescribed in the First Schedule hereto.***
>
> ***(2) Along with oath of 6th Schedule to be taken***
>
> *(3) The age of retirement of a Judge of the High Court (other than a Commissioner of the High Court appointed under Article 111A of the Constitution) **shall be sixty-one years.***
>
> *(4) The age of retirement of all other Judges and Magistrates shall be as provided by rules made under the **Public and Judicial Officers (Retirement) Ordinance**."*

It should be noted Article 111M provides the Interpretation of Judicial Officer It enacts;

> *"Judicial officer" means **any person** who **holds office as judge**, presiding officer or **member of any Court of First Instance**, **tribunal or institution created and established for the administration of Justice** or for the adjudication of any labour or other dispute**, but does not include a Judge of the Supreme Court** or of the 112[**Court of Appeal**] or a person who performs arbitral functions or a public officer whose principal duty is not the performance of functions of a judicial nature"*

With regard to the Financial Security of Judges, Article 108 says as follows;

> *"108. (1) The salaries of the Judges of the Supreme Court and of the Court of Appeal shall be determined by Parliament and shall be charged on the **Consolidated Fund.***
>
> *(2) The salary payable to, and the pension entitlement of a Judge of the Supreme Court and a Judge of the Court of Appeal **shall not be reduced after his appointment**."*

In terms of Section 7 of the Judicature Act, the remuneration of a High Court judge is also charged to the **Consolidated Fund.**

In relation of deduction of tax, in S.C.S.D. No. 64/2022, "INLAND REVENUE (AMENDMENT) BILL", the Supreme Court had this to say;

> *"Accordingly, in exercising its constitutional jurisdiction over fiscal statues, this Court is mindful of the **full control Parliament exercises over public finance under the Constitution including imposing of taxes and levies**.*
>
> *"the **law operates unequally, and that cannot be justified on the basis of any valid classification, that it would violate the right to equality"***
>
> *"**No one has a vested right to continuance of the law as it stood in the past**; in **tax law it is imperative** that legislation conform to changing social needs and governmental policy. **A taxpayer may plan his financial affairs** in reliance on the tax laws remaining the same; he takes the **risk that the legislation may be changed**."*

Thus, it is to be noted, in arranging your financial affairs, you should not burden your liabilities unnecessary. However, the decision for deducting taxes from judges is *sub judicae*, under appeal in the Supreme Court[67].

In ***Dr. Nayaka Bandaralage Dileepa Namal Bandara Balalle and other, Vs A.S.M. Jayasingha, And Others CA/WRIT/35/2023*** (Judges Tax case) the following remarks have been made with regard to task of judges;

67 SC. Appeal NO.165/2003

"The judges do not hold public office. This is clear in that: i. Article 111 L and Article 111 J draw a clear distinction between judicial office and scheduled public officer; judges do not come within the rubric of "public office"

Judges are not under the Public Service Commission. iii. Article 170 of the Constitution where "judicial officer" is defined separately from "public officer". iv. A public officer is also defined and specifically mentioned that a public officer is not a judicial officer.

***Impartiality** : Judges are expected to be impartial and unbiased in their decision-making. They must set aside personal beliefs and emotions to ensure fair and just outcomes.*

***Legal Knowledge and Expertise** : Judges require specialized legal knowledge and experience to interpret and apply the law effectively. This sets them apart from the general population.*

***Public Scrutiny** : Judges' decisions are subject to public scrutiny, which can put them under a unique kind of pressure. Responsibility : Judges hold the responsibility of safeguarding the rule of law and protecting individual rights, making their role crucial in maintaining a just and orderly society.*

***Lifestyle and Social Circles** : Judges often maintain a distinct lifestyle, sometimes interacting more within legal circles and being mindful of their public image.*

Judicial officers face challenges, make personal sacrifices, and contribute to society in their own way, just like any other profession. It is essential to remember that judges are still human beings with personal lives, emotions, and experiences. While they may have a unique role, they are part of the society as well. The perception of judges as distinct and separate can vary across different cultures and legal systems. Ultimately, their distinctness lies in their professional duties and ethical obligations, but they remain integral members of the broader community they serve."

Clause 31 of the Beijing Principles, August 1995 states that the remuneration and conditions of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.

Further, in the '**UN Basic Principles on the Independence of the Judiciary'**, it is provided in **clause 11** that the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement shall be adequately secured by law.

The "**Latimer House Guidelines" for the Commonwealth, 11.2** states that as a matter of principle, **judicial salaries and benefits should be set by an independent commission and should be maintained**."

The decision of ***CA/WRIT/35/2023*** (supra) is *sub judicae* before Supreme Court and should not be discussed beyond this point.

The Ministry of Justice is the paying authority of the salary, as the executive branch. However, as a committee member of the High Court Judges' Association, the author aware that the Ministry of Justice had failed to release Rs.300,000 for printing for commutative stamp in completion of fifty years of Sri Lankan High Court. It is to be noted that the official felicitation in this regard was scheduled in June 2024 and it was also cancelled. The courts are revenue collectors of the Ministry of Justice by way of imposing fines and all monies were remitted to Provincial Councils and to the Ministry. Yet, there was no allocation for judicial training and betterment of infrastructure of the courts. This is something to be considered in name of independence of judiciary.

Administrative Independence

The smooth administrations of courts are secured by the Constitution.

The Article 111C (1) deals with the "***Interference with judiciary***" and enacts it is an offence an offence". It says;

> *"Every judge, presiding officer, public officer or other person* ***entrusted by law with judicial powers or functions*** *or with functions under this Chapter or with similar functions under* ***any law enacted by Parliament****…"*
>
> *"111C (2)* ***shall be guilty of an offence punishable by the High Court*** *on conviction after trial without a jury with imprisonment of either description for a term which* ***may extend to a period of one year or with fine*** *or with both such imprisonment and fine and may, in addition,* ***be disqualified*** *for a period not exceeding* ***seven years*** *from the date of such conviction from* ***being an elector"***

It is also be noted the interference of the decision of Judicial Service Commission is also an offence. Article 111 L provides;

> *"Every person who otherwise than in the course of such persons lawful duty,* ***directly or indirectly, alone or by or with any other person, in any manner whatsoever, influences or attempts to influence any decision or order made by the Commission*** *or to so* ***influence any member*** *thereof, shall be guilty of an offence and* ***shall on conviction be liable to a fine not exceeding one hundred thousand rupees*** *or to* ***imprisonment for a term not exceeding three years or to both*** *such fine and imprisonment."*

Judicial Independence could be separated into two branches. Those are;

1- **Individual** - This is independence of the judge alone

2- **Institutional** - Judiciary as whole and others particularly other branches of state organs that is legislature and executive

Thus, judiciary, in reality and in appearance must be independent in every sense to uphold the confidence of the public.

It should be noted, Wadugodapitiya J. in ***Victor Ivan and Others Vs. Hon. Sarath N. Silva & Others*** [2001] 1 SLR at pg. 327, held, in the guise of judicial decisions and rulings, Judges cannot and will not seek to usurp the functions of the Legislature, especially where the Constitution itself is concerned. Thus, all three branches of the State honour each others in their functions.

Relationship between individual and institutional independence

If the individual judge is with other branches of State, Judge may not be appropriate state of mind to adjudicate cases since the court which he presides has interference from other branches, that judge cannot be said independent. If a Judge favours for Government Agent of the area or Divisional Secretary, Government Officers, he cannot be free from executive. Thus, you as a judge may be placed on isolated, remote, area but you, as a judge should stay away from officers from other branches; however, you are alone at the station. If you tainted with individual independence, it reflects institutional independence as well, the judiciary is undermined as whole. Thus, your paramount duty is to protect yourself as well as the judicial institution.

Very recently, early this month (September 2024) His Lordship Chief Justice of India D.Y. Chandrachud invited Indian Prime Minister Hon. Narendra Modi for Ganpati Puja which was held in Chief Justice's Residence. The action of Chief Justice claimed open criticism. Lawyer and activist Prashant Bhushan said that Chief Justice Mr. Chandrachud's actions were a violation of the Code of Conduct for Judges.

He quoted the Code of Conduct for Judges as follows:

> *"A Judge should practice a degree of aloofness consistent with the dignity of his office. There should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held" Violation of Code*

Further, several prominent lawyers and politicians, including Indira Jaisingh, Prashant Bhushan and MP Sanjay Raut criticized Chief Justice of India D.Y. Chandrachud after he invited Prime Minister Narendra Modi on Wednesday (September 11, 2024) to participate in Ganpati Puja at the CJI's residence in New Delhi. They say it was dangerous precedent set by the highest official of the Court.[68]

68 **The Hindu, "*Indira Jaising, MP Sanjay Raut question CJI Chandrachud's independence after Ganpati Puja celebration with PM Modi*"** https://www.thehindu.com/news/national/cji-chandrachud-ganpati-puja-pm-modi-controversy reactions/article68633051.ece (accessed on 20/09/2024)

Connection between judicial independence and Doctrine of the separation of powers

It should be noted principle of Montesquieu's separation of powers noted followings;

- Concept is each branch of state organs is separate from each other,
- Branches are Executive, legislature and judiciary
- This is intended to guard against tyranny/dictatorship
- The doctrine of separation of powers believe that it protects democracy and forestalls/rejects tyranny

By the Privy Council, in ***Liyanage v The Queen*** [1967] 1 AC 259; 68 NLR 265, it was held that the doctrine of separation of powers was embedded in the said Constitution, albeit by implication.

It should be noted that *"Absolute power corrupts absolutely"* is the best-known quotation of the 19th century British politician Lord Acton.

The interference to the judicial independence by Executive and legislation, the below are few of the instances where the independence of the judiciary was questioned.

Year and the Event	Ratio of the consequence
1) 1952 - Appointment of Chief Justice.	Appointing Justice H. Basnayake over the most senior judge, Justice Nagalingam.[69]
2) 1974 - Acquisition of land.	A new interpretation law[70] (Interpretation (Amendment) Law No. 29 of 1974) was brought in by the legislature to nullify the majority decision of *Sirisena Vs. Minister of lands*[71].[72] (*Sirisena vs. Minister of* Lands 80 N.L.R 1)
3) 1978 – Second Republican Constitution	Addition of section 35 which awarded the president absolute immunity from suits. Therefore, the productivity of checks and balances was reduced.[73]
4) 1983 – Promoting a police officer who was sentenced guilty by the Supreme Court.	The government promoted the accused for a higher rank ignoring the decision of Vivie*nne Gunawardene Vs. Hector Perera.*[74] [1983] 1 SLR 305]

69 Wijenayake, Lal. "Blows on the independence of Judiciary in Post Independence in Sri Lanka." Independence of the Judiciary in Sri Lanka since Independence. Pannipitiya, Sri Lanka: Stamford Lake, 2004. 19. Print.

70 Interpretation (Amendment) Law No. 29 of 1974

71 Sirisena vs. Minister of Lands 80 N.L.R 1

72 Wijenayake, Lal. "Blows on the independence of Judiciary in Post Independence in Sri Lanka." Independence of the Judiciary in Sri Lanka since Independence. Pannipitiya, Sri Lanka: Stamford Lake, 2004. 23. Print.

73 Wijenayake, Lal. "Blows on the independence of Judiciary in Post Independence in Sri Lanka." Independence of the Judiciary in Sri Lanka since Independence. Pannipitiya, Sri Lanka: Stamford Lake, 2004. 37. Print

74 Vivienne Gunawardene Vs. Hector Perera Fundamental rights cases Volume 2, Page 426.

In ***Jathika Sevaka Sangamaya vs Sri Lanka Hadabima Authority,*** *SC Appeal No: 15/2013, Decided on: 16th December, 2015, Priyantha Jayawardena, PC. J, had this to say in separation of powers;*

> ***"Separation of Powers The doctrine of separation of powers is based on the concept that concentration of the powers of Government in one body will lead to erosion of political freedom and liberty and abuse of power.*** *Therefore, powers of Government are kept separated to prevent the erosion of political freedom and liberty and abuse of power. This will lead to controlling of one another. There are three distinct functions involved in a Government of a State, namely legislative, the executive and the judicial functions. Those three branches of Government are composed of different powers and function as three separate organs of Government. Those three organs are constitutionally of equal status and also independent from one another.* ***One organ should not control or interfere with the powers and functions of another branch of Government and should not be in a position to dominate the others and each branch operates as a check on the others. This is accomplished through a system of "checks and balances",***
>
> *Where each branch is given certain powers so as to check and balance the other branches…*
>
> *…**Sri Lankan Constitution shows that some members of the legislature are performing executive functions and thus, in respect of certain areas there is no strict demarcation of separation of powers between the executive and the legislature – for instance the members of Parliament are appointed as ministers who perform executive functions. The said position is reflected in Article 42 (1) and (2) of the Constitution."***

But, in practical, it is not the case. As an example, President Ranil Wickramasinghe refused to nominate judges to Constitutional Council for the Court of Appeal, despite 5 vacancies occurred for a year; where several requests were made by the High Court Judges Association. Not only that, the His Excellency criticized members of the judiciary in the Parliament said the Apex Court practices "*judicial cannibalism*". However, before the Presidential Election which was held in 21 September 2024, 4 vacancies were filed by him left one senior judge whom recommended by Hon. Chief Justice without any reason or rational. Till today, it was not filled (as at 04/10/2024). When appointing judges to the apex courts, the High Court Judges Association requested to give prominence by 4:1 ratio in favour of the judiciary. The Executive Committee of the High Court Judges Association made following remarks to justify the request;

> *"The only career path available to a High Court Judge is the appointment as a Judge of the Court of Appeal. Therefore the High Court Judges' Association concerned with the adverse consequences of delay in making appointment to the Court of Appeal upon the career prospects of the Judges of High Court who had served for more than twenty five years in various capacities. Your Excellency would be pleased to see that there is a legitimate expectation for the High Court Judges to be appointed as the Judges of Court of Appeal as they have made a huge sacrifice to uphold the rule of law of the country under challenging circumstances".*[75]

This request was not considered by the Executive. When one branch act with malice on other branch; the quality and the principle of separation power is seriously under threat.

The first value of Bangalore Principle that is judicial independence is divided into 6 sub values and its application.

Bangalore Principle 1.1

> *"**A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law**, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason."*

Independent exercise of judicial function, how to be exercised? That is only on the conscientious understanding of the law, without extraneous influence, inducement (not merely the ability to resist temptation of financial inducement but more importantly, resist the weakness induced by ambition)

As a judge, you should remember that the judicial independence is not a privilege or prerogative of the individual judge. It is the responsibility imposed on each judge to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone.

The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court; not influence by outsider; the pressure may be by government, pressure group, individual or even another judge should not interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision.

75 Letter dated 08/09/2024, to His Excellency Ranil Wickramasighe by the Secretary to the Association under the command of EXCo.

This value No 1 has been divided to sub divisions as follows;

Bangalore Principle 1.2

In this regard a judge not to be influenced by the society, when deciding as in preponderant social opinion or by parties to a dispute, judge should not be influenced. It says;

> "*A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.*"

It is a question that how independent of society is a judge expected to be? It is to be noted that the vocation of a judge was once described as being '**something like a priesthood'**.

Dr. Nihal Jayawickrama, eminent jurists noted recent news item as;

> *"I grew up, spending my childhood, adolescence and early adult life, in the home of a judge who ended his judicial career as head of the country's highest court. I also had the enviable experience of serving as his private secretary sometime between my graduation and entry into the profession. The life of a judge of that time, as I observed it, is perhaps best described in the words of Justice Michael Kirby of the High Court of Australia. The regime imposed on a judge, he said, "is monastic in many of its qualities". Lord Hailsham, a former Lord Chancellor, described the vocation of a judge as being "something like a priesthood". Sir Winston Churchill considered that "A form of life and conduct far more severe and restricted than that of ordinary people is required from judges". While judges did not isolate themselves from the rest of society, or from school friends and former colleagues in the legal profession, they rarely, if ever, socialized with politicians. They declined to perform the quasi-executive function of serving on commissions of inquiry. In that relatively calm and stable economy, their salaries were rarely increased. They drove, or were driven, to Hulftsdorp in their own cars. They lived in their own homes, except for the Chief Justice who was provided with an official residence."*[76]

Another judge wrote that the Chief Justice goes into a monastery and confines himself to his judicial work.[77]

However, it is also be noted that neither the judge's personal development nor the public interest will be well served if the judge is unduly isolated from the community he or she serves. Legal standards frequently call for the application of the reasonable person test. Judicial fact-finding, an important part of a judge's work, calls for the evaluation of evidence in the light of commonsense and experience. Therefore, a judge should,

76 Lord Hailsham, Lord Chancellor of England, cited in ***https://www.colombotelegraph.com/index.php/judicial-corruption/ ,*** Judicial Corruption, By Dr. Nihal Jayawickrama , Colombo Telegraph (Online edition), 3 October 2024, Accessed on 03/10/2024)

77 William H. Taft, Chief Justice of the United States Supreme Court, cited in David Wood, Judicial Ethics: A Discussion Paper (Victoria, Australian Institute of Judicial Administration Incorporated, 1996).

to the extent consistent with the judge's special role, remain closely in touch with the community.[78]

It should be noted in a judges workshop one judge said that when the induction as a judge his father had advised him to not to associate "Five Ps from the society which is said to be the truth. Those people are priests, politicians, press people, police officers and prostitutes[79]. To maintain the independence and impartiality, propriety, when associating people by judge, these should be double checked.

Further, under the one principle of natural justice, ***Nemo judex in causa sua***, a judge should not be a party to his own action.

Judges on Media

In relation to interact with media, Lord Kilmuir established the principle that judges should keep out of the media. The rule is called **"Kilmuir Rules."**

The backdrop for this is in 1955, the Director-General of the BBC suggested to the Lord Chancellor, Lord Kilmuir, that senior judges might participate in radio programs to talk about great judges of the past. The reply for that invitation was;

> *"…So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism.*
>
> *It would moreover, be inappropriate for the Judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment…"*

The rationale of the Kilmuir Rules was to protect judicial independence, one of the cardinal principles of constitutional system and rule of law. Yet one might justifiably take the view that judicial independence is not the same as judicial aloofness, and in line with above thinking Kilmuir rules were abandoned by Lord Mackay LC in 1987, ironically, on the basis that such rules were inconsistent with judicial independence. The view from the woolsack (Lord Chancellor) at that time was that judges needed to be able to decide for themselves when it was appropriate to speak out.

Lord Mackay of Clashfern in 1987, said that the Kilmuir Rules should be abolished in the United Kingdom. He noted;

78 *https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf* (accessed on 03/10/2024)

79 Hon. D.F.H. Gunawardhana, Judge of Sri Lankan High Court, "Judicial Ethics Train the Trainer Workshop", from June 7 to 9 2024, Galadarai Hotel, Colombo, Sri Lanka, Author was a participant.

> *"….I believe that [judges] **should be allowed to decide for themselves what they should do …. Judges should be free to speak to the press, or television,** subject to being able to do so without in any way prejudicing their performing of their judicial work. …It is not the business of the Government to tell the judges what to do."* [80]

If you into criticism, as a judge you cannot reply to them. In this regard Lord Denning MR in ***R v Police Commissioner of the Metropolis ex parte Blackburn (No 2)*** [1968] 2 QB 150 had this to say:

> *"All we would ask is that that those who criticise us will remember that, from the nature of our office, **we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy**. **We must rely on our conduct itself to be its own vindication**. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done."*

FREEDOM OF EXPRESSION AND ASSOCIATION

In considering the freedom expression Articles 8 and 9 of Basic Principles on the Independence of the Judiciary is much important. They say;[81]

> *"8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly, provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.*
>
> *9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence."*[82]

Bangalore principle 1.3

> *"A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom."*

80 The Times, 4 November 1987, P.3.

81 ADOPTED 06 September 1985 BY the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985

82 "COMMENTARY ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT", THE JUDICIAL INTEGRITY GROUP March 2007, Page 34, https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf (accessed on 19/09/2024)

As noted above in CJ India, judge should void inappropriate connections from the executive or legislature. The test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether a reasonable observer would (or in some jurisdictions "might") perceive/ understand/think the tribunal as independent. In this regard following incidence be considered.

- Member of Parliament asks to expedite the case of his friend, constituent. Not good.
- Acceptance by a judge during a period of long leave of full-time employment at a high, policy-making level of the executive or legislative branch (as special adviser on matters related to reform of the administration of justice) is inconsistent with the independence of the judiciary.
- Where a judge's spouse is an active politician, the judge must remain sufficiently divorced/detached from the conduct of members of his or her family to ensure that there is not a public perception that the judge is endorsing a political candidate.
- A practice whereby the Minister of Justice awards, or recommends the award, of an honour to a judge for his or her judicial activity, violates the principle of judicial independence.
- The payment by the executive of 'premium' (i.e. a particular incentive) to a judge in connection with the administration of justice is incompatible with the principle of judicial independence.

Bangalore Principle 1.4

Resist influence from sister/brother judges on the bench

> *"In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently."*

As you noted above, a judge is obliged to make independent decision. In other words, judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the actions or attitudes of other judges However, judicial decision-making is the responsibility of the individual judge, including each judge sitting in a collegiate appellate court.

Further, in the performance of his or her functions, a judge is no-one's employee. He or she is a servant of, and answerable only to, the law and to his or her conscience.

It is my understanding was for a quality and precise judgment, judge may get an second opinion from a mentor or a senior judge, if he cannot make a clear judgment. But he/ he should not totally rely upon them. He /she should weigh the evidence, facts and law

should make the conclusion thereafter. This would minimize unnecessary litigation due to flaw of judgment.

Bangalore principle 1.5

> *"A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary"*

That is to uphold safeguards to maintain operational and institutional independence. He cannot think inadequate resources, poor quality supporting staff and inappropriate political interventions should be actively exposed. A judge should be vigilant with respect to any attempts to undermine his or her institutional or operational independence. Public awareness of judicial independence must be encouraged in this regard.

Bangalore principle 1.6

> *"A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence."*

Public acceptance of, and support for, court decisions depends upon public confidence in the integrity and independence of the judge. This, in turn, depends upon the judge upholding a high standard of conduct in court. The judge should, therefore, demonstrate and promote a high standard of judicial conduct as one element of assuring the independence of the judiciary.

Conclusion

As above noted, the Bangalore Principles now provide the judiciary with a framework for regulating judicial conduct and independence. Though, it is not mandatory to follow, it is the well accepted global principles. In line with, these principles some countries have drafted model for codes of judicial conduct. These codes are mostly drafted for curtailed judicial corruption. Many judiciaries across the world have adopted them to achieve many objectives in keeping the judiciary without derailed. So far, the Sri Lankan Judiciary has not decided or implemented a code of judicial conduct to regulate their members. As a judge for 26 years of experience, 32 years in the legal arena, author experienced public confidence on the judiciary other than other state organs. But, no sinister being done drafting a code of judicial conduct for Sri Lankan Judicial Officers.

I would wind up this article that makes me wet my eyes sometimes on the bench. If you noticed, some old litigants, after calling their cases, before they left the court, worship to the bench. Why is that? That is what we called that we are doing divine job. They worship us as deities. We judges come to courts everyday with light heart. Unlike go to a cinema,

litigants/people are compelled to go to courts, police stations, hospitals without their wish to protect their life, rights and liberty. They come with heavy hearts. The robe you wear to adjudicate cases gives that divine power, I myself, has seen in the priests of West Minister Abbey wore similar cloaks for Church Services and I believe that is the link of the divine power. One of my senior said that a judgment delivering without a judicial cloak, has no judicial force or power. It may be a tradition. Hence, you should not go to the bench without wearing a cloak. In line with this divine link, it has something with it. Thus (we);

"*Judges are mere mortals, but they are asked to perform a function that is truly divine*"[83]

83 D Pannick, Judges (Oxford University Press, 1987, P 17.)

Judicial appreciation of confessionary statements recorded by Magistrates

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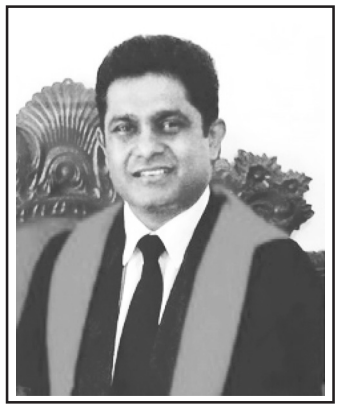

INTRODUCTION

A confessionary statement recorded by a Magistrate is considered as a judicial confession. Thus, judicial confessions are those which are made before a Magistrate or Court in the course of judicial proceedings. The Black's Law Dictionary defines a judicial confession as a plea of guilty or some other direct or manifestation of guilt in court or in a judicial proceeding.[1] As Coomaraswamy points out confessions may be either judicial or extra judicial and judicial confessions are those which are made before a Magistrate or in court.[2] He identifies four categories namely statements made in the course of the preliminary inquiry before the magistrates, statements made in the course of prior judicial or quasi-judicial proceedings, statements made by an accused in the course of a previous trial on the same charge and confessions recorded by a magistrate under the law relating to criminal procedure after taking adequate precautions to satisfy himself that the confession is voluntary.[3] Thus, in the criminal justice system of Sri Lanka, law provides for a specific power on Magistrates to record confessionary statements.

STATUTORY PROVISIONS RELATING TO POWER OF MAGISTRATES RECORDING CONFESSIONARY STATEMENTS

In the Administration of Justice Law (AJL) which operated before the introduction of the Criminal Procedure Code initially recognized the power of a Magistrate to record

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1 Black's Law Dictionary, Eighth Edition, South Asian Edition, Bryan A Gardner, Thompson Reuters, p.317

2 Coomaraswamy. E. R. S. R. The Law of Evidence, Vol- I, p.392

3 Ibid.p.393

confessionary statements in terms of section 74(3) of the Administration of Justice Law. Subsequently the section 134 of the old Criminal Procedure Code stipulated the statutory guidelines in this regard. It is significant to note that the section 74(3) of the Administration of Justice Law and the section 134 of the old Criminal Procedure Code are identical in context. Referring to this legal provision in the Administration of Justice Law, professor Peiris articulates that a confession made to a Magistrate by a suspect while in the custody of a police officer is admissible in accordance with the Evidence Ordinance.[4] In support of this view he has made reference to findings of justice Soerts in the case of ***Police Sergeant Hendric v Arumugum***[5] respectively. He went on to say that the reason is that the Magistrate is neither a police officer nor an inquirer holding an investigation.

PROCEDURAL REQUIREMENTS IN RECORDING CONFESSIONARY STATEMENTS

Generally, when a suspect informs the Magistrate as to his intention to make a statement, it is the duty of the Magistrate to explain the suspect that such statement can be used against him in a future criminal proceeding. Moreover, the Magistrate should ask the suspect as to whether he is making the statement on his own free will. It is always advisable for the learned Magistrate to grant more sufficient time to the suspect to re-think over his decision to make a statement. Having granted sufficient time, and upon questioning the accused as to whether he still wishes to make the statement, when the magistrate has reason to believe that the statement is going to be made voluntarily, then only the statement should be recorded. If the suspect does not understand the language of the court proceedings, it is the duty of the Magistrate to get the services of a competent language interpreter to explain the suspect in the language he understands, the consequences of making such a statement and whether he still wishes to make a statement. The general rule is that a confession made by a suspect is relevant and admissible provided it has been voluntarily made. In terms of this provision, a Magistrate is vested with the power to assess voluntariness of a statement given by a suspect and determine as to whether the said statement meets the requirements as provided for under section 24 of the Evidence Ordinance. Thus, voluntariness is the threshold to appreciate a confessionary statement made to a Magistrate.

It should be understood that voluntary in ordinary parlance means "*of one's own free will*".[6] The word " *voluntarily*" is not stated anywhere in the section 24 of the Evidence Ordinance and it only states that a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have

4 Peiris G.L. Criminal Procedure in Sri Lanka,5th print, A Stamford Lake Publication,2014, p.76

5 Police Sergeant Hendric v Arumugum, 39 NLR, p. 31

6 Nuwan de Silva v AG (2005) 1 Sri L. R. 146

been caused by any inducement, threat, or promise. In this regard the views expressed by Justice Gunasekera in the case of ***Queen v Cicilin***[7] is very significant. In said case Justice Gunasekera has extensively discussed the word "voluntarily" with regard to a confessionary statement. He said *"In my opinion a confession is made "voluntarily" if it is made in circumstances that do not render it inadmissible by reason of the provisions of section 24 of the Evidence Ordinance, which enacts a principle of the English law that a confession is admissible in evidence only if it is made voluntarily."*[8]

The procedure and requirements that should be followed by a Magistrate recording a confessionary statement is well articulated by His Lordship the Chief Justice Sarath N Silva in the ***Nuwan De Silva***'s case (Sadeepa Lakshan kidnaping & Murder case) as follows;

> "*Section 127 (3) specifically deals with the recording of a statement, being a confession. It requires the Magistrate not to record any such statement "unless upon questioning the person making it he has reason to believe that it was made voluntarily". This provision requires the Magistrate to make a signed memorandum at the end of the statement, recording his belief that the statement was voluntarily made. This requirement is coupled with the provisions of Section 24 of the Evidence Ordinance which provides an exception to the general rule of the relevancy of admissions and confessions.*"

As stated before, after recording a confessionary statement in terms of section 127, the Magistrate is required by law to have a certificate or memorandum at the end of the confessionary statement as *"I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him."* However the case law jurisprudence shows that the Magistrate's Certificate is not conclusive as to voluntariness.

This is evident in the findings of the court in ***king v Weerasamy***[9] and ***Queen v Wittie***[10] respectively. Professor G L Peiris articulates this requirement to the effect that the certificate given by a Magistrate under section 134 of the Criminal Procedure Code (Old CPC) does not even create a presumption relating to the voluntary character of a confession and it does not absolve the trial judge from satisfying himself that the confession was made voluntarily[11].

7 Queen v Cicilin, 58 N.L.R.475
8 Ibid.p.475
9 King v Weerasamy,43 NLR 207
10 Queen v Wittie(1960), 63 NLR 121, at p.124
11 Peiris.G.L, *The Law of Evidence in Sri Lanka*, 3rd revised edition, p.141

In any event, the section 127 of the Code of Criminal Procedure Act No15 of 1979, which is the currently applicable statutory provision, has specifically given the sample of the certificate/memorandum that has to be enclosed immediately after recording of a confessionary statement. Therefore it is always advisable to have the said certificate/ memorandum enclosed at the end of the statement so recorded. As stated before, it is the fundamental duty of the Magistrate to question the accused in order to satisfy himself that the confession is voluntary. Moreover, if the accused is in a state of fatigue, the Magistrate should not record the confessionary statement. It is also a fundamental duty of the Magistrate to read over the confessionary statement to the person who made it as stipulated in the section 127.This aspect is discussed in the case of the ***King v Karaly Muttiah***[12] to the effect that omission of the Magistrate to read over the confession to the accused was a fatal irregularity. In the case of ***The Queen v Wilbert Perera***[13] also the Magistrate had omitted to read over the statement himself to the person who made it and also failed to sign the memorandum set out at the end of the section. However in said case the court held that the omission could be supplied by the oral evidence of the Magistrate. Referring to this case, Justice Soza had stated that that it would be most imprudent and cause unnecessary problems if the facts that the statement was read over to the maker and that the statement was voluntarily made are not recorded as prescribed[14]. In the circumstances, due diligence is always expected from a Magistrate who is called upon to records a confessionary statement from a suspect in terms of section 127(3) of the Code of Criminal Procedure Act No15 of 1979. Before taking steps to record a confessionary statement, the Magistrate must assure the suspect/accused that he would be handed only to judicial custody and not to police custody. Justice Soza further states that a Magistrate assumes jurisdiction to record such confessionary statements only after initiation of proceedings before him. His view is that the very act of producing the suspect/accused of an offence can constitute initiation of proceedings and the Magistrate has no power to record such confessionary statements where no proceedings are pending in court. He says that the very act of bringing the arrested person in custody before the Magistrate accused of committing an offence gives the Magistrate the power to record the confessionary statement.[15]

SHOULD AN OATH BE ADMINISTERED TO THE SUSPECT PRIOR TO MAKING A CONFESSIONARY STATEMENT TO A MAGISTRATE?

Usual practice is that whenever a person makes a statement to a Magistrate in a judicial proceeding, an oath or affirmation is administered and thereafter it is reduced in to

12 The King v Karaly Muttiah, 41 NLR 172

13 The Queen v Wilbert Perera(1957) 61.N.L.R.142

14 Justice J.F.A. Soza Confession *to a Magistrate*, Judges Journal 1991 December, p.39

15 Ibid.p.40

writing. However, when a statement recorded from a suspect in terms of section 127 of the Code of Criminal Procedure Act No 15 of 1979, it should not be recorded under oath as the law does not provide for the administration of an oath.[16] This legal position has been well articulated by a full bench of then Supreme Court in the case of ***The King v Mudiyanse et al***[17] respectively. It was held in said case that a Police Magistrate had no power to administer an oath before taking down the confession of an accused. According to the Rules for the guidance of Magistrates in recording statements and confessions, under section 134 of the Criminal procedure Code, introduced by the Hon. Mr. J.C. Howard, Legal Secretary, the Rule No 6 states that *"No oath should be administered to the person nor should he be affirmed before his statement is recorded."*[18]

CAN A CONFESSIONARY STATEMENT BE USED AGAINST A CO-ACCUSED?

When a confessionary statement is made to a Magistrate in terms of section 127(3) of the Code of Criminal Procedure Act No 15 of 1979 an accused may implicate a co-accused. Even though the co-accused was implicated in such a confessionary statement, it cannot be used against the co-accused. This principle of law is very clearly stated in the section 30 of the Evidence Ordinance. According to section 30 of the Evidence Ordinance, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court shall not take into consideration such confession as against such other person. This significant legal position has been well articulated by His Lordship Justice Shiran Gunaratne in the recent Supreme Court case of ***Kotuwe Gedara Sriyantha Dharmasena v AG***[19], where the legal position in the section 30 of the Evidence Ordinance was adequately reiterated. In said case the trial court has used a confession made by one accused against the co-accused and convicted him and sentenced. The Court of Appeal also held with the said findings of the trial court and affirmed the same. However, the Supreme Court set aside the conviction and sentence and the Supreme Court held that making use of the confession made by the 2nd and 3rd Accused against the Appellant is obnoxious to Section 30 of the Evidence Ordinance. However, it should be understood that this restriction would not be applicable to confessions recorded in terms of section 16(3) of the Prevention of Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979 respectively.

16 Peiris.G.L, *Recent trends in the Commonwealth Law of Evidence*, 1989, Sarvodaya Vishva Lekha Publication, p.96

17 The king v Mudiyanse et al, 21 NLR 48

18 Wijetunge. E.P. A Complete Digest of Case Law on the Criminal Procedure Code of Ceylon, M.D.Gunasena & Company Ltd, Colombo, p.132

19 Kotuwe Gedara Sriyantha Dharmasena v AG, SC Appeal No: 184/2019 SC (SPL) LA Application No: 210/2018 CA Appeal No: CA 122-123/2007 High Court: Kandy 161/1995, decided on 4/11/2022

SHOULD THERE BE A *VOIR DIRE* INQUIRY TO DETERMINE THE ADMISSIBILITY OF A JUDICIAL CONFESSION?

In a case of a *voir dire* inquiry relating to admissibility of a confession, usual practice is that the prosecution places evidence first to establish the fact that the confession sought to be marked is made voluntarily. The phrase "*Voir Dire*" a French term literally means, to "**speak the truth**". In England and Wales, refers to a trial within trial. A *voir dire* is a pre-trial procedure used to determine the admissibility of particular piece of evidence. It occurs when one party challenges the admissibility of evidence the other party proposes to adduce. A *voir dire* consists of the court making findings of fact and applying the law after hearing evidence and submissions[20].

In the current judicial practice, such *voir dire* inquiries are held in respect of alleged confessionary statements made to a Magistrate in terms of section 127(3) of the Code of Criminal Procedure Act No 15 of 1979. Apart from making judicial confessions, confessions are made to a police officer above the rank of an assistant superintendent of police in terms of section 16(2) of the Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979. According to Regulation 63 of the Emergency Regulations (Miscellaneous Provisions and Powers) No.1 of 2005 published in the Gazette No 1405/14, at the trial of any person for an offence under any Emergency Regulation, a statement made by such person whether or not it amounts to a confession and whether or not such person was in the custody of a police officer at the time the statement was made and whether or not such statement was made in the immediate presence of a magistrate, may be proved as against such person. Since this article predominantly concentrates on judicial confessions, I would not go in to detailed discussion about such other category of confessions which are not falling within the ambit of judicial confessions.

PROCEDURE ADOPTED IN A *VOIR DIRE* INQUIRY

Very often confessionary statements recorded by Magistrates in terms of section 127(3) of the Code of Criminal Procedure Act No15 of 1979 are submitted in evidence in judicial proceedings before the High Court. Therefore, overview of the procedure adopted in the High Court is timely relevant. In trials relating to Indictments filed under the provisions of the Prevention of Terrorism Act No 48 of 1979, the prosecution calls the magistrate to testify about the confessionary statement sought to be marked as an exhibit or a production of the prosecution case, the defense objects to the said application made by the prosecution alleging that the impugned confession or confessionary statement sought to be marked as an exhibit or a production of the prosecution has not been made voluntarily by the accused. Immediately thereafter, the

20 Fernanda Dahlstrom: https://www.gotocourt.com.au/criminal-law/nsw/voir-dire/

court holds a *voir dire* inquiry (trial within trial) to ascertain the voluntariness of said confessionary statement. After the prosecution closing its case for the *voir dire* inquiry, the defense calls its evidence. In most occasions, the accused himself gives evidence on oath at the *voir dire* inquiry and call for witnesses on his behalf. In some occasions, the prosecution calls evidence in rebuttal as well. Thereafter either party makes submissions, which may be written or oral. Thereafter, the court having considered the evidence placed in the *voir dire* inquiry makes a written order either accepting or rejecting the application made by the prosecution to mark the impugned confession or confessionary statement made to a magistrate. The usual practice is that if the application of the prosecution is allowed, the prosecution calls the Magistrate once again to the witness stand and proceeds to formally mark the confession or confessionary statement and relevant contents therein. As discussed above, usually the prosecution calls evidence first in the *voir dire* inquiry. When the case law jurisprudence is examined it is observed that in the case of ***Rex v. Franciscu Appuhnmy***[21], justice Wijewardena has followed a different procedure in said case by asking the accused to lead his evidence first at the *voir dire* inquiry.

CONCLUSION

In terms of section 127(3) of the Code of Criminal Procedure Act No 15 of 1979, only a Magistrate is empowered with the unique power to record a confessionary statement from any person. Every Magistrate, in his or her judicial career, gets an opportunity at least once to record such a confessionary statement in terms of the above discussed provision of the Criminal Procedure Code. Thus, understanding the evolutionary background of recording confessionary statements or commonly known as judicial confessions and the practical implications with regard to recording of such judicial confessions or rather confessionary statements is a *sine qua non* for a Magistrate. In this regard it is reiterated that in the interest of justice, the 18 Rules for the guidance of Magistrates in recording statements and confessions, introduced by the Hon. Mr. J.C. Howard, Legal Secretary[22] need to be followed by every Magistrate, when they perform the solemn duty of recording confessionary statements during judicial proceedings.

21 Rex v Fransiscu Appuhamy (1941) 42 N. L. R. 553.

22 Wijetunge. E.P. *A Complete Digest of Case Law on the Criminal Procedure Code of Ceylon*, M.D.Gunasena & Company Ltd, Colombo, p.131-134

PARTITIONING A "LARGER LAND" IN A PARTITION ACTION

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1. ABSTRACT

This article focuses on the procedure for continuing the action when a larger land is disclosed. The term "Partition" is used in property law to illustrate an act by court order or otherwise to divide up the land into separate portions representing the proportionate entitlement of the co-owners of the land and its fixtures, plants, cultivations, and all appurtenances therein. Even today, in most civil courts, the oldest cases represent cases instituted to partition co-owned land, which have been continuing for several decades and have even resulted in the second or third generation of the original parties continuing the same.

Notably, many partition cases from the past to date have been liable to be dismissed, leaving co-owners in more trouble and conflicts as they cannot end their co-ownership. One main reason for such dismissals is the failure to identify the corpus. It is trite law that the title can only be investigated upon proper corpus identification. Therefore, the case cannot proceed further, dismissal being justifiable. However, many cases have been dismissed due to the failure of the corpus to be identified, even in the instances in which the corpus could have been identified, due to failure to take requisite at the proper stage.

It is significant that from the past to the present, people, especially in rural areas, are more concerned about possessing lands rather than acquiring "title" while living on the same. Thus, due to the expansion of the family unit, disputes arise with the other co-owners. Therefore, special attention must be given to partition cases where many parties attend

✶ L.LB/LL.M

the courts daily seeking expeditious and qualitative adjudication even though many of them cannot bear the cost of litigation and the time. The cost might be higher than the value of his share of the land, which is ultimately adjudicated in the judgment in his favor. Moreover, the land to be partitioned may be larger than the land described in the plaint.

A perusal of many authorities reveals that there are miscarriages of justice due to the failure to follow the proper steps when a larger land is disclosed to be partitioned.

It is important to consider the devolution of partition law from its inception to understand the nature of the action and the extent to which the provisions of the law have been applied.

2. RECAPITULATION THE HISTORY

The principles of Partition law derived from Roman Law were further developed in Roman-Dutch Law by Roman-Dutch Jurists like *Grotius* and *Simon van Leeuwen*. Roman-Dutch law principles were applied in ancient partition cases of Sri Lanka since the same was common law before the statutory provisions were enacted. The action named **'*Actio Communai Dividendo*'** *(Communi Dividu'ndo A'ctio)* derived from Roman Law applied to the partitioning of lands held in common as a method of judicial partition of co-owned property. The underlying notion is that no co-owner is, in normal circumstances, obliged to remain in co-ownership against their will, and any co-owner can claim the division of the joint property according to that joint owner's share in the property.[1]

However, the Partition statutes of Sri Lanka were drafted based on the English Partition Acts. Ordinance No.21 of 1844 is the oldest enactment to provide partition provisions with a more specific method of partitioning the properties held in common. However, the question of title would have to be tried in a separate suit as the ordinance did not contemplate cases where a party's rights are disputed; therefore, it was not an adequate or satisfactory statute. The Supreme Court pointed out such shortcomings of the ordinance in several judgments. After that, some sections were repealed by Ordinance No. 11 of 1852 and subsequently enacted the Partition Ordinance of 1863. There were only nine sections applicable to partition in the ordinance of 1844; however, 19 sections were compiled in the Ordinance enacted in 1863.

1 Simone Engelbrecht on Actio Communai dividendo: the Judicial Partition of Co-owned property, http://www.adams.africa

The nature of the Ordinance is illustrated in the case of *ALMEDA et al. Appellants, and, DISANAYAKA et al. Respondents.*[2]

> *"It is clear from the Partition Ordinance that it is not an attempt to codify the existing Roman-Dutch Law. It purports to create a new jurisdiction, a new procedure, new forms, and new remedies. In fact, one finds in it a complete scheme wherein provision is made for (a) a method of the institution of proceedings, (b) a procedure for service of summons, (c) a right of appeal, and (d) stamp duty and taxation of costs."*

Even though no decision was made by a court that holds that the '*actio communi dividendo*' is no longer available for the partition of lands held in common, the parties have adjusted to follow the ordinance. Anyway, the ordinance operated for quite a lengthy period; the defects, shortcomings, inadequate provisions, and unavailability of the provisions led to the necessity of a new law. Therefore, by the act No. 16 of 1951, the ordinance of 1863 was repealed. After that, as a result of the enactment of Administration of Justice Law No. 44 of 1973, act No. 16 of 1951 was replaced and incorporated a separate chapter for the partition of lands. The above provisions were repealed owing to the enactment of partition law no. 21 of 1977. It is still in force with the following procedural amendments, which were needed with promptitude as and when required. Thus, the amendments include Act No. 05 of 1981, Act No. 6 of 1987, Act No. 32 of 1987, Act No.17 of 1997, and Act No.27 of 2024. The above development has been a testament to the long history of cases based on the law of partition.

3. SOCIO-LEGAL BACKGROUND

It is essential to properly understand that in adjudicating a partition action, the cultural and social background and the property rights system devolve on inheritance. The Matrimonial Rights and Inheritance Ordinance and personal and territorial laws such as *Kandyan, Muslim,* and *Thesawalamei* Law provide the devolution of immovable and movable properties among heirs. The Last Will Ordinance 21 of 1844 and subsequent amendments provide to execute a will bequeathing and disposing of any movable and immovable property and all and every estate, right, share, or interest in any property which belongs to him at the time of death. Similarly, it is not a secret that most of the family's primary source of income is agriculture, whereas the people prioritized cultivation rather than claiming property Rights. All deeds of private highlands and paddy lands are described with old measures, which cannot precisely say the extent. As such, sociological facts are interconnected with the country's mixed law system.

2 As per Basnayaka J. 49 NLR 257

Moreover, many people believe that partition law and procedure are complicated. This is not so if the gritty provisions are correctly understood, as the present Partition law and subsequent amendments are comprehensive and updated.

4. EXPECTED ROLE FROM THE TRIAL JUDGE

A series of judgments, including *Kularatne vs. Ariyasena*[3] *and Chandrasena vs. Piyasena*[4], have illustrated that the purpose of the partition action is to ascertain who the owners of the land are. The judge must thoroughly investigate and decide on the title of each party of the action based on evidence, not on any admission. The role of a judge has been distinguished from other actions in the case of *Maddumaralalage Dona Mary Nona* vs. *Maddumaralalage Don Justin and others*.[5]

> *"In a Partition action, the procedure is laid down by the Partition Act as to how to file a partition action, what should be done first and how court can issue a commission to survey the land, etc., but at the end of the case, writing of the judgment has to be done in compliance with Sec. 187 of the Civil Procedure Code. In a partition action, the judge has to decide what share of the land should be allotted to which party. It is different from answering issues in a money recovery case, a divorce case, a rent and ejectment case, a land dispute case, a debt recovery case, a case based on contract or a case based on delict etc.*
>
> *In those cases, the answers could be in the affirmative or in the negative, maybe with some comment or a remark which would show the inclination to the final decision.*
>
> ***But in a partition action, each party claims different portions of one big land and the Judge is expected to sort out what share of the land should be granted to which plaintiff and or defendant. For this reason, I find that the onus of the Judge in a partition case is somewhat more complex than in any other kind of case, since the Judge has to specifically calculate the share of entitlement". (emphasis added)***

As such, it should be borne in mind that a judge of a partition action is expected to have a sacred and imperative duty to investigate each party's title on evidence.

5. UNIQUE FEATURES

It is also essential to study unique features of the partition law, which should be understood before adjudicating a partition action, such as the dual capacity of the parties

3 2001 BLR 06

4 1999 (3) SLR 201

5 As per Eva wanasundara J. SC /APP/174/10 Decided on 08.06.2016

(duplicia judicia), the Inquisitorial part of the Judge, active participation of parties, the surveyor, and the panel, supervision of *lispendens* registration in the correct folio, raising points of content, preliminary survey, final survey, and scheme inquiry which are essential requirements of qualitative and conclusive judgment *in rem*.

Duplicia Judicia connotes that both parties of a partition action (plaintiff/s and Defendant/s) have the dual capacity of becoming the plaintiff as defendants and defendants as plaintiffs. In other words, both the Plaintiff and Defendant are equally interested in the matter of the suit.

According to *Gaius*[6], there are no defendants in a Partition Action, and *Voet*[7]'s view is that all the parties have the double capacity of Plaintiff and Defendant. It means all the parties are, in a sense, plaintiffs. Where the plaintiff fails to prove his title, there is no objection to a partition among the defendants who had established their title if they so desired it because the defendants are, for some purpose, in the position of plaintiffs. This situation has been illustrated in the case of *Weerakoon et al. vs. Waas et al*[8]. However, it should be mindful to manage such dual-capacity where necessary, as in the case of *Dalten Wijeratne Vs. Herman Wijeratne*[9] Supreme Court held that although in a partition action, all the parties have the double capacity of Plaintiff and Defendants, the general principle has its limitation and that the District Judge has the discretion in refusing permission to the plaintiffs to call the Defendants as witnesses. This is based on the rule that *neither the law nor common sense sanctions call the opponent as his witness*.

The legislature has enacted these provisions and interpreted them by the Supreme Court to make every endeavor to end the co-ownership of land in common rather than the case being dismissed due to technicalities. Therefore, unique features must be considered and differentiated from the other actions. Thus, the defendant can proceed with the action when the plaintiff fails to proceed or where it is necessary to proceed unless the defendant in the partition action sought a dismissal only. Notably, a partition action cannot be settled without investigating the title.

As mentioned above, the trial judge's inquisitorial participation in a partition action is another significant feature. Under the adversarial system, the judge is considered a mere umpire who hears both parties. Only the parties and their attorneys are responsible for maintaining their cases. In a partition case, active intervention by following the

6 Gaius (130-180) was a Roman jurist whose writings became authoritative legal texts during the late Roman Empire.

7 Vii *Johannes Voet,* also known as *John Voet* (3 October 1647 – 11 September 1713), was a Dutch jurist whose work remains highly influential in modern Roman-Dutch Law.

8 57 NLR 25

9 1993 (1) SLR 314

procedure, supervision, conducting, and giving instructions by the judge where necessary is expected to achieve the role above.

In the case of *Maligaspe Koralage Leilani Priyanthi vs. Kariyawasm Hegoda Gamage Uma*[10] Supreme Court stressed the inquisitorial feature of a partition action.

> *"I do not say that a partition trial shall be conducted in the same manner as any other inter partes civil trial. Notwithstanding the system of justice which prevails in our country is adversarial as opposed to inquisitorial, the role of the Judge in a partition case is different and unique.* ***The responsibility of the Judge in a partition case is much greater than in an ordinary civil trial, particularly because collusive actions deprive the rights of the true owners simply because partition actions are actions in rem. (emphasis added)"***

The Supreme Court expresses a similar view in the case of *Madara Mahaliyanage Bandusena vs. Don Dharmadasa Weerasekara and others*[11] that

> *''In a partition action, all parties are not active; most of them remain dormant. Nevertheless, the District Judge in a partition action cannot afford to remain dormant. He must play an active role throughout the proceedings. Although the system of justice we adopt is adversarial as opposed to inquisitorial, the Judge in a partition action assumes an inquisitorial role. This distinction arises from partition actions being actions in rem, where the resulting decree binds the entire world."*

The trial judge's crucial responsibility is to control the proceedings in a partition action, from the initial plaint to the final judgment. This control is not just a formality but a means to ensure that justice is dispensed effectively and fairly. The judge's role in granting necessary orders and overseeing the execution of the writ or the auction of the divided lots is essential to the process.

6. STATUTORY PROVISIONS

When a party claims or discloses a larger land as the corpus, Partition Law 21 of 1977 stipulates the procedure to be followed. Some of the relevant provisions are reproduced here for easy reference. Section 19 provides the parties' responsibilities after issuing the summons. Section 19(2) applies to instances of partitioning a larger land.

19 (2) (a) Where a defendant seeks to have a larger land than that sought to be partitioned by the plaintiff made the subject matter of the action in order to obtain a decree for the partition or sale of such larger land under the provisions of this Law, ***his statement of claim shall include a statement of the particulars required by section 4 in respect of such larger land, and he shall comply with the***

10 SC/APP/2/2019 - Decided on 15.10.2021

11 SC/APP/172/2017 - Decided on 30.01.2024

requirements of section 5 *as if his statement of claim were a plaint under this Law in respect of such larger land. (emphasis added)*

Notably, section 5 mentioned above refers to the addition of the necessary parties. As such, the basic steps should have been followed again when disclosing a larger land. Subsequent sections further emphasize it. Thus,

19 (2) (b) Where any ***defendant s****eeks to have a larger land made the subject matter of the action as provided in paragraph (a) of this subsection,* ***the court shall specify the party to the action by whom and the date on or before which an application for the registration of the action as a lis pendens affecting such larger land shall be filed in court****, and the estimated costs of survey of such larger land as determined by court shall be deposited in court.*

(c) Where the party specified under paragraph (b) of this subsection fails to comply with the requirements of that paragraph, ***the court shall make order rejecting the claim to make the larger land the subject matter of the action*** *unless any other party, in whose statement of claim a similar claim shall have been set up, shall comply therewith on or before the date specified in paragraph (b) or within such extended period of time that the court may, on the application of any such party, fix for the purpose.*

(d) After the action is ***registered as a lis pendens affecting the larger land*** *and the estimated costs of the survey of the larger land have been deposited in court, the court shall-*

(i) add as parties to the action ***all persons disclosed in the statement of claim of the party at whose instance the larger land*** *is being made the subject matter of the action as being persons who ought to be included as parties to an action in respect of such larger land under section 5; and*

(ii) proceed with the action as though it had been instituted in respect of such larger land; and for that purpose, fix a date on or before which the party specified under paragraph (b) of this subsection shall, or any other interested party may ***comply with the requirements of section 12 in relation to the larger land*** *as hereinafter modified.*

(e) Where the larger land is made the subject- matter of the action, ***the provisions of sections 12, 13, 14, and 15 shall, mutatis mutandis, apply*** *as if the statement of claim of the party seeking a partition or sale of the larger land were the plaint in the action; and-*

(i) Such party ***shall, with his declaration under section 12, in lieu of an amended statement of claim, file an amended caption*** *including therein*

as parties to the action all persons not mentioned In his statement of claim but who should be made parties to an action for the larger land under section 5, and such amended caption shall be deemed for all purposes to be the caption to his statement of claim in the action;

(ii) ***summons shall be issued on all persons*** *added as parties under paragraph (d) of this subsection and all persons included as necessary parties under sub-paragraph (i) hereof;*

(iii) ***notice of the action in respect of the larger land shall be issued*** *on all parties to the action in the original plaint together with a copy of the statement of claim referred to above;*

(iv) *the provisions of* ***section 20 shall apply to new claimants*** *or parties disclosed thereafter.*

(f) *If the party specified by the court under paragraph (b) of this subsection or any other interested* ***party fails or neglects to comply with the provisions of section 12,*** *as herein before modified on or before the date specified in that paragraph,* ***the court may make order dismissing the action*** *in respect of the larger land.*

(g) *Where the requirements of section 12 as herein before modified are complied with,* ***the court shall*** *order summonses and notices of action as provided in paragraph (e) of this subsection to* ***issue and shall also order the issue of a commission for the survey of the larger land,*** *and the provisions of sections 16, 17 and 18 shall accordingly apply in relation to such survey.*

Therefore, it is significant note that all the pre-trial steps have to be taken in such an instance.

7. HYPERALERT RULES ELEVATED FROM CASE LAW

Several authorities have enumerated the legal provisions related to partitioning a larger land parallel to the aforementioned statutory provisions. In the case of *M.P. Dhammika Kumari (substituted Appellant) vs. W.P. Siyathuwa and others,*[12] Justice *Gooneratne* has stated the final effect of ignoring the essential steps. In this case, the Surveyor surveyed a much larger area, which the appellant contends is three times the area described in the schedule to the complaint. It was held that,

> ***"when a larger land surface in the preliminary plan, court has to consider Section 19(2)(b) of the Partition Law. Non observance of essential steps would render the entire proceedings void and the case has to commence afresh from***

12 CA 184/1997 (f) - Decided on 07.02.2013

> ***the beginning. Even with hardships that has to be undergone by parties, the due procedure need to be adopted'.*** *(emphasis added)*

The District Judge's judgment has been set aside, and the case has been sent back to the District Court to comply with the necessary procedural requirements and commence afresh.

Richard and another vs. Seibel Nona and others[13] is another case in which the learned District Judge failed to investigate the title. He settled the case without considering the evidence presented before him.

The court is of the view that the learned District Judge has entirely acted in violation of the provisions of the Partition Law and has delivered judgment without investigating the title. It was held by Justice *Jayawickrema* that,

> *"In the event of any party seeking to have a larger land to be made the subject matter of the action,* ***the Court shall specify the party to the action to file in Court an application for the registration of the action as a lis pendens affecting such larger land and the court shall proceed with the action as though it has been instituted in respect of such larger land after taking necessary steps under sections 16, 17, 18 and 19 of the Partition Act.*** *In the instant case, this procedure has not been followed". (emphasis added)*

The judgment is set aside, and the action is dismissed.

Sopaya Silva vs. Magilin Silva[14] is a landmark judgment that considered the guidelines that should have been followed when a larger land was disclosed. It is a case in which the District Judge dismissed the partition action on the basis of the wrong registration of *lispendans*. However, there was a discrepancy in the extent of the plaint and the preliminary survey. Justice *Sarath N. Silva* (as he was then) has pointed out that following rules should be followed in such an instance.

> "*Once the preliminary survey is carried out, upon receipt of the surveyor's return, which discloses that a substantially larger land was surveyed, the District Judge should have decided on one of the following courses* ***after hearing the parties****. (emphasis added)*
>
> *(i) to reissue the Commission with instructions to survey the land as described in the plaint. The surveyor could have been examined as provided in section 18(2) of the Partition Law to consider the feasibility of this course of action.*
>
> *(ii) to permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment*

13 2001 (2) SLR 1

14 1989(2) SLR 105

of the plaint and the taking of consequential steps including the registration of a fresh lis pendens.

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

It is a trite law that a partition action cannot be filed to partition a portion of the land. The entire land should be brought into the action, and the co-owners of the whole corpus should be parties. (*Herath Mudiyanselage Podi Nilame vs Walpola Kankanamalage Gunarathne)*[15]

7.1. Necessity of amendment of Pleadings

As per the above judgment, after a hearing with all parties and the section mentioned above, action could be continued with substantial amendments of pleadings and proper re-registration of *lis pendens* over the larger land than the land described in the plaint.

Thiththalapitige Thilakaratne vs *Thiththalpitige Chandrawathie Perera*[16] is a case decided by the Supreme Court in which the 3rd defendant, on the date of judgment, sought an alternative commission to the preliminary plan. As there were no objections, the court allowed, but no steps were taken to issue the commission. However, on the date of Commission returnable, the 3rd Defendant has moved only to amend his statement of claims rather than an alternative plan, and by the amended statement of claims, he has submitted that the entire land has not been depicted in the preliminary Plan; therefore, the plaintiff cannot maintain the partition Case. *Samayawardhena* J. is of the view that the conduct of the 3rd Defendant was contrary to section 19 (2) of the partition Law and further held that,

> *"the 3rd Defendant did not take any steps required by law to have a larger land than that sought to be partitioned by the Plaintiff made the subject matter of the action.* ***If the 3rd Defendant wanted to enlarge the corpus, he ought to have taken steps to file an amended plaint inter alia naming new parties as Defendants because, according to the Preliminary Plan, there are several claimants to the adjoining lands on all four boundaries****. All those alleged owners are third parties." (emphasis added)*

In this case, the learned District Judge dismissed the case without answering the issues/ points of contents on the basis that the land sought to be partitioned had not been properly identified.

15 SC/APP/52/2018 - Decided on 10.06.2021

16 SC/App/125/2016 -Decided on 21.05.2021

7.2. Re-registration of Lis pendens in correct folios

Several judgments dealt with the issue of registration of *lispendans; as* per section 11 of the Partition Law, it is imperative and mandatory to register *lispendans* even upon affecting the larger land. *Dias vs. Yasathilaka and others*[17], it was revealed that the *lispendens* had registered in respect to a larger land **but not in respect to the corpus**. The land to be partitioned is a portion of it as the state acquired the balance. The Court of Appeal set aside the partitioning judgment dated 05.11.1992 and dismissed the action in 2005.

It must be noted that the *Sopaya* case (supra) has stressed that the **District judge cannot dismiss the case on the grounds of the wrong registration of the *lis pendens*.** In *Uberis Vs Jayawardene,*[18] Justice *Pulle* has stated that when a plaint in a partition action is amended to substitute a new corpus, for the one described in the first plaint a fresh *lis pendens* would be necessary.

7.3. Supervision of Preliminary Survey Plan and Report

It is common for the preliminary survey to reveal discrepancies between the surveyed land and the land described in the Plaint. The court must investigate such discrepancies at the preliminary plan consideration stage but not at the trial stage.

Another unique feature of partition action is the active participation of the commissioned Surveyor. He cannot act as a mere executor of the commission but perform duties empowered by the act when he surveys and prepares the plan and report. The surveyor's responsibilities are very important as the proceedings should be controlled by the District Judge, who has to give proper instructions and guidelines to the survey panel.

The District judge should be mindful of the surveyors' responsibilities, give proper instructions when they seek them, and inform them if necessary. As part of the inquisitorial feature, the judge is empowered to call a surveyor to clarify matters if he thinks it is essential to do so when the identification is questionable, even after all parties have provided evidence. The Judge's duty when issuing a commission is explained in the case of *Uberis et al.* vs *Jayawardena* (supra)

> *"Another matter I wish to stress is that* ***Judges of first instance should give their personal attention to the formulation of the terms of the commission issued in proceedings for the partition of land and not leave it to be done mechanically by a member of the clerical staff attached to the court.*** *A commission is an instrument issued by the court and should receive its careful consideration and specify in detail what the surveyor is required to do". (emphasis added)*

17 2005(3) SLR 169

18 1959(62) NLR 217

The limits and duties of a surveyor have been illustrated in the case of *Bininda vs. Sediris Singho*[19] It was held that when preparing a preliminary plan in a partition action, it is irregular for a Surveyor, in the absence of an additional commission issued to him under section 23 (1) of the Partition Act, to survey and include in the corpus any land other than that which is referred to in the plaint and which his commission authorizes him to survey. It was decided that the surveyor would not be entitled to receive fees for that part of the survey, which he makes in excess. In this case, the court ordered the surveyor to refund the survey fees to the plaintiff.

His Lordship Chief Justice *Basnayaka*, in the case of *Uberis vs Jayawardena(supra),* has observed that in many cases, surveyors commissioned to carry out a preliminary survey in proceedings under the law relating to partition have failed to appreciate the functions entrusted to them. He held that

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

As such, once the court receives the survey report or requests for instructions to survey a larger land after considering the same, the Court has to decide after hearing the parties either to send a fresh commission or continue with the existing one. The next procedural steps should be taken based on the larger land. It is a collective responsibility of the parties, counsels, surveyors, and the court. If the court sends a fresh commission, pleadings should be amended to include the larger land as the commission should contain the larger land.

It is pertinent to note, as per the *Sopaya Silva* case, the sequence of the steps would be that either the plaintiff or defendant or one of the parties desiring to continue with the larger land must take steps if the plaintiff to amend the plaint and with a caption including the details of a larger land if a defendant amends the statement of claim and must take steps to register *lis pendens* as stipulated in section 11 of the partition act and a fresh commission papers in relation to the larger land.

7.4 Identification of the Larger land/ corpus and investigation of the title.

It is not expected here to focus on the identification of the corpus comprehensively. However, as partitioning a larger land is also a part of the identification of the corpus, some salient features elevated by the judgments have been considered here.

19 1960(64) NLR 208

The trial judge's duty of analyzing evidence related to identification is described in the case of *Thiththalapitige Thilakaratne* vs. *Thiththalpitige Chandrawathie Perera (supra)* as follows,

> *"Without analyzing the evidence from the proper perspective, the learned District Judge made a superficial comparison of the boundaries and extent of the land described in the schedule to the plaint, which is based on old Deeds with the existing boundaries and extent of the land as depicted in the Preliminary Plan to conveniently conclude that the land has not been properly identified. On this basis, without examining the evidence on the pedigrees of the parties and without answering the issues raised at the trial, the action was summarily dismissed. This is erroneous….*
>
> *A partition case is not a criminal case to secure a dismissal by creating doubts of the Plaintiff's pedigree in the mind of the District Judge. The Plaintiff need not prove his pedigree beyond reasonable doubt but on a balance of probabilities".*

Additionally, it is stressed that it is impossible to trace the first deed or the first original owner of the land in all partition actions; therefore, it should be stopped at tracing back at a convenient point.

The case of *Madduma Gamaralalage Dona Mary Nona vs. Madduma Ralalage Don Justin and Others*[20] is also a case in which, unfortunately, the District Judge has not investigated the parties' title to the action. He has only answered issues Nos. 1 to 8 out of the 32 issues raised by all the parties. The evidence in this case was very long, but the District Judge had not analyzed it. He has just held that the shares should be allocated according to what the plaintiff mentioned in the plaint. He has not given reasons for having done so either. Supreme Court has set aside judgments of the District Judge and Civil Appeal High Court and has ordered a re-trial. As per Justice *Eva Wanasundara*,

> *"according to the way he has written the judgment, if it is decided that the Plaintiff is correct, it is not necessary to look into other issues raised and/or other claims placed before court by others even though they all led evidence at the trial."*

K.G. Alwis and Others vs. Lakshmi Alwis[21] *and Others is* a case in which the 7th-11th defendants have stated that the land to be partitioned is a portion of a larger land. The District Judge held tightly only to that point and dismissed the action. However, no reason has been given to come to that conclusion. In one sentence, he stated what the said defendants stated but did not state whether he accepted that position, why he accepted it, and how it affected the maintainability of the partition action. After considering all the circumstances, Justice *Samayawardhena* set aside the Judgment

20 SC/App/174/10 - Decided on 08.06.2016

21 CA 508/2000/F - Decided on 30.07.2019

of the District Court and directed the District Judge to deliver the Judgment afresh on the evidence already led.

It is observed that the District Court judgment was delivered on 12.07.2000, and the appeal was decided in 2019, whereas the case was sent back for a proper Judgement after 19 years.

As such, for the sake of justice, it has been decided in the cases of *Gabriel Perera vs. Agnus Perera* and *Yapa vs. Dissanayaka Sedara*[22] that wherein a deed of partition which conveyed the land is clearly described and ascertained, a mere inconsistency as to the extent should be ignored by treating as '*falsa a demonstration non nocet*' where a false description does not vitiate or spoil. However, the aforementioned procedure should be followed if the discrepancy is beyond mere inconsistency and the extent is much larger. *(Liyanage Indrani Malani Charlotte vs. R. M. Jayathilaka and another*)[23]

It is pertinent to note that Justice *Eva Wanasundara,* in the case of *Maddumaralalage Mary Nona (supra), has stated that the guidelines enumerated in the Sopaya* case should be adhered to in all partition actions. Nevertheless, in the recent case of *Jayasingha Arachchige Thilakaratne* vs. *Jayasingha Arachchige Wimalawathie and others*[24], *samayawardane* J. has differentiated the *Sopaya* case from the instant case and has stressed the procedure should be followed according to the circumstances of each case. Thus,

> "***the principles of law enunciated in one case have no universal application to all future cases of the same species indiscriminately unless the facts are similar. Bearing in mind the established principles of law, each case must be decided on the unique facts and circumstances of that particular case***. *The ratio decidendi in Sopaya Silva's case cannot be mechanically applied whenever there is an issue in relation to the identification of the corpus in a partition action". (emphasis added)*

It is revealed that In *Sopaya Silva's* case, the plaintiff filed an action to partition land to the extent of 8 acres, 3 roods, and 29 perches, but the surveyor prepared the preliminary plan for an extent of 11 acres, 1 rood, and 33 perches. There was no contest in the case. Having found this discrepancy when writing the judgment regarding the extent of land sought to be partitioned and the land surveyed, the District Judge dismissed the action on the basis that a larger land had been surveyed.

But in the instant case (*Jayasingha Arachchige Thilakaratne vs. Jayasingha Arachchige Wimalawathie and others),* the extent given was not specific as it was stated in an ancient Sinhala land measure, namely three *palas* of kurakkan sowing area. Hence,

22 1999(1) SLR 361

23 SC/APP/59/14 - Decided on 09.02.2017

24 SC/APP/82/2020 - Decied on 23.09.2022

the Supreme Court decided that the learned High Court Judges erred in concluding that the guidelines given *in Sopaya Silva's* case should have been followed in the instant case. Therefore, the court must apply the above provisions and principles in fit and proper instances in which it is very clear that a party has sought to partition a larger land than the land described in the plaint.

Notably, identifying a corpus is an imperative legal requirement for partition action. It is a question of fact and not a question of law. Therefore, it should be considered with the totality of the evidence. In the case of *Bamunusinha Arachchilage Dona Kamalani vs. Chandra Wijesinghe and others*[25] it was held that all these irregularities inherent in the proceedings that led to the judgment would render the judgment perverse and they would constitute circumstances that shock the conscience of Court warranting the exercise of revisionary jurisdiction of this Court.

In the case of *Adhikaram Mudiyanselage Punchi Amma Adhikaram vs. Sirima Shanthi Mendis*[26], Justice *P.A. Rathnayake* is of the view that failing to clear identification issues is a serious lapse. Therefore, the Judge must be attentive to these clarifications.

> "*In the preliminary plan the two lands are shown contiguously but the Surveyor has not given any reason as to how it could be so in the context mentioned above. It was the duty of the surveyor to have explained as to how this has happened.* ***Parties including the Respondent have also failed in their duty by not questioning the surveyor on this important aspect. But such failures on the part of the surveyor and the parties will not absolve the duty of the Court to consider this matter. This is a serious lapse that has occurred in the District Court proceedings and overlooked in the judgment." (emphasis added)***

It is very significant that in judgments, the uncertainty of the conclusion or contradictory versions may lead to setting aside the judgment. In the case of *Pulukkutti Ralalage Karunaratne Vs. Pulukkuttiralalge Dhanapala and others.*[27] Supreme Court ordered a retrial based on the findings of the learned District Judge that at one stage, the learned trial judge had concluded that according to the documentary and oral evidence of the appellant, **"it is not possible to accept that the corpus is a separate piece of land** but a part of a larger land of eight acres in extent." However, the learned trial judge has subsequently concluded that the evidence of the 19th respondent and the evidence of the plaintiff confirm that the land in the extent of two roods remained **a separate portion for a long period**. It is also observed that the judgment of the learned trial judge dated 26.03.2007 was set aside in 2022 after 15 years.

25 CA/1105/2006 - Decied on 17.05.2019

26 SC/APP/169/2010 - Decided on 23.02.2012

27 SC/APP/239/2016 - Decided on 10.08.2022

It should be pertinent to note that the decree of partition is final and conclusive except in the instances mentioned in section 48 (1) of the partition Law. The Supreme Court has the power to set aside, revise, or restitution needy instances. Justice *Soza* has stated in *Somawathie vs Madawala*[28] that,

> ***"although the Act stipulated that decrees under the Partition Act are final and conclusive even where all persons concerned were not parties to the action or there was any omission or defect of procedure or in the proof of title, the Supreme Court continued in the exercise of its powers of revision and restitution in integrum to set aside partition decrees when it found that the proceedings were tainted by what has been called fundamental vice."*** *While section 48 of the Partition Law enacts that the interlocutory decree entered shall be subject to the decision of any appeal which may be preferred therefrom, be final and conclusive for all purposes against all persons whomsoever, I am of the opinion that it does not affect the extraordinary jurisdiction exercised by way of revision or restitution in integrum."* (*emphasis added*)

The Supreme Court expressed a similar view in the case of *Jayaratne and Another vs. Premadasa and others*[29]. The Plaintiff filed an action to partition land of 30 acres, whereas the preliminary survey depicted 71 acres. An interlocutory decree was entered based on the judgment, and steps were taken to partition the larger land based on the final plan. Subsequently, three petitioners, not parties to the action, intervened and applied to set aside the judgment or to vary the corpus to 30 acres and for the rights to that land. It was revealed that the District Court has no jurisdiction to entertain the application as it is out of section 48 (4) of the Partition law. The petitioners were not the parties to the action. It was further revealed that the surveyor failed to seek directions from the court, no steps were taken to amend the plaint, and *lis pendens* were registered.

Justice *Weerasooriya* stated in the judgment that the learned District Judge acted in blatant disregard of the provisions of section 48. It was further held that,

> *"the Court had no jurisdiction to vary the judgment. The decree is final, subject to appeal under section 48 (1) and revision or restitutio in integrum…."*

Justice *Weerasooriya* concluded that the District Court had acted wrongly in proceeding to trial regarding what appeared to be a larger land than that described in the plaint and had not properly identified it. In any event, **the peremptory steps relating to an amendment of the plaint, the registration of a new *lis pendens,* and the fresh declaration in terms of section 12 have not been complied with. Therefore, it has**

28 1985 (2) SLR 15

29 2004(1) SLR 340

set aside the proceedings in the District court leading up to the trial, the judgment, and the interlocutory decree.

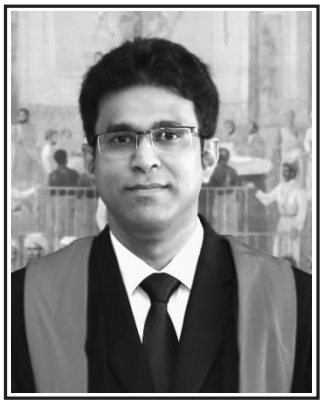
Therefore, it is essential to re-follow all pre-trial steps as presented a new plaint to the court.

8. CONCLUSION

Notably, in everyday life, people can select what they prefer: a private doctor, a preferable lawyer, food and lodging, a spouse, etc. However, where litigation is the last resort, a person has no right to multiple choices except to go to the court, which is vested with competent jurisdiction. Therefore, public confidence could be maintained by safeguarding their rights through proper adjudication. As such, the court must ensure the expected sacred role by adhering to the stipulated provisions.

Malicious Prosecution and Malicious Civil Proceedings under the Roman Dutch Law and English Law

Chamath Madanayake
Judge of the High Court



Under the Roman Dutch Law, the two main actions of the law of delict are the *Aquilian Action* and the *Actio Injuriarum*. Thus, "malicious prosecution" is not a distinct form of action in RDL. An action based on malicious prosecution would fall under *Actio Injuriarum*. However, it is a basis for a separate action under the English law.

Common features of *Actio Injuriarum*

In **Mohammed Saththas Issathul Sareena v Sadayan Kanapathi Sandrakala**[1] *Actio Injuriarum* was referred to as an "act committed with dolus (wrongful intent) or as it is usually termed in this connection, *animus injuriandi* which consists of an impairment of the plaintiff's personality."

The requirements to infer liability under *Actio Injuriarum* are;

(1) Unlawful act constituting an impairment of the plaintiff's personality

(2) *Animus injuriandi* or the wrongful intent on the part of the defendant

Therefore, the intentional violation of the plaintiff's rights as to his person, property, dignity and reputation would constitute an *injuria*, which is the basis for an *actio injuriarum*. Unlike in an *Aquilian action* where culpa (negligence) is sufficient to incur liability on a defendant, in *Actio Injuriarum*, the intention to injure the plaintiff must necessarily be proved.

An *actio injuriarum* being a personal action, maxim *Actio personalis maritur cum persona* (a personal action dies with the parties to the case) would apply. Hence, the *actio*

1 SC Appeal 162/15 and dated 01.12.2021

injuriarum lapses with the death of the plaintiff or the defendant. Only exception being a situation where the action has reached *litis contestatio*, the cause of action would survive upon the death of the plaintiff. On the contrary, an *Aquilian action* is transmissible and the rights of a deceased plaintiff and the liabilities of the wrongdoer (defendant) would pass to his or her heirs, subject to certain limitations (i.e. only the actual patrimonial loss could be claimed if the action had not reached *litis contestatio*). See **John Fernando and Attorney General v Satharasinghe.**[2]

Impairment of personality (referred to in (1) above) could be constituted in the following instances;

(1) **Wrongs against person** (Death, assault, false imprisonment etc.)

(2) **Abuse of legal procedure** (discussed below)

(3) Wrongs to reputation (defamation, libel, Innuendo)

(4) Wrongs to property (trespass to lands, servitudes, copy rights and trade marks)

Mckerron[3] describes one category of the wrongs for which the *action injuriarum* provides a remedy as "**Abuse of Legal Procedure**". The chief classes of proceedings to which the rule applies are;

(1) **Malicious criminal prosecutionS**

(2) Malicious imprisonment or arrest

(3) Malicious execution against property

(4) Malicious insolvency and liquidation proceedings

(5) **Malicious civil actions**

As shown above, in RDL, malicious prosecutions and malicious civil actions are contained in the class of "Abuse of legal procedure". As malicious prosecution and malicious civil actions are considered to be sub species of *Actio Injuriarum*, the common features of such action discussed earlier would also apply in respect of malicious criminal prosecutions and civil proceedings.

This article intends to discuss the application of the relevant law only in relation to institution of malicious criminal and civil proceedings referred to (1) and (5) above as they are the most commonly used in practice.

2 2002 2 SLR 123

3 Law of Delict, 6th Edition p 224

(A) Malicious Criminal Prosecution

Every person has a duty to inform the authorities of any offence committed by another. The person who complains to the authorities should be safeguarded by the law itself. He should not be penalised or held liable for damages for his lawful acts. However, if he goes beyond the limits recognised by the law, and prosecutes such person maliciously and without reasonable and probable cause, such acts would amount to an actionable wrong.

It was decided by our courts in **Karunaratne v Karunaratne**[4] that "a person who discharges a legal duty is free from liability for his own act even when the discharge of his duty hurts another. It is only when he goes beyond the limits of his legal obligation or acts altogether outside it, that he may render himself liable."

According to Mckerron[5]

> *"Every person has a right to set the law in motion, but a person who institutes legal proceedings against another maliciously and without reasonable and probable cause, abuses the right and commits an actionable wrong."*

In an early decision of **Corea v Peiris**[6] Lascelles A.C.J. held that 'the law in Ceylon with regard to action for malicious prosecution is the same as that in force in England'. In appeal, the Privy Council also held that "the principles of Roman Dutch Law on the essentials for an action for malicious prosecution are practically identical with the principles of English law and the onus of proving malice rests on the plaintiff in both systems of law."

Referring to the rules on malicious prosecution, Mckerron states that "although the rule is directly traceable to the influence of English law it has its origin in principles which are common to our law (RDL) and the law of England."

Ingredients of an action based on malicious prosecution

The essential ingredients for an action based on malicious prosecution are almost similar in both systems of law. In the South African case of **Easter v Langer**[7] the ingredients were set out as follows;

(a) An absence of reasonable and probable cause for instituting the prosecution
(b) Malice in instituting the criminal proceedings
(c) The existence of the prosecution
(d) Termination of the criminal proceedings in favour of the plaintiff

4 63 NLR 365
5 Law of Delict – 6th Platinum Re-print 2009 at page 259
6 9 NLR 276
7 (1884) 2 H.C.G. pg 505

Commenting on the ingredients in an action found in English law, Winfield[8] states that the plaintiff shall prove;

(a) that the defendant prosecuted him

(b) the prosecution ended in the plaintiff's favour

(c) prosecution lacked reasonable and probable cause

(d) the defendant acted maliciously

In **Silva v Silva**[9] our Court of Appeal emphasised the following grounds to be proved by a plaintiff;

(a) there was a prosecution on a charge that was false;

(b) such prosecution was instituted maliciously or with animus injuriandi and not with a view to vindicate public justice;

(c) there was want of reasonable or probable cause for such action

(d) the prosecution terminated in favour of the plaintiff as against the complainant

Anuradhapura Nandawimala Thero v Dharmatissa Herath[10] is a decision in which it appears that the court while appreciating the RDL to be the law applicable, describes the action with the terms 'malicious prosecution', although it is in fact an action for *injuria* under RDL. In that case, the Supreme Court discussed the substantive requirements of the action for malicious prosecution under the following headings;

(a) The institution of the prosecution (involves failure of prosecution)

(b) The absence of reasonable and probable cause

(c) Malice

(d) The termination of proceedings in plaintiff's favour

(e) Damages

Also see **Pathirage Don Abeyratne v Gamage Don Chandradasa**[11]

However, noticeably, an action based on malicious prosecution in the two systems entail slight differences. This can be mainly seen in the circumstances upon which the institution of proceedings under the two systems takes place.

8 Law of Tort 4th Ed p 611

9 2002 2 SLR 29

10 SC Appeal 159/2010 and dated 08.10.2018

11 CA 818/97(F) and dated 23.06.2011

In **Collins v Minnaar**[12] Watermeyer J held as follows;

> "Now, whatever the English law may be about malicious prosecution, we must be guided by the principles of the Roman Dutch law, and in Roman-Dutch law what is complained of is an injury…"

Institution of Proceedings

To file an action based on malicious prosecution, the prosecution must have been commenced. It is not necessary that it should have been carried through all its stages. What is necessary is that the accused should have been before court.[13] Therefore, in a case where the magistrate refuses to issue summons on the accused, there is no criminal prosecution, even if the preliminary steps required were taken.[14]

Generally, the criminal proceedings commence with a complaint made to the authorities by the virtual complainant against the offender. This would result in the offender being charged in a criminal court. The nature of the civil action filed, is to be identified on the basis upon which the plaintiff seeks to incur liability on the defendant. The action could be based on the premise that a false complaint had been made by the defendant which had resulted in the criminal proceedings. In such a situation, the cause of action could be the making of the false complaint. On the other hand, the action can be filed against the authorities, based on their institution of criminal proceedings.

Both situations above fall under the class of 'abuse of legal procedure' as in both situations, the virtual complaint and the authorities respectively, set the law in motion. In RDL, civil action could be filed in both situations. However, under the English law, an action could be instituted only in the first situation where the institution of the prosecution is by the defendant.

Thus, contrary to English Law, in the Roman Dutch Law, in an action based on malicious prosecution, it is sufficient if the defendant sets the authorities in motion. As was held in **Podi Singho v Appuhamy**[15]

> "Besides, the Roman Dutch law action for injury is quite different from the English action for malicious prosecution, and I think it is sufficient if the defendant sets the authorities in motion to the detriment of the plaintiff."

This difference was considered in the case of **Wijegunatilleke v Joni Appu**[16]. In this case, the lower court described the action as malicious prosecution and considered it as an action identical to an action found in the English law as 'malicious prosecution'.

12 (1931) CPD 12,14
13 E.B.Wickramanayake The Law of Delict in Ceylon page 93
14 Dionis v Silva 16 NLR 154
15 (1904) 3 Bal 145
16 (1920) 22 NLR 231

On appeal, referring to an unreported judgment of **Naide Hangidia v Abrahamhamy**[17], Schneider AJ held;

> "It is clear that an action on this case for injury lies. That is a form of action free from the technicalities of the English form of action.
>
> If the present case be regarded as identical with the English law action of that name it is bound to fail, for in the circumstances the defendant cannot be said to have prosecuted the plaintiff. The defendant did no more, than give information to the police, and the police after investigation prosecuted. In the circumstances it had been held that the defendant not being the prosecutor no action for malicious prosecution lay against him.
>
> The action *injuriarum* of the Roman Dutch law is much wider in its scope than the action for malicious prosecution known to the English law. It lies whenever a person does an act *dolo malo* to the detriment of another."

It is pertinent to note that even filing an action based on malicious prosecution against the complainant has to be decided on circumstances of each case. Mere making of a complaint will not give rise to a cause of action. His positive conduct towards the institution of proceedings by authorities should be taken in to consideration. This position is exemplified in the following decisions.

In **Sarawanamuttu v Kanagasabai**[18], it was held that "in an action for malicious prosecution in order to establish that the defendant set the criminal law in motion against the plaintiff, there must be something more than a mere giving of information to the police or other authority who institutes the prosecution. There must be the formulation of a charge or something in the way of solicitation, request or incitement of proceedings."

In **Kotalawala v Perera**[19] it was held that "if it be clearly shown that a private person procured a prosecution at the public instance, maliciously and without reasonable cause, an action may lie against him. It is in any case clear that where a private individual merely lays information concerning the commission of an alleged criminal offence, without requesting or directing the prosecution of any particular person, and the public prosecutor is left to exercise his own judgment as to whether a prosecution shall be instituted or not, such prosecution is not traceable to the action of the person who gave the information and he cannot be held liable for it".

17 SC minutes Mar 1,1898 CR
18 43 NLR 357
19 39 NLR 10

In **Hendrick Appuhamy v Matto Singho**[20], the decision in **Tewari v Bhagat Singh**[21] was quoted. Accordingly, the question as to who prosecuted, has to be decided upon the conduct of the complainant.

> "If a complainant did not go beyond giving what he believed to be correct in formation to the police and the police, without further interference on his part (except giving such honest assistance as they might require) thought fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge was false to the knowledge of the complainant, if he misled the police by bringing suborned witnesses to support it, if he influenced the police to assist him in sending an incorrect man for trial before the magistrate, it would be equally improper to allow him to escape liability because the prosecution had not technically been conducted by him. The question in all cases of this kind must be – who was the prosecutor? And the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion was not the criterion, the conduct of the complainant, before and after making the charge, must also be taken in to consideration."

In **Anuradhapura Nandawimala Thero v Dharmatissa Herath** (supra) the Supreme Court found that the Defendant-Appellant instigated the police to institute proceedings and having instituted the proceedings the Defendant-Appellant kept away from courts and his conduct was reprehensible. The Defendant-Appellant attributed the failure on the part of the police to prosecute and the lethargic conduct of the police for not securing the presence of the complainant and witnesses. However, the Defendant-Appellant was held liable as he failed to appear in courts despite several dates were given to secure his presence, which had ultimately resulted in the acquittal of the accused.

Therefore, in English law, it is necessary to have a prosecution instituted maliciously and without reasonable and probable cause. Moreover, it is required that the prosecution terminated in favour of the plaintiff to succeed in the action. In addition, in English law, it is necessary that the prosecution should have been instituted by the defendant and not by the authorities acting on his information.

However, in the Roman Dutch law, in *actio injuriarum*, action can be based on the false statement maliciously made against another, which results in the latter being charged by the authorities. In such a situation, although the statement might have prompted the authorities to institute proceedings, the cause of action stems from the false statement of the defendant and therefore the maker of the statement could be made liable.

20 44 NLR 459

21 24 TLR 884

Malice

An essential ingredient of an *injuria* in RDL is the intention to subject a person to an injuria. (*animus injuriandi*) It is often stated that the *animus injuriandi* in RDL is similar to malice in the English law.

According to R.G. Mckeron[22];

> "The plaintiff must prove that the defendant actuated by malice. By malice it is to be understood not necessarily personal spite and ill will, but any improper or indirect motive some motive other than a desire to bring to public a person who one honestly believes to be guilty".
>
> "The existence of malice can be established either by showing what the motive was and that it was wrong or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor. Malice may be inferred from want of reasonable and probable cause, but it is not a necessary inference…"

In **Pieris v Pieris**[23] a full bench of the Supreme Court opined that the mere averment of intent to injure is insufficient to prove malice. The fact that a person pleaded guilty to a charge brought against him is not conclusive on the issue as to whether such charge was in fact false and malicious.[24]

In **Silva v Silva** (supra) the Court of Appeal held as follows;

> "Malice is a feature of the mind and must be gathered from the circumstances. One should not presume the existence of a delict so long as it is possible to suppose the contrary.… An *animus injuriandi* cannot be presumed from the fact that the prosecution was found to be false and that the accused has been acquitted."

The consideration of malice under the two systems were discussed by Pereira J in **David v Bell**[25].

> "In a case of defamation malice in modern English law is no more than the absence of just cause or excuse and similarly an actual intention or desire to injure is not under the Roman Dutch law necessary to constitute the animus injuriandi. Reckless or careless statements may be taken as proof of animus injuriandi and while in English law malice can only be refuted by showing that the occasion was privileged or that the words were no more than honest and

22 Mckerron Law of Delict 7th edition at pages 263-264
23 Ram 1863-68 191
24 Sunderam v Kanakapillai 1 CLW 66
25 16 NLR 318

> fair expressions of opinions on matters of public interest and general concern, the RDL allows proof not only of such circumstances that the occasion was privileged but of any other circumstances that furnish a reasonable excuse for the use of the words complained of."

This shows that in RDL, the defences available to a defendant are more extensive than in English law.

In **Alwis v Ahangama**[26] (action based on malicious arrest) the Supreme Court held that the action of the plaintiff was maintainable, being an action in respect of an *injuria* allegedly committed by the defendant maliciously making a defamatory complaint of theft against the plaintiff, without reasonable and probable cause, which resulted in the arrest and legal proceedings in the Magistrate's court.

Absence of reasonable and probable cause

Not only malice, absence of reasonable and probable cause should also be proved. When a person is said to have committed a crime, he should be prosecuted and punished. Therefore, once a person is prosecuted, the law will presume such action to be *bona fide*. It is for the plaintiff to prove the presence of *animus injuriandi* on the part of the defendant. Such is not presumed from the fact that the prosecution was false and the accused had been acquitted.

Following is a statement made in the decision of **Corea v Peiris**[27].

> "It is incumbent upon the plaintiff to prove malice as well as want of reasonable and probable cause. In order to succeed in an action for malicious prosecution, the plaintiff must prove that the defendant acted without reasonable and probable cause. The absence of reasonable cause may be so glaring as to give rise to a presumption of malice. But malice is a distinct and necessary element in the constitution of the cause of action in an action for malicious prosecution."

A comprehensive definition, guided by the reasonable man's test, was given to the term "reasonable and probable cause" by Hawkings J in **Hicks v Faulkner**[28]

> "I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilt of the crime imputed."

26 2000 3 SLR 225
27 10 NLR 321
28 (1878) 8 QBD 167 at page 171

In **Jayawickrema v Lanka Electricity Board and another**[29], Abdul Salam J took the view that raising a reasonable suspicion as to the commission of an offence by a person would not suffice to bring an action for malicious prosecution. It was held that;

> "to succeed in an action of this nature the plaintiff must establish that the charge was false and false to the knowledge of the persons giving the information that, it was made with a view to vindicate public purpose and that it was made without probable cause. The material relevant shows nothing more than the defendants having set rolling a stone of reasonable suspicion pertaining to the commission of an offence against the plaintiff, as permitted by law, which alone is insufficient to hold the defendants responsible for malicious prosecution, malicious arrest or causing nuisance."

The plaintiff must prove that the prosecution was instituted by the defendant without reasonable and possible cause[30]. Even where it has been shown that the defendant was actuated by malice, the burden still lies on the plaintiff to prove the absence of reasonable and probable cause. The burden does not shift to the defendant to show that there was reasonable and probable cause for the charge and that he honestly believed it to be a true one. **(Candamby v Abaran**[31])

In **Perera v Perera**[32] the court held that if the defendant in making a criminal charge honestly believe in the truth of the charge and the facts of the case are such as to lend colour to that belief, even if they do not entirely prove the charge, the court will infer that he acted with reasonable and probable cause.

If the defendant acted with proper legal advice, it is necessary for the plaintiff to show that the defendant had not taken reasonable care to inform himself of the facts and that he did not act *bona fide* upon the advice believing that he had a cause of action. The defendant will be deemed to have had reasonable and probable cause where (1) he took reasonable care to find out the facts; (2) he honestly though erroneously believed them to be true; (3) the facts if true would have warranted a prosecution.[33]

Therefore, the question whether there was reasonable and probable cause is a question of fact and must depend on the circumstance of each case.

Termination of the proceedings in plaintiff's favour

The plaintiff's cause of action begins to run only after the termination of the criminal proceedings.

29 (2007) 2 SLR 406
30 Hathurusinghe v Kudaduraya 56 NLR 60
31 2 Matara 83
32 (1932) 1 C.L.W. 2100
33 Wickramanayake The Law of Delict in Ceylon page 95

Referring to the decision of **Gilding v Eyre**[34], the rationale for this requirement was explained by Mckerron as follows;

> "It is a rule of law that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination or other final event of the suit in the regular course of it."

Other than proving the termination of the criminal proceedings in his favour, the plaintiff need not prove his innocence to the charge. It is not essential that the accused should expressly be found not guilty of the charge. It is sufficient if the charge is withdrawn or for any reason the plaintiff is discharged, but there must be a definite termination in plaintiff's favour.[35] The acquittal of an accused is not conclusive as to his innocence and it would be open to the defendant in a civil action based on malicious prosecution to show that the plaintiff was in fact guilty of the charge against him.

Although it is accepted that the termination of the criminal proceedings is a *sina qua non* for the institution of a civil action seeking damages for malicious prosecution, a contrary decision was pronounced in **Kalu Banda v Rajakaruna**[36]. Rejecting the objection as to the maintainability of the action on the ground that the criminal proceedings were not concluded, the Court of Appeal held that "as far as the present civil action is concerned, it is the institution of criminal proceedings maliciously without any reasonable and probable cause that had caused the plaintiff to institute court proceedings." The Court in arriving at its decision seems to have relied on the judgment in **Alwis v Ahangama** (supra). However, it had failed to consider that in Alwis v Ahangama, the basis for action was not malicious prosecution but malicious arrest. With due respect to the Court of Appeal, it must be stated that the decision in Kalu Banda v Rajakaruna does not expound the correct legal position.

However, in **Pathirage Don Abeyratne v Gamage Don Chandradasa**[37] the Court of Appeal correctly held that the termination of the criminal prosecution is essential for the subsequent civil action based on malicious prosecution.

Damages

Since the action is an *actio injuriarum*, in an action based on malicious prosecution, the plaintiff must prove either the proceedings caused him patrimonial loss or that the offence with which he was charged was calculated to injure his reputation.[38] Thus, a plaintiff can claim damages for pain of mind, injury to feelings and reputation, and also for patrimonial loss.

34 (1861) 10 C.B. (N.S.) 592
35 ibid
36 (2002) 3 SLR 44
37 CA 818/97(F) and dated 23.06.2011
38 R.G.Mckerron 7th edition page 259

Compensation in an action for malicious prosecution has been described by Gatley[39] in the following manner;

> "Malicious prosecution involves hurt to reputation and feelings and this is not something that can be technically or arithmetically calculated/quantifiable but is based on policy considerations depending on the status, position of the person affected and the nature of the prosecution. Compensation unlike in other cases is not merely to repair damages but punitive and deterrent."

In **Patterson v Samudiri**[40] the court decided that in a case of malicious prosecution where the claim was for the damages caused to the reputation, the evidence as to the character of the plaintiff could be put in issue to calculate the damages.

In **Sarnelis v Appuhamy**[41] damages were awarded where the plaintiff's good reputation was held to have impugned by the prosecution.

(B) Malicious Civil Proceedings

Under the Roman Dutch law, the malicious institution of civil proceedings is an abuse of process of law. As an action based on such a cause of action would be an *actio injuriarum*, the common features of such action would apply to malicious civil proceedings as well.

Malicious civil proceedings should be differentiated with erroneous civil proceedings. In the absence of malice or fraudulent deception of court, no action will lie against a person for obtaining an erroneous decision of a court.[42]

According to Maasdorp[43], "with respect to malicious legal proceedings, whether civil or criminal, it may be laid down generally that when a person sets the law in motion and damages to another person ensues therefrom, he will be liable in damages, if it can be shown that in doing so he acted maliciously and without reasonable and probable cause." However, in the absence of malice or fraudulent deception of the court, no action will lie against a person for obtaining an erroneous decision of a court.[44]

If a person summons another to appear before court, maliciously and without reasonable and probable cause, it could amount to an *injuria*. There is nothing in law to prevent a person from bringing an action for damages against another for the wrongful institution of civil process.[45] According to the principles of RDL, the plaintiff must establish that

39 Gatley, Libel and Slander 11th Edition pp 265-270
40 (1926) 8 C.L. Rec 32
41 (1932) 1 CLW 299
42 Hart v Cohen (1899) 16 SC 363
43 Book III page 80
44 Moaki v Reckitt and Colman (Africa) Limited 1968 (3) SA 98
45 Wickramanayake, Law of Delict in Ceylon page 98

the defendant filed the earlier action, maliciously and with the intention to injure the plaintiff.

In relation to the institution of malicious civil actions, Mckerron draws a difference between the two systems of law. Accordingly, in English law the rule is that 'the bringing of an ordinary civil action (not extending to any arrest or seizure of property) is not a good cause of action, however unfounded, vexatious and malicious it may be'. [46] With reference to the Roman Dutch Law, he says 'But in principle there is no reason for denying a remedy to a person against whom a civil action has been instituted maliciously and without reasonable and probable cause, provided he can show that the bringing of the action caused him patrimonial loss, or the nature of the action was such that it was calculated to injure his reputation'.

Cooray v Fernando[47] was a decision where our superior courts identified the difference in the two systems of law in relation to malicious civil proceedings. This was stated in the following manner;

> "While, therefore in English law it is sufficient for a plaintiff to show that a civil action was instituted, carried on or defended by the defendant in the absence of lawful justification as explained already, under the Roman Dutch law, a plaintiff must prove in addition that there was malice, as well as want of reasonable or probable cause on the part of the defendant."

In this case, it was decided that, under the Roman Dutch Law, an action will lie for maliciously instituting civil proceedings in respect of a maintenance case falsely instituted. Soertsz J observed that "Malice in the case of civil proceedings is not confined to actual personal malice but may include the case where the defendant has been actuated by any other improper and indirect motive."

In **Serajudeen v Allagappa Chetty**[48] it was held that "as regards the element of malice, it is of course well known that it does not mean ill-will. It has the import of mala fides, an intention to cause wrongful injury, or such reckless action that the party must be held responsible for the consequences."

As in the case of malicious criminal prosecution, the previous civil litigation has to be concluded, so as to institute an action for malicious civil proceedings. A defendant in the same action by way of a cross claim cannot plead or claim damages against the plaintiff on the basis that the action had been instituted maliciously. In this regard, the decision of the Court of Appeal in the case of **Dr. De Sylva and Others v Dr. Ranjan Fernando**[49]

46 Mckerron Law of Delict 7th edition page 260
47 42 NLR 329
48 21 NLR 430
49 2002 2 SLR 108

is worth to be mentioned. In this case, the defendant was claiming damages from the plaintiff as a counter claim on the basis of malicious civil proceedings in relation to the same action. The court refereed to the treatise of Mc Kerron on "*The principles of liability for civil wrongs in the law of South Africa*" where he had stated that "no one shall be allowed to allege on a still pending suit that it is unjust. This can only be decided by a judicial determination or other final event of the suit in the regular course of it. Consequently, no action will lie for the malicious institution of proceedings unless the proceedings are terminated".

Conclusion

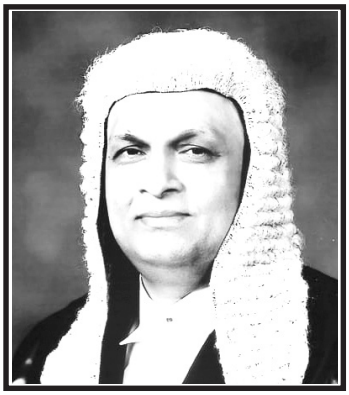
An action based on malicious prosecution under the Roman Dutch law is somewhat similar to one under the English law. Malice and absence of probable and reasonable cause stand as essential ingredients common under both systems. However, when it comes to the institution of the criminal proceedings, the two systems change slightly from one another.

In malicious civil proceedings, the Roman Dutch law permits a plaintiff to claim damages, even if the defendant's action was merely for a frivolous claim, provided it was instituted maliciously and without a reasonable and probable cause. However, under the English law, the plaintiff is only entitled to claim damages in such an action, if the defendant in his action had maliciously sought to arrest or seize the property of the plaintiff. Therefore, the scope of the action under the RDL is wider than the scope under the English law. The former system attempts to ensure the rights of the persons against abuse of process of law to an extent greater than the latter.

However, in English law, it is sufficient to prove the absence of lawful justification in malicious civil proceedings while the Roman Dutch law requires malice and absence of reasonable and probable cause, which is a higher degree of proof.

The Role of the Magistrate in Ensuring a Fair and Efficient Investigation

Sarath Jayamanne[*]
President's Counsel



Introduction

A criminal investigation is crucial before prosecuting a case. Investigators, part of the executive branch, are given extensive powers by law and judicial interpretation. In Sri Lanka's adversarial system, the trial judge acts as an umpire. However, during the course of an investigation, the magistrate should not act as a mere umpire or silent observer, but is duty-bound to see that a fair, efficient and independent investigation is conducted in a timely manner, though he is not in charge of the investigation.

The purpose of this Article is fivefold:

First, it examines the purpose, scope, and objectives of criminal investigations;

Second, it discusses the magistrate's role when a suspect is brought before the court;

Third, it analyzes how the magistrate is required to exercise their discretion in granting bail in cases where there is public outcry or claims of interference with witnesses;

Fourth, it explores the assistance and guidance a magistrate should offer investigators during the investigation;

Fifth, it evaluates the steps a magistrate must take upon receiving the final investigation report.

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Mechanical application of isolated provisions of the Code of Criminal Procedure Act ("CCPA")[1] can result in flawed and weak decisions. Thus, magistrates must have an overall understanding of the scheme of the criminal procedure; this requires a sound philosophy on criminal justice.

1. The purpose, objective and the ambit of the investigation

The State is duty-bound to conduct investigations and, thereafter, prosecute offenders. The judiciary, an independent arm of the state, determines whether the prosecution has proven the offence beyond reasonable doubt, based on legally admissible evidence. Upon conviction, the judges impose sentences according to relevant penal laws, serving a deterrent function and fulfilling retributive and incapacitative purposes, while also partially addressing victims' rights and entitlements. Therefore, the effectiveness of the entire criminal justice system depends heavily on the integrity and efficiency of the investigation process.

The primary goal of an investigation is to collect truthful evidence and materials for the trial. Investigators must verify the reliability of eyewitness claims and rigorously assess circumstantial evidence. Modern technology and scientific testimony may offer more reliable evidence than human testimony, which can be prone to error. Investigators should prioritize scientific evidence where possible.

During an investigation, investigators may arrest a suspect only if there is reasonable suspicion. Once in police custody, investigators must record and examine the suspect's statement and investigate their explanation, after which a decision to institute legal proceedings may be made. Due to allegations of bribery and corruption within the police, magistrates must carefully scrutinize B-reports and police requests. Some civil disputes are misrepresented as criminal cases, expecting resolution by the criminal trial's end.

Thus, the fundamental principle underlying investigations is the pursuit of truth, ensuring the prosecution of perpetrators while protecting the innocent. Thorough, fair investigations uphold the rule of law; flawed investigations risk acquittals and potential violations of the accused's fundamental rights.

2. The role of a magistrate when a suspect is produced

The arrest of a suspect, their production before a magistrate, remand, and the institution of proceedings are governed by the Code of Criminal Procedure Act, of which Sec.5 states:

1 No. 15 of 1979.

All offences –

(a) Under the Penal Code,

(b) Under any other law unless otherwise specially provided for in that law or any other law,

*Shall be **investigated**, inquired into, tried and otherwise dealt with according to the provisions of this Code.*

Where statutes prescribe a special procedure for certain offences, that procedure must be followed; where there are lacunae in said statutes, the CCPA will apply. Where no procedure exists, a procedure that aligns with the justice of the case and is consistent with the CCPA may be adopted.[2]

Investigations are governed by sections 108 to 125 of Chapter XI CCPA. Upon receiving information, the Officer-in-Charge ("OIC") initiates an investigation only if a criminal offence is disclosed.[3] Statements must be recorded,[4] and if the investigation reveals that the information is credible or gives rise to a reasonable suspicion, the suspect may be arrested.[5] Such decision should not be arbitrary and must follow the criteria laid down by the judiciary.

If, during the investigation, the OIC finds no grounds to justify forwarding the suspect to the magistrate, the suspect must be released.[6] If the OIC finds that the information is **well-founded**, the suspect should be produced before the magistrate within 24-hours of his arrest. [7]

When producing the suspect before the magistrate, synopses of all witness statements must be included in the B-Report: this is stipulated in **sec. 115(1) CCPA** as follows:

> *"Whenever an investigation under this Chapter cannot be completed within the period of twenty-four hours fixed by section 37, and there are grounds for believing that further investigation is, necessary the officer in charge of the police station or the inquirer shall forthwith forward the suspect to the Magistrate having jurisdiction in the case and shall at the same time transmit to such Magistrate a report of the case, **together with a summary of the statements, if any, made by each of the witnesses examined in the course of such investigation relating to the case.**" (Emphasis added)*

2 sec. 7 CCPA
3 sec. 109(5)(a) CCPA as amended by Act No. 52 of 1980
4 sec. 110(1) CCPA
5 sec. 32(1)(b) CCPA
6 sec. 114 CCPA
7 sec. 116(1) and 37 CCPA

The OIC must demonstrate that an offence was committed, that the information is well-founded, and that the statements implicate the suspect. These procedural safeguards helps to prevent potential abuse of power by law enforcement.

The Court in ***RP Wijesiri v Attorney-General***[8] emphasized that submission of B-Reports was "imperative [as the] Magistrate should be kept informed of the progress of the investigations." Ranasinghe J held:

> *"Chapter XI of the New Code is, in my opinion, one of the most, if not the most,* ***important safeguards against arbitrary deprivation of the liberty*** *of the subject. It is the foremost bastion of the all-important citadel of individual freedom.* ***It is the bounden duty of the Courts to be extremely vigilant*** *and ensure that those, who are charged with the duty of exercising the powers vested in them by the provisions of the said Chapter, not only* ***exercise such powers within the limits imposed by law and do not overstep them,*** *but also that* ***they do not side-step and circumvent*** *the said provisions unless such deviation is clearly and categorically provided for by some provision of law.* ***Chapter XI is what gives teeth to the guarantee of individual freedom*** *enshrined in the Constitution of Sri Lanka."(emphasis added)*

If the B-Report fails to meet legal requirements, the magistrate is not obliged to remand the suspect. Further, the magistrate must only consider the admissible material, and disregard any purported confessions made to the police. Without sufficient evidence, there is no legal basis for remand or bail; the magistrate's jurisdiction arises only when the magistrate satisfied that the evidence justifies further action.

In ***Jayasinghe v AG***[9] Dias J held that remanding a suspect is irregular if a person arrested without a warrant was produced before the Magistrate without a synopsis of witness statements. Similarly in ***Dharmarathana Thero and Ors v OIC Mihinthale***[10] it was held that magistrates must be satisfied through the synopses that the police have ascertained the credibility of the complaint or information prior to the arrest. In ***Meettage Piyaseeli v The Attorney-General***[11] it was held that the submission of the aforesaid synopses is essential, for the magistrate to ascertain reasons if any to remand, and those relevant provisions of the law cannot be ignored.

In ***Mohamed Razik Mohamed Ramzy v. B.M.A.S.K. Senaratne and Others***[12] the Accused had been arrested for offences under the ICCPR Act,[13] Penal Code and

8 (1980) 2 Sri LR 317
9 50 NLR 202
10 SC FR 313/2009, SC Minutes of 09.11.2011
11 CA CPA/63/2021, CA Minutes of 30.11.2021
12 SC/FR Application No.135/2020, SC Minutes of 14.11.2023
13 International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007

Computer Crimes Act for a Facebook post which stated *inter alia* "Muslims should pay attention to the need to carry out an ideological Jihad (ideological war) by using the mainstream media, social media and all other space." The Supreme Court, holding that no offence had been made out, stressed that:

> *"**At the stage of the suspect being produced** and upon a consideration of the material contained in the report and the summary of statements recorded submitted under section 115(1), the **Magistrate must judicially consider the material** contained in the report and the summary, and determine whether it is expedient to place the suspect in remand custody… As opposed to the exercise of judicial discretion, a mere perfunctory endorsement of the application of the Police to place the suspect in remand custody, would make **the ensuing order of the Magistrate placing the suspect in remand, devoid of requirements of the law, injudicious and a mockery of the justice system**. This is of considerable significance, and a decision to place the suspect in remand custody amounts to deprivation of his liberty… in terms of Article 13(2) of the Constitution." (emphasis added)*

While fundamental rights ("FR") jurisdiction covers only executive and administrative decisions, if a magistrate does not make a judicial decision, their order can be questioned in an FR case, potentially leading to a finding of fundamental rights violations. In ***Farook v Raymond***[14] the Supreme Court held that when a judge complies with or accedes to or acquiesces in proposals made by police officers "acting in concert with them, **consenting rather than assenting**, he would **not**… be acting judicially" and would be considered to have "abdicated his authority."

In ***Seneviratne v Rajakaruna, SI CID***,[15] it was held that the Legislature has been emphatic that mere suspicion would be insufficient to arrest a person. The below extract from Indian Scholar Sohoni's work on the Indian Criminal Procedure Code was quoted with approval:

> *"A general definition of what constitutes reasonableness in a complaint or suspicion and credibility of information … must depend upon the existence of **tangible legal evidence** within the cognizance of the police officer and he must judge whether the evidence is sufficient to establish the reasonableness and credibility of the charge, information or suspicion. What is a reasonable complaint or suspicion **must depend on the circumstances of each particular case, but it must be at least founded on some definite fact tending to throw suspicion** on the person arrested and **not on mere surmise or information**." (emphasis added)*

14 (1996) 1 SLR 217

15 (2003) 1 Sri LR 410

Although the police can arrest persons suspected of cognizable offences without a warrant, they sometimes seek a warrant, hoping that if the arrest is challenged in an FR or writ application, it would be the magistrate and not the police who is held responsible. Situations also arise where a State Counsel appears along with the police and seeks the magistrate's intervention to issue a warrant or to remand a suspect, thereby exerting pressure on the magistrate, even where an offence may not be divulged or where the synopses of the witness statements do not link the suspect to the crime.

In ***Mahanama Thilakaratne v Bandula Wickramaginghe***[16] a 5-judge bench dealt with *inter alia* the justifiability of the warrant issued by a Magistrate for the arrest of a sitting High Court Judge, which had been issued subsequent to a request by a State Counsel who made submissions along with the CID in the Magistrate's Court. The Supreme Court held that

> *"Issuing a warrant is a judicial act involving the liberty of an individual and no warrant of arrest should be lightly issued by a Magistrate simply because a prosecutor or an investigator thinks it is necessary. It must be issued as the law requires, when a Magistrate is satisfied that he should do so, on the evidence taken before him on oath.* ***It must not be issued by a Magistrate to satisfy the sardonic pleasure of an opinionated investigator or a prosecutor****." (emphasis added)*

Magistrate should not act mechanically, but must use their judicial mind to evaluate the B-Reports. In ***Danny v Sirinimal Silva***[17] the Court held that

> *"remanding a person is a judicial act and as such a Magistrate should bring his* ***judicial mind*** *to bear on that matter before depriving a person of his liberty." (emphasis added)*

Similarly, in ***Dayananda v Weerasinghe***[18] it was held that

> *"Magistrates should be more* ***vigilant and comply with the requirement of the law*** *when making remand orders and* ***not act as mere rubber stamps****." (emphasis added)*

It was also held that a summary of the statements of witnesses should be filed and that the magistrate must give reasons if remanding the suspect.

When magistrates make remand orders, they must not only be satisfied of the existence of the criteria in sec. 14 of the Bail Act No. 30 of 1997, but also be alive to the fact that their jurisdiction to remand only arises where there is sufficient material against the suspect, which has emanated prior to the arrest.

16 (1999) 1 SLR 372
17 (2001) 1 Sri LR 29
18 (1983) 2 Sri LR 84

In ***Premalal Silva v IP Rodrigo***[19] the suspect was arrested for questioning regarding a robbery, because he had been involved in a series of robberies previously; the Supreme Court held such arrest was illegal. In ***Channa Pieris v The Attorney-General***[20] it was held that an officer cannot make an arrest founded on mere conjecture or vague surmise.

The magistrate cannot remand a suspect expecting the police to go on a voyage of discovery and elicit evidence after the arrest and thereby to justify the arrest. In the FR case ***Koneshalingam v Major Muthalif*** [21] the Court held that

> "***[The] matter in issue is not what subsequent investigations revealed, but whether at the time of the arrest the person was committing an offence, or that there were reasonable grounds for suspecting that the person arrested was concerned in or had committed an offence***.
>
> *In the instant case, although the detention orders refer to the petitioner as "a member of the LTTE",* ***no material was produced before this Court to show that at the time of the arrest*** *of the petitioner, the arresting officers had such information prior to the decision to arrest the petitioner.…The silence of the 1st respondent and his officers and the non-availability of any material indicating the reasons for the arrest of the petitioner, only leads to the conclusion that,* ***no acceptable reasons were available at the time he was arrested****.*
>
> *It appears that the petitioner was taken into custody on* ***vague suspicion,*** *without there being any reasonable grounds for such arrest. The arresting officer could not have possibly informed the petitioner the reason for his arrest.*
>
> *I therefore hold that the petitioner's fundamental right guaranteed under Article 13(1) of the Constitution was violated."(emphasis added)*

In ***Corea v The Queen***[22] it was opined arrests on a mere 'unexpressed suspicion' that a particular cognizable offence has been committed were illegal, and that police officers must be persuaded of the guilt of the suspect, and cannot bolster up the strength of the case by seeking further evidence while detaining the suspect or taking him to a spot where they know they may find further evidence. This dicta is very vital, especially as it has been the general practice of the police officers to arrest a person and thereafter claim they make a sec. 27 Evidence Ordinance recovery. If there was no justification in the arrest, it does not become legal just because a "sec. 27 recovery" was made later.

19 SC FR 24/89, SC Minutes of 05.09.1990
20 (1994) 1 Sri LR 1
21 (2004) 3 Sri LR 226
22 55 NLR 247

In ***Muttusamy v Kannangara***[23] it was held that the magistrate's function is to inquire into the officer's state of mind at the time he arrested the suspect, and evaluate the reasonableness of his suspicion. In that case, the arresting officer had failed to provide the magistrate with the complaint or information to justify the suspicion to justify his search without a warrant. Graetien J held that

> *"When private citizens are arrested without a warrant, it is imperative that the provisions of Sections 37, 126 and 126A of the Criminal Procedure Code should be scrupulously applied. If this is not done, police, powers which are designed to protect the community "become a danger instead of a protection"…*
>
> *No evidence was led upon which the learned Magistrate could hold that Kannangara was entitled to search the premises without a warrant… [The]* ***Inspector would probably have been a trespasser*** *if he had persisted in entering the premises without a warrant when permission to enter was refused him...*
>
> *No one should be arrested by the police except* ***on grounds which in the particular circumstances of the arrest really justify the entertainment of a reasonable suspicion.****" (emphasis added)*

The Court found that the suspects had a legitimate right to protest against the illegal actions of the police, and as such this was not an obstruction of the public officer's duties. Thus this judgment establishes that citizens have a right to protect their body and self and protest.

Tiran Alles v IGP[24] was an FR application filed by the petitioner to prevent his arrest based on an unverified complaint of misappropriation. It was held by the Supreme Court that

> *"the* ***burden is on the peace officer*** *to place sufficient material to the court that the deprivation of the suspect's liberty is not arbitrary, capricious or unreasonable." (emphasis added)*

Legal power to remand

If there is no evidence, the magistrate does not have the jurisdiction to order remand, and a decision to remand in such a situation is commonly challenged by way of an FR or Revision application. The Court of Appeal has held that where the there is no evidence; the jurisdiction of the magistrate is affected, entitling the suspect to not only seek revision but even pursue a writ application.

23 52 NLR 327

24 SC FR Application 171/15, SC Minutes of 02.09.2015.

This matter was recently discussed at length in ***CA Writ/184/2024***[25]. The Court of Appeal held:

1. The Petitioner was not prohibited from invoking the Writ jurisdiction as the Learned Magistrate has <u>*acted ultra vires*</u>, and

   "any ultra vires conduct falling within the manifold grounds of judicial review, this court would be inclined to exercise its discretion and grant relief in favour of the Petitioner. The purpose of judicial review is to keep the relevant officials within the bounds of the rule of law."

2. It has been demonstrated that there was no evidence against the Petitioner that warranted him being placed in remand custody.

3. Referring to sec. 115(2) CCPA, it was held that the Learned Magistrate had to satisfy herself that detention is required, based on the evidence placed by the Police before her; as there was no summary of statements, her judicial discretion was tantamount to being an order of remand where there was 'no evidence' to justify it.

   "As opposed to the exercise of judicial discretion, a mere perfunctory endorsement of the application of the Police to place the suspect in remand custody, would make the ensuing order of the Magistrate placing the suspect in remand, devoid of requirements of the law, injudicious and a mockery of the justice system." (emphasis added)

4. The Learned Magistrate should have been possessed with evidence of atleast a *prima facie* standard if she were to decide to remand. Mere assumptions could not be placed as evidence.

Therefore the Court of Appeal issued an interim order directing the Learned Magistrate to release the Petitioner from remand custody. This case clearly articulates that even if the suspect is arrested and produced for an offence under the OPPA, magistrates are not bound to remand if there is 'no evidence,' and are duty-bound not to remand if the B-Report does not contain the statements of the witnesses that would satisfy the suspect has committed the relevant offences.

The fundamental principle of the rule of law is that a person against whom there is no evidence should not be kept as a suspect is reflected in the fact that the sec. 114 and 115 CCPA provide that the police must release a suspect within 24 hours if there

25 CA Writ/184/2024, CA Minutes of 25.07.2024. Note: Usually a Revision Case would lie against an order of the Magistrate, but here, a writ was sought as the Magistrate's jurisdiction was challenged. It should be noted that the learned Magistrate was cited as a respondent as the petitioner argued that there was a lack of jurisdiction; in a revision application however, it would have sufficed to have named the Attorney-General as a Respondent.

is no material against him, and that the magistrate must release a person from the case and cannot remand him or release him on bail if there is no evidence. If future investigations uncover sufficient evidence, the status of 'suspect' can be re-assigned.

Alleged offences under the PTA, PODDO and OPPA

Offences Against Public Property Act ("OPPA") set out that if the value of the subject matter exceeds twenty-five thousand rupees, the suspect must be in remand until the end of the trial, and can be enlarged on bail by the magistrate only based on the proof of exceptional circumstances. A suspect arrested for an alleged offence under the Prevention of Terrorism Act ("PTA") can be enlarged on bail by the Court of Appeal, if the trial against the suspect has not commenced after expiration of 12 months from the date of arrest. Under the PTA the High Court can release the suspect on bail in exceptional circumstances. When the suspect was arrested by the Police and produced before the magistrate in connection with an offence under section 54A and 54B of the Poisons, Opium and Dangerous Drugs Ordinance ("PODDO"), the suspect can be enlarged on bail by the High Court in exceptional circumstances. If the pure quantity of the dangerous drug is ten grammes or more, the suspect can be enlarged on bail by the Court of Appeal in exceptional circumstances.

The deliberation we need to make is: whether the suspect in connection to an offence under the aforesaid Acts can be enlarged on bail in even where there is insufficient evidence. The answer is in the negative, as the law contemplates the suspect can only be released on bail based on the above conditions. However, our concern is what would arise where there is no evidence: the magistrate cannot place the suspect in remand custody. As such, it is basic and fundamental that where a suspect cannot be remanded, he must be released; regardless of the nature of the case, where there is no evidence, the magistrate is obliged to release the suspect, regardless of what the statute lays down.

In ***Padmanathan v SI Paranagama, OIC NIB***,[26] the suspect was arrested for an alleged offence under the PTA. Mark Fernando J held that the Magistrate is not bound to remand a person unless the B-Report provides sufficient material to justify remand. The rationale of the judgment is that even in a PTA case, the insufficiency of evidence should result in the release of the suspect by the Magistrate, notwithstanding the fact that the Magistrate has not been empowered to enlarge the suspect on bail.

In **Colombo MC Case No. B/80303/08/22**,[27] the Convenor of the Inter-University Students Federation Wasantha Mudalige was arrested by the Police and produced before the magistrate and remanded for the commission of offences under sec. 2 and 3 PTA. The State was represented by an officer of the CID and a Senior Deputy Solicitor-General.

26 (1999) 2 SLR 225

27 Colombo MC Minutes of 28.07.2023

He was kept in remand for several months, and the counsel for the Defence made submissions that no offences under the PTA had been revealed and sought magistrate to give a suitable order. In this case, the magistrate had no power to grant bail as it was a PTA offence, but the learned Magistrate carefully analyzed judicial precedent and the facts of the case, and determined that there was no evidence that the suspect had committed an offence under the PTA. As such, he discharged the suspect from the case. The decision of the magistrate was not challenged by the Attorney-General by way of Writ, Revision or Appeal.

AG's power to order an arrest

Another issue that must be deliberated is whether the Attorney-General can order the police to arrest a suspect, and whether the police would be bound to act on such an order.

In ***Mahanama Thilakaratne*** (discussed above), the arresting police officer sought to justify the illegal arrest of the suspect claiming that he was acting on the directions/advice of the Attorney-General. However, the Court was not convinced by this argument and found that it was the police officer who made the arrest who is responsible to make a legal arrest.

In ***Ramalingam Ranjan v The Attorney-General and Ors***[28] a writ of Mandamus was sought by a citizen compelling the Attorney-General, IGP and Director CID to arrest and detain the Senior Deputy Inspector-General Deshabandu Tennakoon for his involvement in the attack in "Gota Go Gama" in Galle Face. The Court held that said officers did not have a public duty to arrest a person, detain him and record a statement, and that this was only a discretionary power to be exercised when they deem necessary. This judgement demonstrates that no one can direct the investigating officer to arrest a person during the investigation; even the magistrate cannot order the police to do so, unless the police move the magistrate seeking a warrant. When a warrant is issued, the police are bound to arrest a person. However, once the trial commences, it is within the prerogative of the judge to issue an order to arrest an absconding suspect.

3. Powers of bail vested with the magistrate where there is public outcry/ witness interference claims

This discussion addresses practical issues, focusing on how magistrates should respond when the State opposes bail due to 'public outcry'. Magistrates must assess the facts to determine if credible evidence exists against the suspect when the police objects to bail claiming that there would be public outcry or interference with the witnesses if the suspect is released on bail.

28 CA Writ/437/2022, CA Minutes of 27.03.2023

According to Sec.2 Bail Act, granting bail is the rule, and refusal is the exception. Often, police request remand extensions due to incomplete investigations, but Sec.14 Bail Act makes it clear that this is not a valid ground for objecting to bail. Thus, refusing bail solely for incomplete investigations is unlawful; the police must provide evidence that one or more grounds under Sec. 14 Bail Act exist.

In ***Anuruddha Ratwatte and Ors v The Attorney-General***[29] the suspect had been enlarged on bail, but the Trial Judge cancelled bail upon service of the indictment, placing him in remand with no justification. It was held that the remand orders should not be perfunctorily made without there being any application, a hearing, any grounds being adduced, or any reasons stated in writing, and the grounds stipulated in sec. 14 Bail Act must be set out.

In ***Kamani Abeysekera v OIC, CID***[30] the Court of Appeal discussed the question of whether the suspect, Shani Abeysekera, would interfere with the witnesses and obstruct the course of justice like the police claimed. The Court enlarged the suspect on bail holding that there was no cogent material before the court of witness intimidation.

In ***Sicille Kothalawela v The Attorney-General***[31] and ***Lama Hewage Emil Ranjan v OIC SID***[32] it was held that the evidence must be shown by the investigators that the alleged public outcry in the event the suspect is released on bail. It was further held in the latter case that further remand of the petitioner for the purposes of investigations cannot be a ground for continued detention, taking into consideration the long delay in the investigation process.

In ***Nadeeka Sandamali v OIC Kadawatha***[33] it was held that the seriousness of an offence alone cannot form a ground to refuse bail, and that the court must bear the presumption of innocence in mind.

An issue sometimes arises as to whether the merits and strength of the case can be considered in granting bail. In ***Sadeesa Imali v OIC PNB and Another***[34] the Court of Appeal held that when a petitioner presents circumstances in a bail inquiry capable of weakening the prosecution's case, the court has the discretion to tentatively examine the facts to determine if reasonable grounds exist to grant bail, and any doubt should benefit the suspect. It was also held that the lack of incriminating evidence against the suspect, apart from a co-accused's confession, could be considered when adjudicating bail. The Court opined that the weakness of the prosecution's case and its likelihood

29 (2003) 2 Sri LR 39.
30 CA CPA/18 /2021, CA Minutes of 16.06.2021
31 CA (PHC) 27/2016, CA Minutes of 24.03.2016
32 CA (Bail) 19/2018, CA Minutes of 04.04.2019
33 CA (PHC) APN/138/22, CA Minutes of 19.07.2023
34 CA BAL/0108/2022, CA Minutes of 05.07.2023

of success could be considered when deciding on bail, as remand should not be treated as a punishment.

Dr. A.R.B. Amerasinghe in his book titled 'Judicial Conduct, Ethics and Responsibilities' at page 224 sets out that

> *"The State imposes a punishment on the suspect indirectly by keeping him in remand custody for an uncertain period. Obviously, that was not the intention of the legislature when it enacted Article 13(5) of the Constitution" (ie presumption of innocence).*

4. Assistance and instruction from a magistrate during the course of the investigation

Magistrates play a supervisory role in the investigation and are key instruments in the administration of justice, assisting and guiding the investigators to arrest the real perpetrator in a legitimate manner, eliciting truthful material. Investigators may arrest someone as a scapegoat to cover inefficiencies, or to avoid scrutiny from superiors, the government, or the media. Cases based on untruthful evidence result in innocent persons being arrested and even incarcerated and the perpetrator being unaffected, with a detrimental impact on the innocent persons, victim's and society's rights.

When an innocent person is investigated, their personality and reputation suffer, violating the protection of law under Article 12(1) of the Constitution. In Sri Lanka, once lost, a reputation is hard to restore. Even an arrest can have a lasting impact, tarnishing a family's name for generations. Investigators, therefore, carry a sacred duty, and magistrates must recognize the risk of abuse, including potential misconduct by officers.

Therefore, the role of the magistrate in applying his judicial mind when the police submit various reports is integral. In ***Udaya Gammanpila v MDCP Gunathilake, IP SIU and Others***[35] Sripavan CJ held

> *"When a "B" Report is filed, the Magistrate has to apply his judicial mind to the said Report and give appropriate directions to the Police if further investigations are necessary."*

The initial report is submitted when the suspect is arrested and produced, and further reports are submitted every 15 days appraising the magistrate of the progress of the investigation.[36] A final report is submitted upon the conclusion of the investigation.[37]

Investigators must be independent, competent, professional, expeditious and appropriate in their investigations, having understood the ingredients of the offence and their evidentiary value and relevance to the case. Magistrates in turn should properly and

35 SC FR Application No. 207/2016, SC Minutes of 11.07.2016 at page 3.

36 sec. 120(1) CCPA

37 sec. 120(3) CCPA

diligently oversee the investigation, bearing fair trial principles in mind, providing assistance if it is sought under sec. 124 CCPA.

The fairness of an investigation was expounded on in ***Victor Ivan v Sarath N Silva***[38] as follows:

> *"A citizen is entitled to a proper investigation - one which is* ***fair, competent, timely and appropriate*** *- of a criminal complaint,* ***whether it be by him or against him.*** *The criminal law exists for the protection of his rights -of person, property and reputation - and* ***lack of a due investigation will deprive him of the protection of the law****." (emphasis added)*

Investigations must be balanced, and investigators must verify witness statements and not accept them at face value. If a suspect provides information supporting their innocence, it should be investigated. If the police fail to conduct a further investigation or omit to include something the suspect has said when the police writes down the suspect's statement, the suspect's counsel can inform the magistrate, who can order the police to conduct a proper investigation. Failing to do so undermines the right to a fair trial and violates Art. 12 of the Constitution, which ensures equality and fairness of the investigation. Violation of fair trial rights can be challenged by way of a FR Case, and has been deliberated in the following judgments.

In ***Kusumdasa Mahanama v CIABOC***[39] it was held:

> *"Not only should a criminal investigation be lawful,* ***it must be fair as well; fair from the perspective of both the victim of crime and the suspected perpetrator of the offence.*** *From the perspective of the suspect, a fair investigation will include the investigator adhering to the following:*
>
> *(i) Explaining to the suspect the allegation against him.*
>
> *(ii) Affording the suspect, a full opportunity of* ***presenting his position*** *with regard to the allegation against him and regarding persons who have made incriminatory statements and items of incriminatory material gathered by investigators.*
>
> *(iii) Conducting investigations based on* ***exculpatory positions*** *(if any) taken up by the suspect.*
>
> *(iv) Treating the suspect in a humane manner, and in a manner that would not infringe his fundamental rights.*
>
> *The investigator must always* ***maintain an objective mind*** *and not view or treat the suspect with any prejudice. Ascertainment of the truth in terms of the law*

38 (1998) 1 Sri LR 340

39 SC TAB 1A and 1B/2020, SC Minutes of 11.01.2023

> *should be the prime motive of the investigator, and not to 'develop a case against the suspect so that he could be somehow prosecuted'…..*
>
> *If an investigation is conducted in an unfair manner, the accused (when indicted) may be able to claim that he had been deprived of his fundamental right to a fair trial. Further,* ***by the conduct of an unfair investigation, there is every reason to believe that the truth will not surface, and in the circumstances, the public will lose confidence in criminal law enforcement*** *and in the criminal justice system." (emphasis added)*

The facts of **Colombo HC Case No. 3125/21**[40] present a striking example of fabricated police evidence being exposed in a bail application through the use of CCTV footage and courageous legal action. Though the police claimed they arrested the suspect in Dematagoda while driving a Wagon R car with bags of heroin, CCTV footage from the apartment where the suspect lived in Wattala showed the arrest actually took place two days earlier at said apartment, contradicting the police's version of events. After the arrest at the suspect's apartment, the suspect's wife quickly retained a lawyer who, upon discovering the suspect was being held by the Colombo Crimes Division, provided an affidavit confirming the arrest two days earlier. Additional affidavits from the suspect's friend and relative, as well as the building owner, who submitted the DVR unit with the CCTV footage, were filed in the Magistrate's Court. The Defence also requested verification from forensic experts at the University of Moratuwa, which was granted by the Magistrate. The experts confirmed that the date and time on the CCTV footage were accurate and unaltered.

The Colombo High Court granted bail on exceptional grounds, concluding that the police's version of the arrest was fabricated. Thereafter, the Attorney-General's Department decided not to file an indictment and recommended the suspect be discharged, consequent to a Representation made by the Defence explaining the paucity of evidence.

This case demonstrates the importance of using technology to counter false allegations and highlights the role of lawyers and the judiciary in safeguarding individual rights against miscarriages of justice. Fortunately, the magistrate was mindful of the principles pertaining to a fair trial.

This case highlights the vital role a proactive magistrate plays in ensuring justice. Rather than passively accepting the police's account, the magistrate actively intervened during the investigation, which was crucial in uncovering the truth. By carefully reviewing CCTV footage, considering affidavits, and seeking expert verification from the University of Moratuwa, the magistrate demonstrated a commitment to fairness. Without this

40 Colombo HC Minutes of 14.10.2021

vigilance, fabricated evidence might have resulted in a wrongful conviction. This underscores the importance of judicial oversight in preventing miscarriages of justice. Magistrates must ensure that investigations are thorough and fair, upholding the integrity of the justice system and protecting individuals from false prosecutions.

The above dicta supports the argument that even a suspect can request investigators to gather evidence proving their innocence, such as CCTV footage to show they weren't at the crime scene, phone records to dispute claims, or DNA and voice samples. Using technology can address gaps in the police evidence. As such, objections by the Police or Attorney-General raised when a suspect requests certain items be sent for expert analysis must be considered by magistrates in this light. Further, sec. 7 CCPA provides for a procedure suitable to the justice of the case to be followed, and can be utilised by magistrates in conjunction with sec. 124 CCPA to justify the assistance provided to the suspects. In any case, sec. 124 CCPA predates modern technological advancements, and waiting for it it to be suitably amended would amount to a mockery of justice.

5. The steps the magistrate should take when an investigator submits a final investigation report

The Final Report submitted to the magistrate by the police upon the conclusion of the investigation must reflect a comprehensive synopsis of the evidence and witness statements. If the police find insufficient evidence, they may request the magistrate to discharge the suspect. However, if the investigation reveals sufficient evidence and a reasonable prospect of securing a conviction, they must submit a recommendation to prosecute, along with a plaint, draft charge and the final report. The magistrate, although presented with the plaint and draft charge by the police, has the legal responsibility to carefully assess the evidence and whether there is a reasonable prospect of securing the conviction and thereafter formally frame the charge.

Magistrates must not act passively during this stage. The plaint must contain a clear synopsis of the witnesses' statements, and magistrates must ensure that the charges align with the evidence outlined in the report and the plaint and evaluate whether the evidence supports the allegations and meets the legal requirements of the suggested offence. This prevents unfounded plaints and charges from being arbitrarily filed.

After this assessment, under sec. 139 CCPA, the magistrate issues summons/warrant to the suspect only after being convinced of the sufficiency of the evidence. Magistrates must avoid issuing summons mechanically; as such actions could lead to unwarranted legal proceedings.[41] The suspect, once summoned, retains the right to object to the plaint and charge, providing a further layer of protection against potential miscarriages of justice. This is an accepted right of the suspect to bring it to the notice of the magistrate

41 sec. 139(1)(a) CCPA

prior to the framing of the charge; the magistrate would be able at this juncture to refrain from framing the charge sheet, as sec. 182 CCPA requires the charges to be framed only if the magistrate finds that "there is sufficient ground for proceeding against the accused."

When plaints are filed by private parties the complainant's evidence must be led in court before summons are issued.[42] While police-filed plaints do not require immediate testimony from key witnesses before issuing summons, judicial precedent suggests that in such cases, the evidence of the key witness should still be presented. This judicial precedent further underscores the importance of witness testimony and corroboration in ensuring that charges are legitimate.

In ***Peter Leo Fernando v The Attorney-General and Others***[43] it was held that

> "***The requirement as to the examination of the complainant is imperative and should be strictly complied*** *with in order to prevent a false, frivolous and vexatious complaint being made to harass an innocent party and to waste the time of the court… The examination is not to be a mere form, but must be a full and intelligent enquiry into the subject matter of the complaint carried far enough to* ***enable the magistrate to exercise his judgement and see if there is a prima facie case or sufficient ground for proceeding.*** *The examination should be on facts which are within the complainant's knowledge."(emphasis added)*

The magistrate's vigilance in scrutinizing the evidence and the charges ensures that justice is not compromised, guarding against wrongful prosecutions and upholding the accused's right to a fair investigation. Below are some landmark judgments issued in respect of sec. 139 and 182 CCPA.

The Court in ***Abdul Sameem v Bribery Commissioner***[44] held that violation of the fundamental principle under sec.182 (1) is not a defect curable under sec.436 CCPA, and that

> *"an* ***independent judicial mind*** *is required to assess the sufficiency of the material available against the accused* ***even before summons or warrant is issued in one instance and in any event before a charge is framed****…It must not be "mechanically adopted." (emphasis added)*

The Court further held in ***Seenithamby v Jansz***[45] that

> "***Magistrates must not slavishly adopt as charges the plaints tendered by the police,*** *either in summary or non-summary cases, but should themselves*

42 sec.139(1)(ii) CCPA
43 (1985) 2 Sri LR 341
44 (1991) 1 Sri LR 76
45 47 NLR 496

> *independently consider the matter and see that the charges, whether in summary or non-summary proceedings are in due form and adequately set out the offence or offences." (emphasis added)*

In ***Malini Gunaratne, Addtl. District Judge v Abeysinghe and Anor***[46] which concerned a 'private plaint,' it was held that:

> *"Section 139(1) [CCPA] requires a Magistrate to form an opinion as to whether there is sufficient ground for proceeding against some person who is not in custody. I am of the view that the opinion to be formed should relate to the offence the commission of which is alleged in the complaint or plaint filed under section 136 (1). The words "sufficient ground" embraces both, the ingredients of the offence and the evidence as to its commission… I am of the view that the* ***proper test is to ascertain whether on the material before Court, prima facie, there is sufficient ground on which it may be reasonably inferred*** *that the offence as alleged in the complaint or plaint has been committed by the person who is accused of it." (emphasis added)*

In ***Abubackerge Jaleel v The Attorney-General***[47] it was held that "that framing of a charge is a magisterial duty which cannot be delegated to the police."

There may be cases where magistrates state that rather than assessing the sufficiency of evidence in the Final Report prior to instituting proceedings and frmaing charges, they will do so at the end of the trial. This is incorrect, and does not conform with sec.182 CCPA.

The importance of assessing the evidence even at a *prima facie* level has been addressed n ***Victor Ivan v Sarath N Silva*** (supra) where it was held at page 344 that:

> *"****A decision to prosecute in such circumstances would be, prima facie, arbitrary and capricious****, and so would the grant of sanction. If the accused were to seek judicial review, relying on Article 12(1), and submitted a certified copy of Court proceedings conclusively establishing that at the time of the alleged defamation he was giving evidence in a Court one hundred miles away, should this Court say that* ***his only remedy was to place that evidence before the Magistrate's Court; obtain an acquittal; and then recover damages for malicious prosecution? That would be to condone the use of the executive power of the State to pervert the criminal justice system*** *into an instrument of harassment, instead of a shield for the protection of the citizen." (emphasis added)*

46 (1994) 3 Sri LR 196

47 CA PHC/108/2010, CA Minutes of 26.08.2014

If the magistrate decides to institute proceedings when there is no sufficient legal and factual basis that decision can even be challenged by way of a writ or Revision application. In ***Pradeep Kumara Wijesinghe v OIC, SIU Rathnapura and Another***[48] Magistrate's refusal to discharge the suspects at the time of filing the plaint was challenged by way of Revision. The suspects were a married couple and directors of a company. The complaint lodged was relating to a commercial transaction between the complainant and said company; however, the plaint filed stated that the suspects had committed criminal misappropriation in their personal capacity. The Defence objected when the plaint was filed and sought the suspects be discharged as there was no evidence against them; however the magistrate decided that this should be a matter that is considered after the trial. In revision, the Court of Appeal held that :

> *"Section 186 in the CPC… empowers the Magistrate to* ***discharge a suspect at any time.*** *This section in furtherance to an individual's right to personal liberty and freedom.* ***Every individual is entitled to be free from arbitrary detention or prosecution in any instance where the commission of a crime cannot be sufficiently ascertained through investigations.*** *Thus, it is within the power of a Magistrate to discharge such suspects, in order to uphold their rights…*
>
> *The Magistrate has a duty to* ***ensure correct application of the law set out in Section 120(3) of the CPC with an eye to the individual's freedom and liberty****. Magistrate must thoroughly peruse the reports of the investigation to* ***firmly ascertain the grounds for suspicion of the suspect, thereby properly discharging and preventing the accumulation of cases which do not seemingly establish suspicion****." (emphasis added)*

In ***Gihan Pilapitiya v Magistrate, Nugegoda***[49] a magistrate's decision to institute proceedings without sufficient legal and factual basis was successfully challenged in the Court of Appeal by way of a writ application. Proceedings were instituted against the 1st Accused for offences under the Penal Code with the Petitioner as the 2nd Accused, accusing him of aiding and abetting and conspiracy with the 1st suspect in fabricating evidence. The Court of Appeal held that the magistrate's decision to name the Petitioner as a suspect was *ultra vires*, as the B-Report only indicated that the 1st suspect, a politician, had committed an offence of contempt of court under Article 111C(2) of the Constitution, and the Petitioner was in fact the victim of such offence. The Court of Appeal further determined that there were no grounds to frame charges against the Petitioner and that a Writ of Prohibition could be issued to prevent the magistrate from proceeding against the Petitioner, even though the Magistrate's Court had by then lost legal jurisdiction to try the case.

48 CA MCR/001/2022, CA Minutes of 14.12.2022

49 CA Writ/05/2020, CA Minutes of 25.10.2021

Magistrates must be open-minded and willing to depart from previous decisions made by them or by a previous magistrate, when any lapses or lacunae in such decisions are shown by Counsel. An unreasonable unwillingness to do so can be challenged in a superior court by way of a writ or FR application, where the magistrate's decision could possibly be overturned. However, seeking for review in a superior court is an arduous and time-consuming process for the suspect as well as the State, and can be avoided if magistrates needs respect and apply relevant judicial precedent.

Directions by the AG to the Police

In ***Deshabandu Tennakoon v The Attorney-General***[50] the petitioner Deshabandu Tennakoon sought a Writ of Certiorari quashing a letter written by the Attorney-General to the CID instructing them to name him as a suspect in the Magistrate's Court in relation to offences in the Gota Go Gama Attack Case. The Court of Appeal held that

> *"It is true and fair that the judicial review cannot be sought against the Hon. Attorney General where the discretion of the Hon. Attorney General has been exercised within his powers and bona fide. But considering the documents filed of this record, it is crystal clear that the Hon. Attorney General has acted beyond his powers, and it is a manifest mala fide decision."*

Reliance on COI Evidence and Recommendations

In ***Ravi Karunanayake v The Attorney-General***[51] the Petitioner had been indicted by the Attorney-General in the High Court on the recommendation of the Commission of Inquiry ("COI"), for offences revealed in COI proceedings. Holding that there was no sufficient evidence that the Petitioner had committed the offence, the Court quashed the indictment, finding that -

> *"However much the Prosecutor is honest and impartial,* ***no person should be prosecuted based only on untenable public opinion or on stereotypical personal ideologies*** *as the role of such Prosecutor or the Attorney-General is to ensure the fairness at every stage in the criminal proceeding." (emphasis added)*

COIs are mere fact-finding missions, which lack legal jurisdiction to investigate; the Attorney-General is not bound by the COI's recommendations. Cases filed on mere material and a COI's recommendation would be illegal. The Commission of Inquiry Act[52] has been amended allowing the Attorney-General to consider the evidence given by a witness in the COI.[53] Upon receipt of such material, the Attorney-General must refer

50 CA Writ/207/2023, CA Minutes of 26.06.2023

51 CA Writ/441/2021, CA Minutes of 28.02.2023

52 No. 16 of 2008

53 In any event, statements made before the COI by potential suspects cannot be used against them in subsequent criminal trials, as it would violate the rule against self-incrimination.

the material to the Police for further investigations. The Police must bring said material to the notice of the suspect and record his statement, and conduct further investigations if necessary.

All these judgements emphatically stress the need for the prosecutor to be satisfied that there is sufficient material. In the Magistrates Court, the magistrate is duty-bound to satisfy himself of the sufficiency of the material concerning the alleged offence, and the reasonable prospect of such material securing a conviction. When cases are highly publicized and brought before the magistrate there is pressure from society to prosecute the suspect. In the recent past, we have seen numerous cases where facts have been reported with lengthy, passionate and emotional submissions by the State Counsel, but many cases have thereafter failed, and in some instances the indictments have not even been filed thereafter. Magistrates must remain clear-headed and impartial, aligning themselves with the legal requirements; if not, the decision to prosecute would invariably be challenged by way of a writ or FR application. This could have a detrimental impact on public confidence in the judicial system.

In the **Magistrate's Court Case regarding the investigations into the XPress Pearl disaster**,[54] the Police sought a warrant against the Captain of the vessel for an offence under the Marine Pollution Prevention Act, No. 35 of 2008. The Defence objected on the basis that only the High Court had the jurisdiction pertaining to arrest and remand under said Act. The Learned Magistrate was upright in her legal thinking and refused to issue a warrant, and as such the captain was not arrested and not produced before the Magistrate's Court. Thus, a great injustice was thwarted by the decision of the Learned Magistrate; such decision was not challenged by the Attorney-General by way of review.

In **Homagama MC Case No. B 74765/24**,[55] the accused was arrested by the STF Officers and handed over to the Police Narcotics Bureau ("PNB"); she was then remanded for alleged possession of cocaine. When the case was presented for bail, the Defence argued that several people were present in the house, making it impossible to assign culpability solely to the accused. They contended that the Prosecution needed to prove conscious, exclusive possession, which had not been established. Furthermore, the Defence highlighted that statements of the the accused's adult children who lived in the house and had been present at the alleged raid as well as the STF officers who had conducted the raid had not been recorded by the PNB. The Defence requested discharge rather than bail, noting that bail for such offences should be sought from the High Court and arguing there was no evidence or reasonable suspicion of a criminal offence. Additionally, the Defence requested the magistrate

54 Colombo MC Case No 51644/6/21, Colombo MC Minutes of 08.06.2021

55 Colombo MC Minutes of 18.06.2024

order that the PNB record the statements of the accused's adult children who lived in the house, denying the recovery of any illegal substances from their home; this was consequent to the filing of the bail application. The magistrate, upon reviewing the case, requested further reports from the PNB, which subsequently confirmed there was no evidence against the accused. The Learned Magistrate held that the Prosecution had not established that the accused had the requisite knowledge and had been in remand for several weeks, and she was discharged from the case.

Conclusion

In this article I have considered the principles and law pertaining to commencement of investigations and all the procedures relating to subsequent steps and finally the institution of proceedings. Each step has to be conducted in a fair manner. A fair investigation is a part of the fair trial norms. The OIC should commence investigations only if he is satisfied there is a reason to believe an offence has been committed (sec. 109(5) CCPA). A person can be arrested only on credible information or if a reasonable suspicion has arisen against such suspect during the investigation (sec. 32 CCPA). The OIC can produce the suspect before the magistrate after the arrest and conduct further investigations if the allegation against the suspect is well-founded (sec. 116 CCPA). If the material is not sufficient, the OIC shall release the suspect (sec. 114 CCPA).

When a suspect is produced before the magistrate, a synopsis of the statements of all the witnesses must be submitted. If such synopsis is not provided or if the material is insufficient or not well-founded, the magistrate must release the suspect. However, if the material is well-founded, the magistrate can either remand the suspect or enlarge the suspect on bail (sec. 115 CCPA, sec. 14 Bail Act). During the course of the investigation, the magistrate must see to it that the police record the statements of truthful witnesses and that the investigations are fair. The magistrate should take every necessary step if the police are attempting to shield the real perpetrator. The explanation of the suspect must be investigated especially by using information technology and other scientific evidence (sections 124, 7 CCPA and decided judgements).

Finally, at the end of the investigation, the OIC shall submit a final report giving the entire synopsis of the statements of all the witnesses, and if the evidence is insufficient to secure a conviction, the magistrate must discharge the suspect. On the other hand, if the magistrate decides judiciously that there is a realistic prospect of securing a conviction, the magistrate must order that proceedings be instituted under sec. 136(b) CCPA.

Before framing the charges, when the suspects are summoned under sec. 139 CCPA, the suspect is entitled to raise legal objections regarding the insufficiency of evidence

and the evidence not touching the legal requirements. If this objection is upheld, the magistrate must discharge the suspect. If the evidentiary and legal requirements have been fulfilled, the magistrate has the legal jurisdiction to frame charges.

If the magistrate does not follow these legal principles, his decisions can be challenged by way of a writ on the basis of the 'no evidence' rule or on the basis of the violation of a fundamental right if there is an encroachment of fair trial rights (Art.12,13 Constitution). Additionally, the suspect would have the right to invoke the revisionary jurisdiction as well for any miscarriage of justice.

This analysis shows the key and pivotal role magistrates are expected to play in preserving fair trial rights, and thereby the rule of law.

UNDERSTANDING A SURVEY PLAN

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The contents are only informative and neither conclusive nor an analytical analysis of the principles. It is only an attempt to identify the sources of information which could be referred to and researched in the event of a necessity.

The science of surveying may be described as the technique of skillfully surveying a parcel of land, depicting the specific identifiable features on a field note and thereafter drawing a plan of such parcel of land, enabling the future identification of such parcel of land using the specific identified features.

It appears that the surveying principles are universal but the practices differ and vary due to the availability of equipment and as such the methodologies vary in different jurisdictions. It appears at first the stars and the sun were used as astronomical locations, now replaced with the Global Positioning System (GPS). The Electronic Distance Measurement device (EDM) which allows more precise land surveying. The above has made the collection of data much easier, but assessment, interpretation and management of data still require highly skilled professionals.

THE TRADITIONAL LAND MEASURES

The traditional Land Measures prevailing in the North and the South of Sri Lanka indicate our ancestors had identified the lands which they were entitled to cultivate with reference to sowing extents. Generally it is accepted that one Acre of mud land is equivalent to sixteen Kurunies of Paddy sowing extent. In the semi dry zone areas where cereals like Kurakkan is sown one Acre is identified as equivalent to one seer of Kurakkan sowing extent.

There are also the regulations made by the Minister of Land and Land Development under S.24 of the Survey Act No. 17 of 2002 read with Section 2 of the Act. In Chapter II of the Regulations under the heading "Conversion Factors" the equivalent in acres of the sowing extents in the Districts are given. e.g. Central Province

1. **Dry Zone**

(a) Paddy Sowing (mud land)

1 am = 2 acres

(b) Kurakkan sowing (high land)

1 am = 30 - 40 acres

2. **Wet Zone**

(a) Paddy Sowing (mud land)

1 am = 2 acres

(b) Paddy Sowing (high land)

1 am = 2 - 4 acres

(RATNAYAKA V. KUMARIHAMY - 2005 (1) SLR 303)

For other District refer the regulations made under the Survey Act No. 17 of 2002.

However, our Appellate Courts in its wisdom has held that the traditional sowing extents could vary with the climatic conditions and fertility of the soil prevailing in different Districts etc. and as such that it is difficult to preciously co-relate land areas with sowing extents with accuracy.

On all such matters, the information contained in the web-site of the Department, Technical Manuals, Technical instructions, Survey Regulations issued by the Department, Articles published by experienced and reputed surveyors and the few reported authorities are informative.

WHAT IS A SURVEY PLAN

"*A Survey Plan is a graphical representation to some scale, of the features on, near, or below the surface of the earth as projected on a horizontal plane which is represented by plane of the paper on which the plan is drawn.*"

The Survey Act No. 17 of 2002, certified on the 04th October 2002 defines:

(a). a "*Plan*"

"*means a graphical representation of any survey*"

(b). a "*Land Survey*"

means

"(a). the determination or establishment for boundary purposes of the form, contour, position, area, shape, height, depth, or nature of any part of the earth or of any natural or artificial features, and the position, length and direction of bounding lines on, below, or above any part of the earth;

(b). the determination or establishment of the extent of any right or interest in land or in air space;

(c). the determination of the location of any feature relative to a boundary for the purpose of certifying the location of that feature; and includes –

(i) Cadastral surveying;

(ii) Compiling a network of any order of precision;

(iii) Preparation of any plan or map; and

(iv) establishing photogrammetric ground controls.

for the purpose of the functions specified in paragraphs (a), (b) and (c);"

Thus, it is clear that a plan by a Registered Licensed Surveyor is prepared after a survey of a parcel of land as above described.

As the preamble to this Surveys Act indicates the Act has been enacted to provide for the powers and functions of the Surveyor-General; to regulate the carrying out of land surveys: to provide for the establishment of a Land Survey Council to regulate the professional conduct of surveyors; to repeal the Land Surveys Ordinance and the Surveyors Ordinance; and to provide for matters connected therewith or incidental thereto.

The provisions of the Act (which has defined a "Plan" and a "Land Surveys" as aforesaid), has been considered and reviewed by Samayawardena J. in the case of ***PUSHPAKUMARA AND OTHERS V. SURVEY GENERAL OF SRI LANKA AND OTHERS*** - 2019 (3) SLR 262.

In the said case Petitioners who are Private Surveys made on application for the issues of a Writ of Certiorari to quash a circular issued by the Survey General permitting Government Surveyors to engage in private practice.

Samayawardena J. in considering the intention of the Legislature, the provisions pertaining to the registration of Private Surveyors, issue of the annual practicing Licenses, distinguishing previous decisions of the Supreme Court refused the issue of the writ and has observed as follows:-

> *"Government Surveyors who engage in private practice will be under the strict scrutiny of the Surveyor General and necessary checks and balances have been put in place by the said Circular itself to regulate such private practice. Private practice is not automatic. A Government Surveyor who wishes to do private practice shall obtain a licence from the Land Survey Council, which can be extended annually,*

based on various factors including the performances of the previous year. Permission to engage in private practice is subject to several conditions designed to maintain the integrity and efficiency of the Survey Department. More importantly, the conditions in the Circular are not fixed. If those conditions are not adequate, more conditions can be introduced both by the subject Minister and the Surveyor General to address the particular issues.

The impugned Circular 5/2011 of the Surveyor General whereby Government Surveyors are permitted to do private practice subject to the conditions stated therein is, in my view, not ultra vires."

It appears that even in Sri Lanka the methodology and the techniques of surveying have changed due to the use of modern techniques and as such Chain Surveying, Theodolite Traversing ect. are considered to be antiquated. Further, the National Metric Conversion Law No. 17 of 1976 and the regulations made there under and published in the Gazette No. 93/6 of 18-07-1980 requires,

(a) only hectares and square meters or decimals of these units be used as units of area,

(b) the scales to be 1:50,000, 1:10,000, 1:5,000, 1:4,000, 1:2,000, 1:1,000 or 1:500 or other metric scale approved.

(c) contours to be in meters or multiples or decimals of a meter.

It appears that until the Registration of Title of all parcels of land are completed under the provisions of the Title Registration Act with such parcels being identified with Cadastral Plans, in all most all proceedings instituted for the vindication of title and where the source of title emanates with reference to survey plans made by the Survey General or Licensed private Surveyors basic knowledge of surveying techniques that existed, the types of plans that have been made, and the ability to read and understand a plan to be a pre-requisite.

CLASSIFICATION OF PLANS

In varied types of proceedings that come up for determination before courts day-in and day-out (specially civil proceedings) the identification of the corpus has been held to be a matter of fundamental and vital importance. In most instances the original source of identification are plans prepared by the Survey-General. There are also numerous instances when plans made by the Survey-General have been superimposed by commissioners of court. Therefore it is necessary to be familiar with the types of plans and the purposes for which such plans had been prepared by the Survey General.

As stated above in Sri Lanka Survey Plans are synonymous with the Survey Department which had been established as far back as 1800 and over the years the Department has prepared varied Survey Plans. The information contained in the web-site of the Department is informative and educational.

R. K. W. Goonesekera one of the most the eminent and respected jurist, Lecturer and practitioner of our time, in a rare book authored by him titled "Select Laws on State Lands" has tabulated and analyzed the cause and effect of legislation pertaining to land commencing with the Proclamation of the 3rd of May 1800 (Tax on Lands and Property) under the chapters headed;

- Sinhala Land Tenure;
- Acquisition of title by the Crown;
- Crown Grants;
- Acquisition of Private Land for public purposes;
- Acquisition of Private Land for planning purposes ;
- Alienation of Crown Land; and
- Land Reform.

The implementation of such Proclamations, Ordinances and Acts has required the Survey Department to prepare plans of various types. With the information contained in the Website and the analysis of Mr. Goonasekera, the plans prepared by the Department may be categorized as follows:

(a). **TITLE PLANS (T. P)**

They are the first plans prepared by the department to facilitate the sale of state (Crown) land to private individuals. These plans were prepared for each separate parcel of land. The Title Plans are classified as follows:-

- Title Plans without any prefix; eg. (1, 2, 3,…)
- Title Plans with Prefix 'T'; (T1, T2, T3….)
- Crown Title Plans; (Cr. T. P. 1, Cr. T. P. 2,….)
- Vesting Order Title Plans; and
- Temple Title Plans.

The Departmental Survey Regulations of 1970 describes "Title Plans" as follows:-

(1) A plan attached to a Crown Grant for land alienated by the Crown.

(2) A plan attached to a private final or settlement order, and called a Final Order Title Plan or a Settlement Order Title Plan.

(3) A Crown Title Plan issued for land which has been surrendered to, reverted to or taken over in exchange under settlement or otherwise, by the Crown.

(4) Title Plans have also been issued with Certificates of Quiet Possession and Certificate of Quiet Possession Title Plans. They were later issued as Certificate of No Claim Title Plans, but on and after 1.9.49 (the date on which Crown Lands Ordinance No. 8 of 1947 came into operation) these title plans are not issued.

(5) Mining Right Title Plans, issued for Mining Rights only.

(6) A Vesting Order Title Plan is a plan attached to a Certificate vesting in a Local Body, such as an Urban Council, land that is Crown or has been acquired by the Crown on behalf of such Local Body."

(See also Diagram Plan and Diagram)

All Crown Grants identify the land conveyed with reference to a Title Plan.

(b). **PRELIMINARY PLANS (P.P)**

Plans prepared of lands situated adjacent to each other.

The Departmental Survey Regulations of 1970 describes "Preliminary Plans" as follows:-

"A plan of a survey, issued by the Surveyor-General to a Revenue Officer, on which he can take action. Preliminary Plans are issued for Sporadic Surveys only. In the past they were issued for other surveys as well."

Preliminary plans are not confined to Crown/State lands. All parcels of land adjacent to one another within the area surveyed is depicted in the Plan. The lands comprised within the periphery are not identified separately by way of lots. The tenement sheet annexed to the Preliminary Plan contains the details of the lands comprised within the periphery, which is also not exhaustive.

(c). PLANS PREPARED UNDER THE WASTE LANDS ORDINANCE_URBAN AREAS

- Preliminary Plans without any prefix (PP);
- Preliminary Plans with prefix "A" (PPA);
- Preliminary Plans with prefix "S" (PPS);
- Preliminary Plans with prefix for each district;

- Chena Survey Preliminary Plan (Chena PP);
- Miscellaneous Survey Preliminary Plan (MSPP);
- Irrigation Survey Preliminary Plans (ISPP);
- Forest Survey Preliminary Plans (FSPP); and
- Town Survey Preliminary Plans (TSPP).

RURAL AREAS

- Block Survey Preliminary Plans (BSPP);
- Block Survey Village Plans (BSVP); and
- Topographical Preliminary Plans (Topo. PP)

When surveying a selected village all the land parcels whether private or state comprised within the village had been surveyed. When such survey was carried out at the request of the Land Settlement Department such plan may include state or private lands. In such an event a final settlement plan is prepared.

The following are the types of Plans available with the Department prepared for the above mentioned purposes;

- Final Village Plan (FVP);
- Finally Topographical Plans (FTP);
- Final Settled Plan (FSP);
- Final Colony Plan (FCP); and
- Final Urban Plans (FUB).

SURVEY DIAGRAMS

- L - Lease Diagrams - Attached to Lease Bond;
- O - Outright Grant Diagrams - Attached to Outright Grant;
- V- Vesting Order Diagrams - Attached to Vesting Order Certificate;
- S - Settlement Order Diagrams – Attached to Settlement Order;
- R - Restricted Grant Diagrams – Attached to Grant under the Land Development Ordinance; and
- M - Mining Right Diagrams - Attached to Deeds of Assignment of Mining Rights.

As it could be seen the Survey Diagrams had been prepared as per the requirements in the issue of grants and leases.

The Departmental Survey Regulations of 1970 describes "Diagram" and "Diagram Plan" as follows:-

Diagram

"An uncertified plan, attached to a grant for land, which has taken the place of Title Plans, Lease Plans and Diagram Plans. No copy of this Diagram is filed of record.

Diagrams are divided into the following six classes:-

(a) *Restricted-grant Diagrams (replacing Diagram plans) are attached to grants under the land Development Ordinance.*

(b) *Outright grant Diagrams (replacing Title Plans) are attached to Outright Grants.*

(c) *Lease Diagrams are attached to Lease Bonds.*

(d) *Settlement Order Diagrams are attached to a Settlement Order.*

(e) *Vesting Order Diagrams are attached to a Vesting Order Certificate.*

(f) *Mining Right Diagrams are attached to Deeds of Assignment of Mining Rights.*

A separate series of numbers is maintained for each of the six classes of Diagrams e.g. the Outright grant Diagrams are numbered 01, 02, 03 &c.. and similarly for each of the other classes. This numbering will be adopted on the original sheet, on the Diagram issued, in descriptions of abutting boundaries and on other records.

Diagram Plan

"(See also Diagram) A plan attached to a grant for land alienated under the Land Development Ordinance, Chapter 464. Legislative Enactments, 1956 Revision. These plans bear the same significance as Title Plans and Lease Plans, but are not guaranteed and show no description of boundaries."

STATUTORY SURVEYS

Statutory surveys are carried out in accordance with an Act or Ordinance. Some of these include;

- Land Development Ordinance;
- State Land Ordinance;

- Land Acquisition Act;
- Special Provisions Act; and
- Registration of Title Act, …., etc.

A further classification of surveys is found in Departmental Survey Regulations of the Department as follows:-

(a). Surveys for issuing grants
(b). Acquisition Surveys
(b). Court Commission Surveys
(c). Cadastral Surveys
(d). Town Surveys
(e). Demarcation Surveys
(f). Encroachment Surveys
(g). Engineering Surveys
(h). Blocking out Surveys
(i). Miscellaneous Surveys
(j). Road and Channel Trace Surveys
(k). Control Surveys
(l). Surveys for Topographical Mapping
(m). Condominium Property Surveys
(n). Block Surveys

For a detail description of each one of the above refer D. S. R.

Surveys for issuing grants

Grants are prepared through surveys carried out under the Land Development Ordinance and State Land Ordinance.

Surveys under Land Development Ordinance

Under this ordinance, suitable people are selected by Divisional Secretary by conducting land kachcheries for the available state lands which are suitable for cultivation and then are allotted these lands on permit to the selected people for cultivation. After satisfactory development of above said permit issued state lands, surveys are done under this ordinance to prepare statuary plans for issue of grants on the requisition received from Divisional Secretary.

Surveys under State Land Ordinance

Surveys for vesting of state lands to the institutions and individual people which/ who are not covered by the Land Development Ordinance are done under this Ordinance. Surveys for the allocation of lands to government institutions, issue of long-term lease for outright grants to middle class people, private institutions and demarcations for reservations are some of the examples.

Acquisition Surveys

These surveys are done at the request of the Acquiring Officer.

(a) Acquisition Surveys under section 2 of the Land Acquisition Act to determine the suitability of the land for the said public purpose. Only a tracing is prepared in this instance.

(b) Acquisition Surveys under section 6 or section 38 (a) of the Land Acquisition Act. When it is decided that the said land is suitable for the said public purpose, a landmarked plan is prepared in this instance.

Court Commission Survey

Commissions are issued by courts generally to check the Licensed Surveyor's work or to superimpose the boundaries of state claims on their plans. These surveys are carried out strictly according to the instructions issued by the courts.

Cadastral Surveys

Cadastral Surveying is fundamental to the process of registration of legal interest to the land. It implies that it is a clear and consistent definition of each land unit (land parcel) within a given area with positional accuracy of every land parcel within the declared area. So the Cadastral Surveying is a process by which the boundaries of each of the land parcels within a declared area are defined in a consistent manner with certainty in the geographical position, definition, extent, demarcation and delineation of land parcels and boundaries. It usually involves the process of re-establishing old and lost boundaries and sometimes the resolution of disputes over the boundaries or other interest in the land.

Town Surveys

These are the surveys carried out by the Survey Department within urban or developed areas to show the roads, watercourses, other natural features, property boundaries and buildings together with other details. Outcome is a record of details as exist on the ground and is meant for assessment and planning purposes only. Old work is not dealt with and the tenement lists are not supplied. Sometimes contours are also drawn at the request of the client institution concerned.

Demarcation Surveys

There are two types of Demarcation Surveys.

1. **Demarcation Surveys in a Block Survey area**

   When the Settlement Officer finalizes his settlements in a village, the survey is carried out with the objective of distinguishing the settled areas. This survey is carried out in accordance with the Settlement officer's memo of demarcation.

2. **Cadastral Surveys in Declared Land Registration area**

   These are the surveys required by the Commissioner of Title Settlement to demarcate the adjudicated boundaries of the land parcels. The Cadastral Map prepared after demarcation will serve as a basis for the title registration.

Encroachment Surveys

These are the survey of unauthorized occupation of state lands on the request of the different parties concerned such as Divisional Secretaries, Land Commissioner, and Conservator of Forest etc. The purpose of the survey may be either to regularize the encroachments or to eject the encroachers. Usually a Theodolite traverse is used to do the outer boundary survey and any other control, and Theodolite survey or Global Navigation Satellite Systems (GNSS) may be used for the details. A tracing is prepared and sent along with the list of encroachers either on the tracing itself or on a separate sheet of paper.

Furthermore, when encroachments are detected at the time of any other survey such as acquisition surveys, road surveys, landmarking surveys etc, such cases must be reported. There are different ways to handle these types of encroachments and the details are discussed in the chapters relevant to that particular survey.

Engineering Surveys

These are the surveys undertaken by the Survey Department for the purpose of designing engineering projects of various kinds. The majority of these contour surveys are for irrigation, flood protection and water supply and drainage etc. The survey requirements in these schemes vary from type to type and standard departmental specifications are available for each type of survey.

Blocking Out Surveys

Blocking Out Diagram (BOD) is prepared after preliminary outer boundary and detail survey of the area to fulfill the requirements of the client organization. Once the BOD is approved by the client concerned, blocking out is done by Theodolite survey or by using Total Stations. The boundaries are usually marked with wooden stakes and pointed out to the approved allottees and to the Grama Niladhari/ relevant officers.

Miscellaneous Surveys

These are the different types of surveys carried out at the request of different governmental organizations. These surveys vary from mere re-demarcation to the surveys of large areas to ascertain some specific requirements of the client and for pointing out the correct positions of disputed boundaries.

Road and Channel Trace Surveys

Roads and Channels are normally designed on contour plans. The centerline is first set out on the ground with the compiled bearings and distances. After setting out, it would be surveyed to the detail order accuracy. Strip Surveys and Longitudinal Sections & Cross Sections Surveys are also done subsequently.

Control Surveys

These are the surveys done for the establishment and maintenance of Control Net Work for the country. It is one of the fundamental responsibilities of the Survey Department. Different methods and different instruments such as Electro Magnetic Distance measuring equipment, GNSS Instruments, Levels & CORS etc. are used in these surveys.

Surveys for Topographical Mapping

These surveys are normally done by photogrammetric methods and by using high resolution satellite imageries. However, ground surveys and field verifications are required before finalizing the map.

Condominium Property Surveys

Condominium property is a property comprising land with a building or buildings of more than one storey and having more than one independent parcel of residential or non-residential accommodation. Condominium property Surveys are carried out by the Survey Department generally on the request of state controlled organizations such as National Housing Development Authority.

Block Surveys

The main object of Block Surveys was to separate claimed and state lands with a view for the settlement by the settlement officer. Lands that were obviously private, i.e. comprised of old cultivations and title plans were surveyed in block showing the different cultivations separately. Cultivated lands which were not obviously private were land-marked according to individual claims unless they were claimed in common. The boundaries between state lands and chena lands were land-marked against private cultivations and the surveys were made in accordance with the Settlement Officer‘s requirements. A village was considered as the unit of area for purposes of Block Survey plans and records and these plans were printed and issued for each village. Block

surveys have been completed now. No more Block Survey Areas remain to be surveyed any longer.

CADASTRAL SURVEYS

Cadastral Plans are prepared under the provisions of the Title Registration Act enacted in 1998. The Act once dormant is now been implemented in selected areas and as such it is of importance to keep abreast with the relevant provisions of the Law.

> "*The Cadastral Map is a primary requirement to register title to land under Registration of Title Act No.21 of 1998 and Surveyor General is mandated to fulfill requirement of preparation of Cadastral Maps under section 11 of the same Act and section 10 of the Survey Act No.17 of 2002.*
>
> *A cadastre is a methodically arranged inventory of land parcels of individual ownership with unique identification number based on a survey of property boundaries. Thus, a cadastre is essentially a systematic description of land parcels within an area. At the beginning of country cadastre, the unit of Cadastral Map was a village and recently changed as a Grama Niladhari (GN) division of a district. A cadastral map consists essentially of two parts via graphic record and textual record.*
>
> *The Surveyor General is responsible to maintain a base of cadastral survey information as per section 8 of the Survey Act and also to fulfill the requirements in section 36 of Registration of Title Act. Accordingly, Survey Department maintains Cadastral Database, as part of its Land Information System (LIS), in both digital and manuscript form.*
>
> *The LIS has been sourced with the field surveyed data under the Land Title Registration Project, currently being proceeds as "Bimsaviya". The Digital Geo-spatial data collected for preparation of Cadastral Maps have been processed to create a parcel based LIS and attributed with Tenement Information, collected for the requirements for issue of land titles."*

With the implementation of the Registration of Title Act No. 21 of 1998, it appears that the aggrieved parties are resorting to legal proceedings in the appropriate Courts and as such the description of Cadastral Surveys in Chapter XXI of the Department Survey Regulations (D.S.R.) is reproduced herewith as a ready-reconer.

Definitions for Cadastral Surveys as contained in D. S. R.

Registration of Title Act : This is an Act to make provision for the investigation and registration of Title to a land parcel; for the regulation of transactions relating to a land parcel so registered and for matters connected therewith.

Registered Licensed Surveyor with Accreditation Certificate: Registered Licensed Surveyor accredited by the Surveyor General to undertake Cadastral Surveys to define boundaries of land parcels as defined in section 11 of Survey Act No. 17 of 2002.

Administrative boundaries: This means the boundaries of administrative territorial units of Sri Lanka as gazetted by the government from time to time.

Beneficiary rights: This means the right of one of the parties of legal relationship to get a benefit as the result of signing of legal civil transaction or based on decision of the authorized state organization or local government.

Beneficiary unit or person: This means the land parcel or person enjoying benefits of material or non-material character as a result of encumbering by the appropriate obligations of other person or land parcel.

Burdened Land Parcel: This means Land Parcel, which h as a right or interest thereon, which provides a benefit to another Land Parcel.

Cadastral Map: This is as defined in Survey Act No.17 of 2002. A Cadastral Map includes any Condominium plan prepared under the Apartment Ownership Law No. 11 of 1973.

Cadastral Plan: This means a plan for a land parcel resulting from a Cadastral Survey as defined under Survey Act No. 17 of 2002.

A Cadastral Plan of a land parcel will show the boundaries and extent resulting from a Cadastral Survey of that land parcel.

Cadastral Plan includes Condominium Plan prepared under the Apartment Ownership Law No. 11 of 1973.

Base Diagram: This means a sketch showing existing statutory plans, existing and proposed control surveys, village boundaries, and adjoining village boundaries, prominent topographical

	feathers, boundaries of land parcel etc. which are considered as necessary.
Cadastral Survey:	This as defined in the Survey Act No. 17 of 2002. Cadastral Survey is a survey for the purpose of delineating, determining, or defining the boundaries of any parcel of land. It also includes determination of extent of the land parcel.
Cadastre:	Inventory of Cadastre in Sri Lanka is a methodically arranged inventory of all land parcels / properties regardless of ownership details each with a unique identification number based on survey of boundaries. Thus Cadastre of Sri Lanka is essentially a systematic description of Land Parcels/Properties.
Certificate of Title:	An extract from the Title Register for a single land parcel and shall show all of the existing registered information to that land parcel as registered by the Registrar General of Titles.
Interests in Land Parcel:	This means an interest less than ownership of the land parcel and includes servitude or encumbrance over such land parcel.
Land:	Includes land covered with water, and any benefits arising out of land, all things attached to the earth or permanently fastened thereto.
Land Information System:	System of capturing, storing, checking, integrating, manipulating, analyzing, and displaying data about land and its use, ownership and development. Read about Geographical Information System. Cadastral maps may be used to create a foundation for a land parcel based Land Information System which is to be established for the administration of land parcels in Sri Lanka.
Land Parcel:	This means an area separately delineated on a Cadastral Map.
Local Authority:	This means any Municipal Council, Urban Council and Pradeshiya Sabha.
Mortgage:	This is as defined in the Mortgage Act.

Owner:	(a) In relation to land parcel, the person or organization named in the Title Register and, (b) In relation to other interests in a land parcel, the person or organization named in the Title Register as the person or organization in whose favour the interests are registered in the land parcel register.
Private land:	This means any land not belongs to the state.
Registered land:	This is the land, the title to which is registered under the Registration of Title Act No. 21 of 1998.
Registered Surveyor:	This is as defined in the Survey Act No. 17 of 2002.
Claims:	This means a documented application to identify existing rights to land parcel and providing the names of the potential owner or owners at present.
Claimant:	This means a person / organization making a claim.
Commissioner of Title Settlement:	A person duly appointed under the provisions of the Registration of Titles Act No. 21 of 1998. This also includes Additional, Deputy, or Assistant Commissioner with delegation of powers, duties and activities of the Commission er of Title Settlements.
Assistant Commissioner of Title Settlements:	A person duly appointed in writing by the Commissioner of Title Settlement to carry out the activities related to Registration of Titles.
Deeds Register:	This means a Register maintained by the Registrar of Lands under any other law other than this Act to carry out activities related to Registration of Titles.
Encumbrances:	Interests, rights and / or claims which can or may be made or set upon in respect of a land parcel, and such dealing that can be registered under the Registration of Title Act No. 21 of 1998.
Geographic Information System:	This means a system for capturing, storing, checking, integrating, manipulating, analyzing and displaying data

related to positions on the earth's surface. (Read about Land Information System). Cadastral Maps can be used as a base for Land administration and land development and land use planning which usually required the establishment of the proposed Geographical Information System.

Instrument: This means a document having the effect of conveying title to and interest in any land parcel in the prescribed form.

Registrar General of Titles: A person duly appointed under the provisions of the Registration of Titles Act and also includes Additional, Deputy and Assistant Registrar Generals, with delegated powers, duties, and activities of the Registrar General.

Preliminary Schedule of Title /Final Schedule of Title: Preliminary Schedule of Title means a list of all interests, rights and information associated with the land parcel. It includes all ownerships details, addresses and data pertaining to ownerships. There is one schedule of titles for each Cadastral Map.

The Field Investigator and Field Surveyor initially create it after the field visit to each land parcel. It is updated by the Commissioner of Title Settlement after completion of investigations in the state offices and then after the receipts of claims. This is generally maintained as digital computer data.

Servitude: Means the rights of land parcel equivalent to the rights enjoyed by another person over another.

State Land: This is as defined in the State Lands Ordinance.

Senior Superintendent of Surveys: This is a person duly appointed with delegated powers to the position of District Superintendent of Surveys by the Surveyor General.

Surveyor General: This is as defined in the Survey Act No. 17 of 2002. Any officer duly appointed to act on his behalf under the Survey Act with powers to carry out duties and delegated work.

Systematic registration of lands: Means the government sponsored program to convert the registered land parcels to the system of Title Registration and / or to carry out the first registration of land parcels.

Title Register: Means the Title Register mentioned under the Act No. 21 of 1998.

Office of Title Registration: This is the office maintaining the Register of Titles to Land Parcels.

Voluntary sporadic land title Registration: This means an unsolicited request from a owner of a land parcel to convert the registration of land parcel to the method of Title Registration.

Village: This is an area identified as Village by the Divisional Secretary.

Land Title Registration Process

Title Registration of Land Parcel is the registration of land after surveying all the land in Grama Niladhari Division wise/Village wise giving a unique identification number to each land parcel and after finding the actual owners to the land parcel in Sri Lanka.

Preparation of Cadastral maps for the registration of title for a land parcel is a requirement under Section 11 of Title Registration Act No. 21 of 1998. According to Title Registration Act referred above, the Title Registration to every land shall be in accordance with the cadastral maps prepared for that purpose by the Surveyor General. The relevant Sections of the Title Registration Act to attend these surveys are Sections 4, 10, 11, 23, 25, 36, 50, 51 and 58.

CONSIDERATION AS PUBLIC DOCUMENTS

The above classified plans made by the Survey General are public documents within the meaning of S. 74 (c) of the Evidence Ordinance which reads as follows.

> "Plans, Surveys, or maps purporting to be signed by the Surveyor-General or officer acting on his behalf."

Such public documents may be produced in proof of the contents thereof by the production of a certified copy under S. 77 of the Evidence Ordinance, where such certified copy has been issued by the competent authority in compliance with S. 76 of the Evidence Ordinance.

PRESUMPTION

Such maps, plans or surveys are presumed to be accurate under S. 83 of the Evidence Ordinance if signed by the Survey General or an officer on his behalf.

If not signed as provided accuracy has to be proved.

The said deeming provision has been discussed by Basnayake J. in the case of ***JAYAWICKREME V. DON LEWIS - 50 NLR 46 at 48.***

> "*I refrain from saying anything on the facts of the case in view of the order I have made. But I wish to state that I disapprove of the course that has been adopted in this case of putting in evidence various figures of survey from which the court is asked to draw inferences of fact without either proving them or calling a qualified surveyor to explain by oral evidence the various features depicted thereon. Except in the case of survey plans which are deemed by statute to be accurate until the contrary is proved and to be prima facie proof of the facts exhibited therein, all other survey plans must be proved according to the rules of evidence. By way of caution to the parties I wish to repeat the words of Laurie J. in Akbar v. Slema Lebbe[4]:—*
>
> *"If on a survey I find certain conventional figures, such as a circle filled with blue, or a number of dark lines or parallel lines red or blue, and if I find on the margin that the surveyor states that he means thereby to represent a well or a marsh or a rock or a road or a river, I take the survey to prove that the well or marsh, the rock, the river or road, was there when the survey was made; but if I find such notes as " East, D on John's property " or " reservation" or "encroachment", the survey does not prove the truth of these allegations. These are not records of the observations of the surveyor. They are statements of hearsay or the results of calculations made by him, and until we know the grounds for his opinion we cannot take that opinion as of probative value.*"

The above principles of law has been reiterated by Basnayake J. in the case of ***AMARAWARDENA V. MINODARAHAMY & ANOTHER - 37 CLW 5 at 6.***

> "*The plaintiff has produced a figure off survey dated 22nd September 1945 made by one K. P. de Silva a licensed surveyor or, but he has not proved the figure of survey by calling the surveyor to testify it. The defendants dispute its correctness and the trial judge finds that it is unreliable. In a case such as this, where the party producing the figures of survey relies on the existence of certain physical features depicted on it, the remarks made thereon by a surveyor who is not called as a witness to testify on oath as to the facts which the Court is asked to believe cannot be preferred to the sworn testimony of witnesses. There seems to be a growing*

tendency among parties to civil proceedings to produced survey plans without proof as to the accuracy and without calling a surveyor to give evidence as to the facts they seek to prove by their production. Except in these case of survey plans which are deemed by statute (Section 83, Evidence Ordinance; Section 6, Land Surveys Ordinance; Section 64, Thoroughfares Ordinance), to be accurate until the contrary is proved and to be prima facie proof of the facts exhibited therein, all other survey plans must be proved according to the rules of evidence.

Section 83 of the Evidence Ordinance makes this quite clear, and it has been so held by this Court in the case of Akbar vs. Slema Lebbe (2 C. L. R. 175) and by the Privy Council in an appeal from the High Court of Patna in the case of Prasad Singh Bahadur vs. Bhagjogna Kuer and others, (1937) A. I. R. (Privy Council) 69 at 74."

In the case of ***DEHIWALA-MT. LAVINIA MUNICIPAL COUNCIL V. FERNANDO*** - ***2007 (1) SLR 293 at 297*** Anil Gooneratne, J. has considered the evidentiary value of a Survey Plan admitted in evidence without any objection. His Lordship has at page 297 observed as follows:-

"Plaintiff also produced 'P6' the plan relied upon by him. In cross examination of the Surveyor on 'P6' he admitted 'P6' was prepared without carrying out a survey, without visiting the site and minus the field notes, but relied on a building plan. The learned Counsel for the plaintiff-respondent contended inter alia that plan 'P6" was admitted in evidence without any objection and invited this Court to accept the position of the Surveyor who gave evidence for the plaintiff may be to prove the identity of the land. Since the document was led in evidence without any objection I would accept the position of the learned Counsel for the respondent on that aspect only. It was also submitted that the Survey General's plan and report should be rejected since it was not produced in the proper way in terms of the provisions of the Civil Procedure Code more particularly section 154 of the Code. I wish to observe that in terms of section 74 of the Evidence Ordinance Survey General's plan is a public document and section 83 of the Evidence ordinance there is a presumption that Survey General's plans are duly made and accurate In the circumstances I would observe that Court cannot reject the plan and report marked as 'D1' & D1 A' merely because of non-compliance with section 154 of the Civil Procedure Code.

In Surveyor General v. Zylva the presumption under the section in favour of such plans or surveys extends to everything necessary to be done in order to make the survey or plan a faithful drawing and measurement of the land surveyed."

SURVEY GENERAL V. ZYLVA is reported in 12 NLR 53. The proceedings were initiated by the Survey General against a surveyor, who had carried out a survey of a large extent of land. It had been alleged that the Surveyor was incapable of discharging his duties and was guilty of misconduct. In the course of the judgment, ***Wood Renton*** J. at page 54 observes as follows:-

> *"Section 83 of the Evidence Ordinance requires the court to presume the accuracy of such surveys and plans if they purport, as those in issue in the present case do, to be signed by or on behalf of the Surveyor-General. I think that the presumption created by this section extends to everything necessary to be done in order to make the survey or plan a faithful drawing and measurement of the land surveyed, and includes, therefore, the selection of proper bases of measurement. The presumption in question is only, however, a presumption of fact;"*

In considering the presumption contained in S.83 of the Evidence Ordinance Nawaz J. has in the case of ***C. A. Case No. 1263/2000(F) D. N. S. WEERASOORIYA V. H. R. SARANELIS*** decided on the 01-08-2019 opined as follows:-

> *"Section 36 of the Evidence Ordinance makes statements in maps or plans under the authority of Government relevant. Whilst Section 36 deals with relevancy, Section 83 creates a presumption as the document being duly made and being accurate. The presumption of accuracy arises only in respect of those maps or plans which are made for a public purpose and by the Surveyor General. It does not apply to private maps - see Shib Charan Dey v. Mahato 17 C.L.J 542. Survey maps prepared under the authority of Government are evidence of possession, and, therefore, also of evidence of title-see 10 W.R. 343 (344).*
>
> *In a case involving a boundary dispute, a survey map, if not conclusive evidence, is evidence of an important character which ought to be looked into and considered-see 15 W.R. 3;20 W.R.243.*
>
> *In the circumstances, one has to presume the accuracy of the Plan until the contrary is established."*

In addition to the above S.21 and S.22 of the Surveys Act provides as follows:-

> *"21. Any cadastral map, plan, or any other plan or map prepared in accordance with the provisions of this Act or any written law, purported to be signed by the Surveyor-General or officer acting on his behalf, and offered in evidence in any suit shall be received in evidence, and shall be taken to be prima facie proof of the facts stated therein; and it shall not be necessary to prove that it was in fact signed by the Surveyor-General or an officer acting*

on his behalf, nor that is was made by his authority, not that the same is accurate, until evidence to the contrary shall have first been given."

22. *Any cadastral map, plan, or any other plan or map prepared in accordance with any written law, purporting to be a true copy of such a plan or map and purporting to be signed by the Surveyor-General or any officer acting on his behalf shall, be admissible in evidence in all cases and for all purposes instead of the original, and may (without proof that the original is not procurable) be taken as prima facie evidence of the truth of the facts stated therein as being that of the original and it shall not be necessary to prove that such copy was in fact signed or authenticated by the Surveyor-General or such officer nor that it is a true copy, not that the facts reflected therein are accurate, until evidence to the contrary shall have first been given."*

PRIVATE SURVEYS AND PLANS

Generally, private Survey Plans are made by a Licensed Surveyor at the request of an individual, a juristic person, to identify a parcel or parcels of land exclusively owned by such person or a land owned in common. Such a survey may be a re-survey of a parcel of land previously surveyed and the re-survey may be for the purpose of locating, identification of boundaries and confirmation and verification of the identity and extent of such parcel of land.

When carrying out a private survey, if any protest is made by an adjoining owner of a land or a co-owner it is very unlikely that the Surveyor would carry out the survey.

Private Surveys are also carried out to end common ownership. Such plans are used for the identification and the allotment of lots to each of the co-owners after agreement amongst the co-owner of their respective undivided shares.

APPUHAMY V. PREMALAL AND EIGHT OTHERS - 1984 (1) SLR 299 at 303

"An amicable division to be recognised by law must be a division that puts an end to co-ownership of property. An amicable division can be given effect to by a deed of partition and a partition plan where all the co-owners sign agreeing to the division or by cross conveyances executed by each of the co-owners, whereby the notarial deeds would be the best evidence of the termination of the common ownership. In the present case, the plaintiff-appellant does not rely on a partition deed or cross conveyances to establish the amicable division. Therefore, the- plaintiff-appellant in order to establish the amicable division has to prove that each of the co-owners entered into separate possession of the divided allotments which were allotted to

each at the division, and that the co-owners possessed their respective divided portions for a period of at least ten years undisturbed and uninterrupted, so that common ownership would in law come to an end."

A private plan made for such purpose does not bind co-owners who are not parties to the Deed of Partition. However, prescriptive rights acquired based on such plans may be claimed after 10 years of undisturbed and uninterrupted possession. There are instances when Courts have accepted the termination of co-ownership where only a plan of partition has been made but not a Deed of Partition. In such an event univocal evidence should be placed before court to the effect that the parties had possessed the land as depicted in the Plan of Partition undisturbed and uninterrupted.

DONA CECILIA V. CECILIA PERERA AND OTHERS - 1987 (1) SLR 235 at 239

"Although the Plan 2D5 was not signed by the co-owners the evidence clearly showed that they were present and were aware of the division of the land and acquiesced in it. Thereafter they had possessed their divided lots exclusively and had taken the produce. Everything pointed to an intention on their part to partition the land permanently and not just for convenience of possession. Where a land is divided with the consent of all the co-owners but no cross conveyances are executed in respect of the lots, co-ownership terminates only after undisturbed, uninterrupted and exclusive possession of the divided lots for a period of over ten years."

Private plans, if produced in legal proceedings may have to be proved by calling the Surveyor himself. If the Surveyor is not available as a witness, the authenticity of the plan may be proved by calling a witness who is capable of giving evidence to identify the signature of the Surveyor as provided in S. 67 of the Evidence Ordinance. If the plan is over 30 years old and if produced in compliance with S. 90 of the Evidence Ordinance the Court may presume that the signature and every other part of the document to be in the hand writing of that particular surveyor. In such an event the plan is admissible in evidence without any further proof.

When an inter-family transfer is sanctioned under the provisions of the Land Reform Law, there are instances when the Commission authorizes a private Surveyor to identify and prepare a plan of the land permitted to be transferred. In such instances it may be presumed that such plans are made under the supervision of the Surveyor General.

A figure of survey may sometimes not be conclusive proof of the identity of a land. If parcels of land have been described with an adequate and sufficient description in a conveyance adopting the description used in all previous conveyances, and is not

disputed, a subsequent description in a plan may be considered as erroneous. The above principle came to be considered by Basnayake J. and Canakeratne J. in the case of ***NOORDEEN LEBBE V. SHAHUL HAMEED - 49 NLR 274 at 280.***

In the said case an added description of the parcel of land had been included with reference to a plan. The Supreme Court was called upon to consider whether the added description was to be accepted in preference to the description of the land contained in the conveyances. After a careful consideration of the descriptions contained in all the conveyances, the Supreme Court had come to the conclusion that the description in the plan was erroneous and contrary to the descriptions contained in the conveyances and as such the description in the conveyances should prevail over the description in the plan. (at page 288)

> *"It is settled law that any subsequent erroneous addition, as in this instance, will not vitiate an adequate and sufficient definition with certainty of what is intended to pass by a deed. It is also now well settled that where a diagram or figure of survey contradicts the unambiguous text of the title it must give way to the text. A plan will not prevail over a description which does not require a plan to explain it, nor will inaccuracies prevail when the property is indicated with sufficient certainty."*

ADMISSIBILITY OF PLANS WITHOUT FURTHER PROOF

(a) S. 18 (2) of the Partition Law provides for the use of plans (preliminary plans) made under Section 18 (1) in evidence without further proof subject to the proviso contained therein.

S. 18 (3) provides for the verification and certification of such plans and field notes by the Survey General.

(b) (i) Once a Plan of Partition is confirmed and a final decree entered under S. 36 or

(ii) Where the land is divided for sale under S. 37, the sale confined under S. 45 and a Certificate of Sale is issued under S. 46,

the plans upon which such the orders are made are admissible in evidence without further proof under the provisions of the Evidence Ordinance on the production of certified copies issued by Court.

(c) If plans made by a Licensed Surveyor are to be proved in evidence, without calling the author, it should be produced in accordance with S. 90 of the Evidence Ordinance.

(d) A plan or map purporting to be signed by the Survey General or an officer acting on his behalf is presumed to be duly made by his authority and are accurate.

In the case of ***WEERASURIYA B. SARANELIS*** delivered by Nawaz J. on the 01st August 2019, it has been held that the said presumption attaches only to plans made for public purposes.

Further the presumption does not attach to plans made in private suits and as such the plans will have to be proved as required under the provisions of the Evidence Ordinance.

Refer - 50 NLR 56

(e) If a plan is made on a commission issued by Court in civil litigation, if marked subject to proof, the plan has to be proved by calling the maker. However on the demise of a maker prior to the proof of the plan, the plan became admissible in evidence, on proof of his demise and formal identification of his signature. In such a case as the veracity of the plan has not been tested under cross Examination the evidentiary value may be diminished or may not be of a high degree.

There are instances in the event of the demise of the author, parties opt to call a Surveyor to give evidence on the contents of the plan. In such a event, the question arises as to whether a another Surveyor is able to give evidence on the accuracy of the plan made by another Surveyor. In the case of Partition Actions, this may be possible as the field notes are filed of record and the Surveyor may be able to give evidence of the contents after verification. However it could only be done after an inspection of the land. Lapse of time may have resulted in the disappearance or the absence of the features and land marks and these may affect the evidentiary value of the evidence.

PREPARATION OF PLANS - D. S. R.

In the preparation of plans the following procedural guidelines have been prescribed.

All plans should be accurately plotted with the meridian parallel either to the length or breadth of the drawing sheet.

Boundary lines, control points, drawing of topographic details will be in black. Gridlines, Grid coordinate of two corners, survey/chain lines, control points, boundary point numbers for few prominent points and field book references will be in blue. Any transferred boundaries will be in red. When boundaries of more than one plan have to be transferred and shown, specific colours should be used and referenced to differentiate.

Photo copies of plans should not be used for transfer, superimposition, compilation, computation or any survey or plan work other than for reference.

Durable drawing paper of 160 GSM or above, in metric sizes A3, A4 or folio (216 mm x 340 mm) size should be used, sectioning it in to A3 or folio size if the survey is large.

RLSS plans can be generally grouped in to three categories.

Category 1:

Plans prepared for execution of Title Deeds Falls in to this category. They are revenue plans strictly prepared for legal purposes. All features existing on ground need to be shown. Proposed features which are to be constructed in the future should not be shown on these plans. Any lot formed in a sub division has to be lotted separately. Hence land within street lines may be lotted separately. Gazetted street lines exist only within Municipal Council Limits. But building lines are there in all areas. Building lines involve with construction work and hence they need not be shown on this category of plans. For the information to be give on these plans see section 17.6.

Category 2:

Plans prepared for investigation purposes or for redefinition of boundaries falls in to this category. The Preliminary Survey plans prepared in partition cases and most of what are called 'L' cases in courts also falls in to this category. Four boundaries of the corpus to be given. But boundary schedule for individual Lots need not be given though extents of individual lots are necessary. There can be several names for a land parcel. For example according to plaintiff the name is …….. according to 4th defendant name is …… and so on. The Surveyor can decide on any additional information to be given on the plan for the conduct of the inquiry. In 'L' cases there can be unclosed lots with no extents given but other information may be given to depict the ground situation. Other than what is specially enumerated in this section is not necessary, all information what is mentioned in section 17.6 need to be given on these plans.

Category 3:

Site plans prepared for development purposes into this category. Contours, heights and proposed features to be constructed, building lines may be shown on these plans. Boundary schedules may not be necessary. Name of land, village, korale district and so on depicting the location of the land together with the name of the project if any and a site plan No. may be given on the plan Lotting and giving extents of individual lots may only be necessary on a special request by the client.

The following information as applicable should appear on the body of the plan.

(a) Plan number (integral number should be in sequence commencing from unity).

(b) North line.

(c) Scale of the plan.

(d) Lot numbers.

(e) Descriptions of all boundaries and boundary marks.

(f) Description of details such as roads (with directions), streams (with direction of flow), building etc;

(g) Abutting information such as assessment numbers with street names or reference to old plans and lot numbers if any, or names of lands and claimants.

(h) Legend including name of Local Authority, Korale, Pattu (Grama Niladhari and Divisional Secretary division as appropriate) revenue District and Province.

(i) Reference to abbreviations used.

(j) Schedule of boundaries and extent of entire land.

(k) Schedule of boundaries, extent of each lot and total.

(l) Name of RLS, professional designation, address, telephone number, registration number in order.

(m) Date of survey.

(n) Certificate with signature and date.

(o) Any explanatory foot notes.

(p) Field note references.

AMENDMENTS TO REGISTERED LICENSED SURVEYOR'S PLANS

When a plan is certified and handed over to the client from then onwards the RLS's control over it will be very much restricted. Hence before handing over, the RLS should go through it carefully and see that there are no omissions. Subsequently at a later date if the client request for some material changed on the plan the RLS has to be mindful that photocopies of the plan may have been already given to various other persons. Therefore it is advisable that the RLS makes the changes on a different plan with new number and new date giving reference to the earlier plan if appropriate stating that it is a resurvey, amalgamation and resubdivision. Before attempting the requested alterations the RLS should look into the fact that if it is a sub division plan whether the Local Authority has already approved the subdivision. If it is so the client should obtain a letter of consent from the local body to effect the changes. Secondly the client should submit an affidavit (if it is a co-owned land all co-owners need to sign the affidavit) swearing that no legal actions, such as executing a deed of transfer or a mortgage bond on any of the subdivided lots has been done. If it is on the contrary no action taken lots cannot be

amalgamated with the action taken lots. The same procedures need to be adopted even on a plan prepared by some other RLS.

RLS should never prepare two plans with the same number and date.

RLS should not amend, alter or insert notes or additional data on plans prepared by other RLSs. This procedure is not advisable even on his own old plans.

Originals of subdivision plans prepared under partition Act, after the issue of the final decree are filed and kept in the court Record Room. RLS should not make any alterations or amendments on these plans when preparing certified copies to the parties. If any amendment is requested it needs to be on a fresh Plan with different number.

Based on a subdivision plan a land owner may sell or gift land parcels to others with the condition of giving only the "right of way" of means of accesses to the prospective buyers or recipients, retaining the soil rights himself. Sometime later it may not be legally sound for the RLS to amalgamate parts of or in whole these means of accesses with other lots on the request of the new owners who do not have soil rights to the means of accesses.

RLS should not issue certified copies of his own plans or plans prepared by other RLSs to any person who do not have a direct connection to the land depicted in that plan.

Chapter IX of the D. S. R. contains the relevant procedure to be followed by a Surveyor in carrying out a detailed survey. Such details are given under the following heads.

(A) Clearing Operations

(B) Service of Grama Niladari

(C) Information obtained from Grama Niladari and Others

(D) Objections to survey

(E) Land Marking

(F) Detailed Surveys

(G) Buildings

(H) Fixation of old boundaries

In the preparation of a Survey Plan, there are distinguishing marks, (which are standard) used to identify revenue boundaries, boundaries, contents and other information. It is necessary to be familiar with those markings to identify and read a plan.

The following are some of the distinguishing features and marks used in the preparation of plans.

PICKET

A Picket is a pointed stake or peg driven into the ground to identify a point in a boundary. Pickets are generally made of cement or clay (in the shape of a corn) and used for a survey of traverse lines.

In surveying pickets are classified as

(a) *Landmark of Cut Stone or of Concrete* - Not less than 18 inches long and about 6 inches square at the base

(b) *Live Rock Landmark* - A centre mark, with broad arrow enclosed by a square figure of 4-inch sides, out on live rock

(c) *5,000-foot Climatic Contour Landmark* - Of cut stone or of concrete,18 inches long and not less than 15 inches by 6 inches at the base.

(d) Old Landmark

(e) Old Rock Landmark

(f) Iron Rail on railway reservation boundaries

(g) *Cement or Stone Block* fixed by the Public Works Department

(h) *Cement or Stone Block* fixed by the Archeological Department

(i) An old landmark found to have been moved

(j) *Landmark Picket* - The same mark as in (a) above, but buried 6 inches below the surface of the ground, to be used as a permanent point of departure

(k) *Live Rock Picket* - A broad arrow, with deep cut centre mark at the apex, cut on live rock

(l) *Sunk Stone* - A stone with broad arrow and centre mark cut on it, not less than 6 inches square by 4 inches deep and buried to a depth of at least 2 inches.

(m) (i). *Cement of Clay Picket* - About 1 ½ inches by 4 inches pointed at the bottom and with a dent for centre mark. To be buried not less than 2 inches below the surface of the ground

(m) (ii). *Traverse Cement or Clay Picket* - 2 inches diameter at the top, 4 inches at the bottom and 8 inches in height. To be buried 4 inches below ground level.

(n) *Wooden picket* - Will not be used in any circumstances as survey pickets, but may be used as temporary marks

(o) *Iron Nail* - See paragraph 781

TRAVERSE

"*A simple line of Survey, usually plotted from compass bearings and chained or placed distances between angular points - a track surveyed in this way.*"

In the Layman's language they are a series of survey lines which are connected to each other with length and bearing. These lines are drawn using the magnetic compass, theodalite and EDM.

In the early days when a decision had been taken to survey a particular area by means of Theodalite Surveys, a scheme of proposed Traverses are prepared by in the Survey Office and forward to the Range Office. Theodalite Traverses are classified under

(a) Primary Traverses

(b) Secondary Traverses

(c) Tertiary and Closed Circuit Traverses.

(d) Detail Traverses

Use of such Traverse in described in the D. S. R. - 3rd Edition - Chapter (III).

Standard Abbreviations used in Standard plans

The following should be noted when inserting abbreviations on plans:-

(A) Revenue Boundaries

Province boundary	+ - - + - - + - - + - - +
District boundary	+ . + . + . + . + . + . +
Divisional Secretary Division boundary	- … - …. - …. - …. -
Korale or Pattu boundary	- . . - . . - . . - .. - . . –
Village boundary	- . - . - . - . - . - . - . - . –
Town boundary	⊢ ⊢ ⊢ ⊢ ⊢ ⊢ ⊢ ⊢

(B) **Boundaries**

B	=	Bank
Dh	=	Ditch
Dn	=	Drain, earth
MDn	=	Drain, Masonry
WF	=	Wire Fence

DF	=	Fence (Dry)
FP	=	Foot Path
LF	=	Fence, Live
Hg	=	Hedge
R	=	Ridge
T	=	Trench
U	=	Indefinite or Undefined (only to be used on unlandmarked boundaries)
W	=	Wall
C	=	Channel (or water-course)
E	=	Ela
S	=	Stream
SF	=	Stone Fence
P	=	Permanent Building
Ty	=	Temporary Building
Road (H)	=	Road (Highways)
Road (P.S.)	=	Road (Pradeshiya Saba)
Road (R.D.A.)	=	Road (Road Development Authority)
Road (I.D.)	=	Road (Irrigation Department)
Road (L.D.)	=	Road (Land Department)

(C) **Distinguish contents of lots**

Cam	=	Camphor
Car	=	Cardamom
CE	=	Coconut estate (over 20 hectares)
Cem	=	Cemetery
CG	=	Coconut Garden (under 20 hectares)
Ch	=	Chena
Cin	=	Cinnamon;
Cit	=	Citronella
Coa	=	Cocoa
Cof	=	Coffee

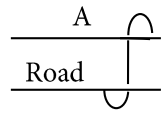
Cot	=	Cotton
D	=	Deniya or Diagram
DP	=	Diagram Plan
F	=	Forest
G	=	Garden (permanent or temporary cultivation)
HJ	=	High jungle
LJ	=	Low jungle
LP	=	Lease Plan
MS	=	Milestone
NC	=	New clearing
O	=	Owita
P	=	Paddy field
PG	=	Palmyrah Garden
PL	=	Plantation (gums, teaks &c)
PM	=	Plumbago mine
PO	=	Post Office
PTO	=	Post and Telegraph Office
Pt	=	Patana
PW	=	Public Work Department bungalow
Q	=	Quarry
R	=	Rubber
RH	=	Rest House
RS	=	Railway Station
T	=	Tea
TF	=	Threshing floor
Tob	=	Tobacco
TP	=	Title plan
TP (Cr)	=	Title Plan, Crown
V	=	Vegetables
WH	=	Water-Hole
WL	=	Open Waste Land
(ab)	=	Abandoned (used in conjunction with other initials as CG (ab)
Rk	=	Rock

(D) **Other Information**

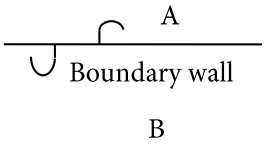
BT	=	Blazed Tree
CBD	=	Change of Boundary Description
CP	=	Cement Picket
Cul	=	Culvert
EP	=	Electricity Post
EW	=	Earth Well
FP	=	Foot Path
Ga	=	Gate
Jak	=	Jack Tree
LP	=	Lamp Post
My W	=	Masonry Well
RP (b)	=	Rock Picket (below the surface)
RP	=	Rock Picket
SR	=	Slab Rock
SS	=	Sunk Stone
TP	=	Telephone Post
WP	=	Wooden Picket

In Survey Plans, clinches are used to indicate the ownership of features with reference to the land surveyed.

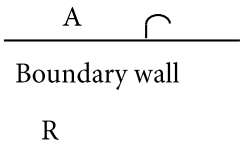
SPECIMEN OF CLINCHES



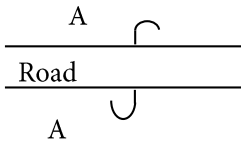
Clinch through (road and land on either side) belong to the same party



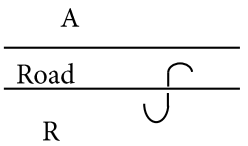
Broken Clinch (wall belong to the both parties)



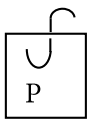
Half Clinch (wall belong to one party)



Clinch across (land on either side of road belongs to the same party.)



Clinch through (road and land belong to the client R)



Clinch through (Building belong to the same land owner)

CONVERSION FACTORS

The failing conversions will be necessary in re-laying boundaries using old plans, field notes, old extents etc.

1 link	=	0.201168 metres
1 meter	=	4.97096 links
1 Hectare	=	2.471054
1 Acre	=	0.40468564 ha
1 Rood	=	0.1 ha

1 Perch	=	25.29285 sq. metres
1 Hectare	=	395.36864 perches

Appendix A in Chapter II of the Regulations made by the Minister may be referred for further details.

PARTITION ACTIONS AND SURVEY PLANS

A heavy burden and responsibility is cast on Trial Judges of Partition Actions under S. 25 of the Partition Law, in the first instance, to determine the corpus sought to be partitioned.

HAPUARACHI V. PODI NILAME - 2021 (1) SLR 134

Therefore, the fundamental requirement is to identify the corpus with the land depicted in the Preliminary Plan made by the Commissioner of Court. In doing so the Appellate Courts have highlighted;

(a) the requirement of the Commissioner to express his opinion as to the identity of the land depicted in the Preliminary Plan with reference to the corpus sought to be partitioned. However it has also been held that such opinion is not to be considered as decisive.

HAPUARACHI V. PODI NILAME - 2021 (1) SLR 134 at 147

> *"It is a grave error to conclude in partition actions that the identification of the corpus is not established upon a mere superficial comparison of the boundaries of the land described in the schedule to the plaint, which is a reproduction of the schedules to old deeds, with the existing boundaries as depicted in the Preliminary Plan. Boundaries do not remain unchanged; they change over the years due to various factors, be it natural or man-made. Whether or not the Preliminary Plan represents the land described in the schedule to the plaint shall be determined upon a consideration of the totality of the evidence led in the case and not solely by such a comparison."*
>
> *"I accept that the surveyor shall record the above-stated question and answer it in the Report (Sopaya Silva v. Magilin Silva). However, failure to answer this question or answering it in the negative shall not be decisive. In other words, the Court cannot dismiss a partition action on basis that the surveyor in his Report to the Preliminary Plan has failed to answer or answered in the negative the question "Whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint." Nor can the Court blindly accept that the Preliminary Plan depicts the entire land to be partitioned if the surveyor in his Report answers this question in the affirmative.*

Whether or not the land has been correctly identified shall be finally decided not by the surveyor but by the Court having taken into consideration the totality of the evidence adduced before it. The answer to the said question by the surveyor is undoubtedly an important item of evidence but it cannot decide the whole case."

UBERIS V. JAYAWARDHANA - 62 NLR 217 **Basnayake, CJ. held as follows;**

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

(b) If there is a substantial discrepancy in the extent of the corpus described in the plaint and the land pointed out to be surveyed, the Commissioner should seek directions from Court.

(c) In the absence of any previous survey plans, the identity of the corpus to be determined taking into consideration the Locality situation, Name, boundaries, the extent and the evidence placed before Court.

(d) If the identification of the corpus is after the super-imposition of its plan or of adjoining lands, the data used for fixation would become relevant.

(e) Identification with reference to existing physical boundaries of the corpus.

There are a few authorities where the Appellate Courts have analyzed the principles of Survey in the identification of a corpus. One such case is ***U. K. DAYASENA V. D. K. PIYASENA - CA/RI: 05/2018*** where C. P. Kirtisinghe J. considered a Petitioners' application for a direction to the learned District Judge to issue a fresh commission to a Surveyor or the Survey-General to ascertain the boundaries of the corpus.

In the said case there had been no physical demarcation of the boundaries of the corpus except on very small portions of certain boundaries. Considering the submissions of learned Counsel Kirtisinghe J. observes as follows:-

"One cannot come to the definite conclusion that it is a physical demarcation of the common boundary as it can be a ditch formed by the natural flow of rain water and one cannot come to the definite conclusion that the drain lies along the common boundary. In the absence of such physical demarcations the plaintiff is not in a position to show the exact boundary to the surveyor. In such a situation it is difficult to demarcate the common boundary without superimposing, on the boundaries surveyed, the earlier plans depicting the corpus. The schedule to the

plaint refers to two earlier plans. One is the final plan filed of record in the partition action no. 30701 upon which lots 3 and 4 were partitioned. The other is the plan no. 976 upon which the lot no. 4 was sub divided. The plaintiff had not made use of any of those plans to identify the corpus. Superimposing the earlier partition plan no. 283 on the boundaries surveyed in the preliminary plan was the best evidence to establish the identity of the corpus and to demarcate the boundaries. That plan was available to the plaintiff. But the plaintiff had not thought it fit to produce that plan to the commissioner to identify the corpus properly.

Kirtisinghe J. further considering the failure to demarcate the boundaries on the ground has observed as follows:-

"It is the case of the petitioners that the surveyor did not demarcate the common boundary at the preliminary survey. Therefore the petitioners could not have known at that stage that there is an encroachment. As the petitioners were not parties to the partition action they did not have an opportunity to show the encroachment in a plan. Had the surveyor demarcated the boundary at the preliminary survey the petitioners could have intervened at the preliminary survey as new claimants and shown the encroachment in the preliminary plan."

IN THE CASE OF A. K. I. CHANDRALATHA V. A. L. A. CHANDIMA PRIYANTHA - SP/HCCA/MA/15/2023(F) which had come-up before Praba Kumari Dela and Chamith Madanayaka, HCJ. (CA) the Hon. Court has considered and analyzed in detail the principles applicable in the fixation of boundaries. In doing so Praba Kumari Dela (HCJ) (CA) has taken into consideration the technical meaning and the definition of the words "General Boundary", "Fixed Boundary", "Fixing", "Fixation Data", "Points of Fixation", "Pickets", "Permanent Data", "Changing Data", "Meaning of Fixation", "Superimposition of Plans", "Tracing" as contained in the Technical and D. S. R. Manual for Licensed Surveyors (2015) and the dictionary meaning and observed as follows:-

"When examining the judgment, it appears that the learned trial judge had been of misconception that for determination of each and every boundary, there should be separate or distinct points of fixation.

In a survey, there can be fixed boundaries and general boundaries. Let me quote from the ***Technical Manual for the Licensed Surveyors (2015),*** *prepared by the Surveyor General.*

Definition of Boundaries

a) *Fixed boundary: it is a boundary that is of man-made features and consists of permanent features such as land makes, boundary walls, wall, wire fences with concrete posts or natural rock walls. Missing features on a fixed boundary should be able to be re-established accurately.*

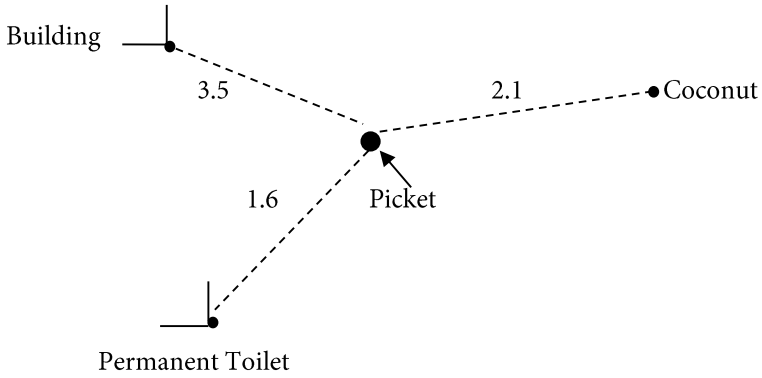
b) *General Boundary: it is a boundary that consists of natural features of which position is vague (cannot be determined precisely). Some of the examples are live fences, hedges, banks, ridges, ditches, grass lines etc.*

*On this subject the **Departmental Survey Regulations of Sri Lanka Survey Department** can be referred to have some guidance. As it states when there is no fixed boundary but want it to be re-established and re defined pursuant to a previous plan for the same, it is necessary to identify well defined features from the previous plan to take as points of fixation. They can be permanent features or impermanent features which are prone to change. The degree of accuracy of a fixation depends on the number and the quality of such points.*

Fixation is the term used for laying down the boundaries of old plans. In case where old pickets are not available, features and boundaries on the old plan which are still on the ground should be surveyed, plotted on the new plan, and the best possible fit of an accurate tracing prepared from the old plan should then be obtained. The detail surveyed for "fixing" old work is known as "fixation data". The degree of certainty is dependent upon the amount of fixation data on the old plan, which can be surveyed and shown on the new plan. It is therefore essential that as much data as possible should be picked up, and that the most suitable and reliable data are adopted for fixation. They are used as key control points when laying the tracing or accurately in positioning and aligning the old plan on top of the new one. When laying the old plan or tracing of it, the fixation points act in guidance in aligning the plans accurately. Once they are so aligned the boundaries from the old plan would be traced to the new plan and those boundaries will represent the original land and its other features. In that manner the old boundaries on the present plan can be ascertained and shown with accuracy."

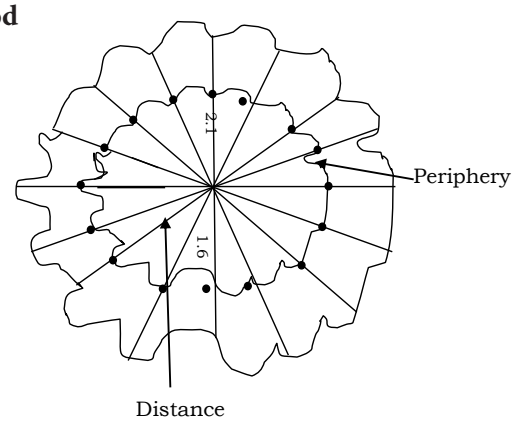
Thereafter the Hon. Court has analyzed the available evidence based on the above principles and the analysis is exhaustive.

Example of relocating a point with dead measurements.



ENLARGEMENT OF PLANS

1. Radiation Method



On a figure of survey, a point is placed within the periphery of the plan and from such point, lines are drawn to each and every corner of the periphery. Thereafter, the lines are extended to the required length and the figure is drawn connecting each one of the lines extended.

2. Re-plotting

If the field notes of a Surveyor who drew the plan are available, another surveyor is able to re-plot the plan using the field notes.

In the case of the partition law, Section 18 makes it imperative for the Commissioner appointed by the Court to prepare the preliminary plan to submit such plan along with the field note.

In the case of plans prepared by the Surveyor General, all field notes of the Surveyor who prepared the plan are lodged with the Surveyor General and such field notes are available for inspection by a Surveyor and certified copies could be obtained from the Department by a Surveyor.

3. Scanning

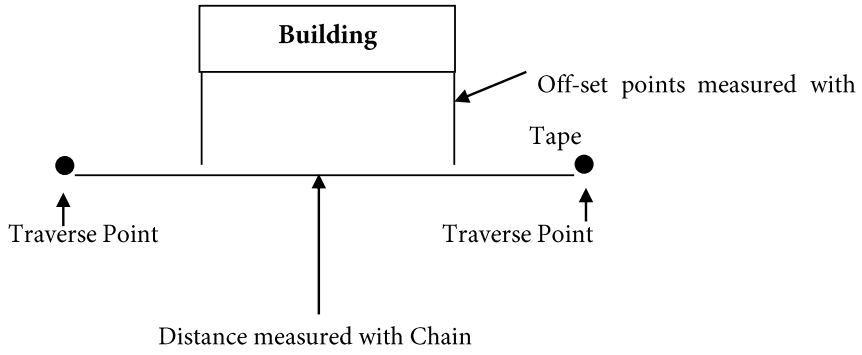
The plan is kept on a scanner and scanned and a command is given regards the required scale factor. The image of the plan according to the required scale appears on the screen.

In order to obtain a copy of the plan, lines are drawn on the image appearing on the screen and a copy taken of the plan.

Once the plan is made using a computer, in order to check the accuracy of the preparation of the plan, a tracing of the plan is taken and placed on the original plan in order to verify that the tracing accords with the original plan.

CHAIN SURVEY

In a Chain Survey, two items are used by Surveyors, namely, a Chain and a Tape. The Chain is used to measure the length between two traverse points and the Tape is used to measure the distance between the off-set points.



TOTAL STATION

This is an instrument used by Surveyors when surveying. It is an instrument taken to the field. Using the instrument, all measurements (data) are electronically measured and recorded in the instrument. Thereafter, such data is fed into a computer using a software to develop the plan.

Using such instrument and the software, the measurement of coordinates, of areas etc. could be easily determined.

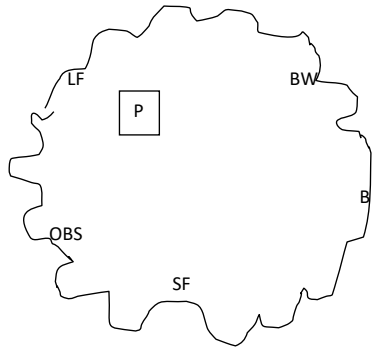
Presently, better equipments has been introduced and is being used by surveyors.

SUPERIMPOSITION OF A PLANS

1. Plan on Plan

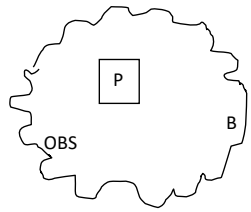
There are many instances when Commissioners of Court are requested to superimpose a plan on another plan to affirm the identity of a land. For example, to superimpose Plan "A" on Plan "B".

Scale 1:1000



Plan"A"

Scale - 2 chains to an inch



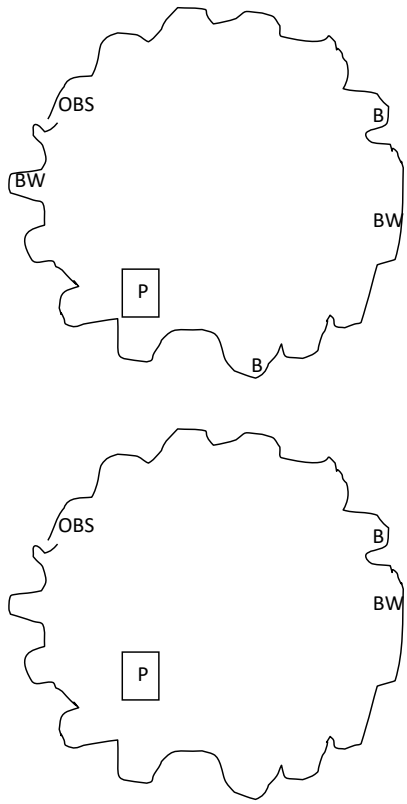
Plan" B"

In order to superimpose, both plans should be of the same scale. Say for instance, if the scale of Plan "A" is 1:1000 and the scale of Plan "B" is two chains to an inch, both must be brought to the same scale.

Generally, before a superimposition, a Surveyor examines plan "A" (the old plan) to identify permanent features, such as buildings, landmarks, trees etc. Thereafter, he would examine Plan "B" to determine the permanent features marked on Plan "B". If in the opinion of the Surveyor, the permanent features appearing on Plan "A" are more or less identical with the features appearing on Plan "B", the superimposition is made using such features. In other words, if the data appearing on both plans are common, the superimposition could be done without a survey of the land.

2. Superimposition after a survey

When an existing plan is to be superimposed, firstly, the features appearing on the plan are identified. Thereafter, a survey of the land including the identified features is carried out and a plan is thereafter prepared. Thereafter, a tracing of the old plan is taken and the tracing is superimposed using the common data.



When superimposing a plan, two points could be used for the fixation. However, most Surveyors regard such superimposition as not being precise but may require at least three points for a precise superimposition. In other words, three points is a necessity in order to check the fixation and classify the superimposition as "precise" as opposed to "questionable" or "rough".

3. Computer Superimposition

Plans could be superimposed using a computer with suitable software. In doing so, the plans are fed into the computer and the superimposition is done by the said computer software.

FIELD NOTES

1. A field note prepared using an Electronic Distance Meter (EDM)

In such a field note, the coordinates of each point measured and the numbering of points is marked on the sketch of the field note.

A specimen of the EDM field book page appears in Appendix 5 - page 01 of the Technical Manual for Registered Licensed Surveyors.

2. A field note prepared using a Theodolite

In such a field note, the following are identifiable.

- Instrument stations
- Length between stations
- Off-set distances with the length along the line
- Bearings based on respective meridians

A specimen of the Theodolite field book page appears in Appendix 5 - page 05 of the Technical Manual for Registered Licensed Surveyors.

The above is a compilation of some basic principles applicable in day to day surveying and is presented with a view to assist readers understanding the complex technicalities of survey Plans. The technical knowhow is presented with the assistance of practicing Court Commissioners.

Note: My thanks to the Court Commissioners,
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Executive Pardon in the Sri Lankan Constitution: An analysis through Sovereignty of the Executive and Morality of Law

Rose Wijeyesekera*

Background

Since the introduction of the executive presidency through the 1978 constitution, Sri Lanka has been on test to determine the parameters of powers, judicial powers in particular, vested in the Executive presidency. Article 34 of the constitution confers on the Executive President the power to grant pardon to 'any offender convicted of any offence in any court within the Republic of Sri Lanka'.[1] Clearly, the wording of the constitutional provision granting powers to the President to overrule or alter a judicial order/punishment are wide. Yet, this power is not without any limitations! Article 34(1) is subjected to a proviso, which requires the President to (i) 'cause a report to be made to him by the Judge who tried the case' and (ii) 'forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent together with the Attorney-General's advice to the Minister in charge of the subject of Justice', where the pardon concerns a convict sentenced with death. The importance of adhering to the said procedure prescribed in the proviso cannot be taken lightly. D. C. Pearce, an authority in statutory interpretation, has this to say on interpreting a proviso:

> "*…the proviso is not to be treated as in any way inferior to the rest of the section… the words of the proviso must be given their full effect…However, it may be that a proviso was inserted out of abundant caution to make it perfectly clear that a section is not to apply in certain circumstances or to certain persons where there is little doubt that it would not have done so anyway.*"[2]

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1 Constitution of Sri Lanka 1978, Article 34 (1) (a)

2 Pearce D C, Statutory Interpretation in Australia, (Butterworths 1974), p 42

That the Executive President exercises 'the People's Executive power'[3] and that constitutionally declared and recognized fundamental rights 'shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied'[4] are equally clear. This provision calls for the subjection of the powers vested on the President to fundamental rights of the citizens at all times. This provision comes *sans* a proviso.

Amidst this constitutional context, and exercising the powers bestowed on the office of the Executive President to its extreme, the 07th and 08th Presidents of the country extended the presidential pardon to two individuals convicted of murder and thus sentenced to death, which were affirmed by the highest court of the country, namely the Supreme Court, on two separate instances. One was to Mr. Don. Shamantha Jude Anthony Jayamaha and the second was to Mr. Arumadura Lawrence Romelo Duminda Silva. In Jude Jayamaha case, the respondent had received two presidential pardons. The first one was granted in May 2016, whereby the sentence of death imposed upon the 2nd Respondent by the Court of Appeal was commuted to one of life imprisonment. The second was granted in November 2019 by the President in a purported exercise of his powers under Article 34 of the Constitution, as a result of which the 2nd Respondent was released from prison on 8th November 2019. In Duminda Silava's case, there were others who were convicted of the same offence, but only Silva was selectively pardoned by the President. On neither occasion, the president had followed the due process prescribed by Article 34(1) of the Constitution. In both cases the nature of the power to grant pardon under Article 34 of the Constitution and judicial reviewability of such executive pardon were the core concerns of the court. On both occasions, the pardon extended by the Executive to selected convicts were appealed against,[5] and the Supreme Court determined that the exercise of constitutional power by the president was *ultra vires*.

'Sanction'

Austin describes sanction[6] thus "[THE] difference between Sanction and Obligation is simply this. Sanction is evil, incurred , or to be incurred , by disobedience to command. Obligation is liability to that evil, in the event of disobedience. Obligation regards the future. An obligation to a past act, or an obligation to a past forbearance, is a contradiction in terms. If the party has acted or forborne agreeably to the command, he has fulfilled the obligation wholly or in part." For classical positivists for whom 'law' is

3 Constitution of Sri Lanka 1978, Article 4 (b)

4 Constitution of Sri Lanka 1978, Article 4 (d)

5 The 1st: *Hirunika Eranjali Premachandra v. AG* SC FR 221/2021, SC FR 225/2021 and SC FR 228/2021 (Hereinafter referred to as Duminda Silva Judgment) and the 2nd *Women & Media Collective* v. *AG* SC (F/R) Application No. 446/2019 (hereinafter referred to as Jude Shamantha case, as they are popularly known)

6 John Austin, Lectures on Jurisprudence – the Philosophy of Positive Law (The Province), Lecture XXII (1875 New York) p 217

simply and exclusively a command of the Sovereign, sanction can simply be envisioned as disobedience to the sovereign, and Executive Pardon also becomes as simple as 'brushing aside the disobedience' by the Sovereign on her/his/their will. No limitations apply on the exercise of executive authority, and no-one to question the Sovereign order, as the Sovereign is above everything and everyone, including the law.

Naturalists rationalize sanction on a completely different basis. Finnis,[7] for example, asserts that the 'system' of criminal law is more than a 'set of prohibitions'. He describes the 'goal' of criminal law as 'a certain form or quality of communal life, in which the demands of the common good indeed are unambiguously and insistently preferred to selfish indifference or individualistic demands for license but also are recognized as including the good of individual autonomy, so that in this mode of association no one is made to live his life for the benefit or convenience of others, and each is enabled to conduct his own life with a clear knowledge and foreknowledge of the appropriate common way and of the cost of deviation from it.'[8] Therefore, Finnis insists on adhering to rules and procedural fairness, i.e. due process of law, in the administration or working out of the sanctions imposed by the criminal law. Adhering to the core principles (though the details may vary depending on the circumstances) are vital for the 'common good of the community' which is key for the good of all its members.[9]

As an integral component of the criminal justice system, 'sanction' is 'a human response to human needs', rather than 'a social defense against a plague of locusts or sparrows.'[10] Sanctions by way of punishments are required 'to avoid injustice, to maintain a rational order of proportionate equality, or fairness, as between all members of the society'[11] including the law-abiding and the criminal. The restraining of the criminal's freedom is important to ensure justice for the common good of the community at large as well as its individuals. Finnis argues that punishment 'characteristically seeks to restore the distributively just balance of advantages between the criminal and the law-abiding, so that over the span of time which extends from before the crime until after the punishment, no one should actually have been disadvantaged - in respect of this special but very real sort of advantage – by choosing to remain within the confines of the law.'[12] Identifying punishment as a mode of distributive justice, Finnis says thus: "What is done cannot be undone. But punishment rectifies the disturbed pattern of distribution of advantages and disadvantages throughout a community by depriving the convicted criminal

7 Finnis J, Natural Law and Natural Rights (Clarendon Press, Oxford, 1980)
8 Ibid, p 261
9 Ibid p 262
10 Ibid p 262
11 Ibid p 262
12 Ibid p 263

of his freedom of choice, proportionately to the degree to which he had exercised his freedom, his personality, in the unlawful act."[13]

Executive pardon

In the simplest definition, executive pardon is a reversal of a punishment judicially declared upon an individual or a group of individuals subsequent to pronouncement of guilt through a legally recognized judicial process, by an official legally authorized to do so. The basis of sanction lies on the recognition that a criminal's (common) good is as good of any other person's, though s/he 'ought to be deprived of some opportunities of realizing that good' because of what s/he had committed. Yet, the reversal of a sanction as grave as 'death', which is imposed for convicts of gravest of crimes, must be done with extreme caution. One reason for the call of 'extreme caution' is the gravity of the offences for which death is prescribed as punishment. While it may be argued that imposing death as a punishment itself is a violation of the most fundamental right of the convict, death is imposed as a punishment only for crimes the very nature of which calls for the extinguishing of the perpetrator from the society for the protection of the rights of other members of the society. The reversal of the punishment enables the convict to re-enter as a free member to the very society which detested him/her and wanted that person permanently removed from it. (This is the very basis of penal law.)

This threatens the very fabric of law and order of any society, and violates the most fundamental rights of its members. Moreover, pardoning a convict sentenced with death while there are thousands of other convicts sentenced with lesser punishments, raises several serious questions including the credibility of such a decision and violation of freedom and rights of citizens as individuals and as a community.

The two judgments

Both the stated cases were filed arguing *inter alia* that the executive pardon (granted separately) to the convicts has violated the fundamental rights guaranteed to the applicants (and to the citizens in the nature of public interest in Jude Shramantha case) by Article 12(1) of the Constitution. The rights-based argument was founded mainly on two grounds: (a) people's judicial power could not be encroached by the Executive; and (b) since the power of presidential pardon is exercised on behalf of the people, it is to be exercised in the public interest in accordance with the public trust doctrine. Additionally, in Duminda Silva's case, the court extensively discussed the judicial 'reviewability' of the Executive pardon. This contention was argued in principle that it is the people's judicial power which reviews the exercise of people's sovereignty by the Executive. In essence, the basis of all these arguments were grounded on one of Lon Fuller's basic ideas, i.e.

13 Ibid p 263

the 'morality of law': that the law is for the people and by the people, even though for governance and administration of justice, it is exercised by different arms of the state. Thus, law does not get its validity simply by virtue of being enacted or implemented within its boundaries, but in order to be legitimate and valid it must conform to its authority, i.e. the people's power, and fulfil its purpose, i.e. protect the people's rights.

The two judgments clearly demonstrate arguments carefully grounded on several aspects of revived naturalist arguments on the one hand to vehemently argue against the snatching of the people's sovereign power by the President, and counter arguments justifying the Executive's action aligned towards Austinian (classical) positivist perspective, on the other. The attempt of this short article is to examine and analyse the philosophies emanating from those arguments. Permit me to first analyse the counter arguments.

Similar counter arguments were put forth in justifying executive pardon in both the cases. They may thus be summarized under four grounds[14]:

i. Statutory powers exercised by the President qua President.

ii. Constitutional powers exercised by the President qua President.

iii. Constitutional/ statutory powers exercised by the President qua member of the cabinet.

iv. Constitutional powers exercised by the President qua Head of State.

The Executive President and illimitable and indivisible sovereign power

The counter arguments were based mainly on two grounds, i.e.

(a) the Executive President of Sri Lanka exercises powers under the Constitution by virtue of being the President, as a member of the cabinet, and as the Head of State, and

(b) these statutory and constitutional powers exercised by the President qua President, are indivisible and illimitable.

The Counsel representing the Executive President(s) contended that the exercise of constitutional powers by the President qua Head of State, is reviewable by court *only to ascertain whether exercise of such powers has been done in accordance with the constitution,* i.e. whether the proper procedure has been followed by the President, and that the court cannot review the Head of State's pardon on its merits. This position was based on the fact that 'the powers of the President that needs to be exercised qua Head of State are incorporated in Articles 33 and 34 (1) (c) of the Constitution' and that 'the powers enumerated in Art 33 (a) to (h), are all traditional powers that are to be generally exercised by the Head of State'.

14 As reported in Duminda Silva judgment.

In a broader sense, this argument envision the Executive President as the 'Sovereign' classified by John Austin in his lectures on Jurisprudence (The Philosophy of Positive Law or the Province of Jurisprudence) delivered at Harvard in 1876, where he took pains to explain the indivisible and illimitable nature of the powers bestowed on the Sovereign. Accordingly, the law is the command of the Sovereign, and no one is above him and he is not bound to obey anyone but everyone habitually obeys him. Whatever the Sovereign commands amounts to law, thus can be made and unmade by him alone. It was argued in the two cases in point that because the law bestows power on the President, qua president, the citizens are her/his subjects and s/he is not subjected to their rights/demands. This is what Austin meant when he said 'To that determinate superior, the other members of the society are subject : or on that determinate superior, the other members of the society are dependent. The position of its other members towards that determinate superior, is a state of subjection, or a state of dependence. The mutual relation which subsists between that superior and them, may be styled sovereignty and subjection…. The party truly independent is not the society, but the sovereign portion of the society.'[15] For Austin, the powers vested in the sovereign by law cannot be limited, divided or questioned. Austin agreed that in some societies, some powers of the sovereign may be exercised for various reasons by 'political subordinates or delegates representing their sovereign author'.[16] They may be legislative, executive or administrative subordinates.[17] The list however, does not include the judiciary! Perhaps, because the judiciary, according to Austin, does not exercise 'delegated powers', and therefore can neither exercise the sovereign's executive power nor question the sovereign's authority in anyway as the sovereign is above the judiciary as much as it is above all other organs of the state.

This line of thinking is grounded on the belief that only laws 'enacted/made' by the powers vested in the 'sovereign authority' amounts to positive law. Further, the hard positivist ideology makes one believe on the one hand, that the 'enacted law' ought to be interpreted in light of the 'illimitable and indivisible' power vested *qua* sovereign (President, King, or any sovereign authority), and on the other, their validity rests on its source and utility rather than its concurrence with morality and rights of its subjects.[18] This strong alignment with the 'intellectual flavor of made law'[19] makes one vehemently deny that (i) there are laws beyond, above, and beneath the 'enacted law', and (ii) the powers vested in the sovereign *qua* sovereign is subjected to and qualified by implicit elements ('natural laws').

15 John Austin, Lectures on Jurisprudence – the Philosophy of Positive Law (The Province), (1875 New York) pp 82-83

16 Ibid, p. 96

17 Ibid, p. 97

18 John Austin, n 15, pp 52-53

19 Lon Fuller, Anatomy of the Law, (1968 USA) p 112

The people's sovereign power

Yet, the contrasting belief is that there is *'an ideal system of law dictated by God, by the nature of man, or by nature itself. This ideal system is the same for all societies and for all times – past, present and future. Its rules can be discerned by reason and reflection. Enacted laws that run counter to this ideal are void and can make no moral claim to be obeyed.'* [20] This hypothesis is rested mainly on two conditions, i.e. people inhere rights by virtue of being human (natural rights) and the authority of the sovereign or the government is contracted only to recognize, protect, and promote these rights (social contract).

This raises further questions: First, what are the rights that the state is bound to respect, protect and fulfil?; second, what implications arise if the state fails to fulfil its contractual obligations towards citizens?; and third, who should be tasked with examining whether the state has fulfilled or has failed to fulfill its task?

The first question warrants an answer which applies to both universal and individual contexts. It has very often been questioned whether, as positivists argue, 'real/justiciable' rights are only those which have been explicitly recognized in made/enacted law, or the enacted law ought to be construed in light of 'inner morality' which looms large beyond four corners of made/enacted law. The resolution to this lies in what justice demands. Neither of these questions occur to a positivist, as for the positivist, internal morality is irrelevant to the validity of law. Yet, a naturalist response depends totally on the very question 'what justice demands.'

Justice demands different meanings to different individuals and groups depending on their conflicting or complementary needs and requirements. Therefore, the importance adhered to rights may vary depending on the social, political, cultural, environmental or other contexts in which the demands are claimed. However, there are inescapable rights and corresponding obligations that are fundamental to every human being in any context. These have been agreed globally after years of careful thought, and have been articulated in the Universally agreed upon Declaration of Human Rights thus: (1) *Everyone* has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, *everyone* shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[21] These standards qualify and complement the universal human rights that are guaranteed under the basic tenets: 'everyone is entitled to' and 'no one shall be discriminated against'. All human rights whether they are recognized as justiciable within a legal system or

20 Ibid, p 116

21 Universal Declaration of Human Rights, Article 29 (1) and (2)

not are subjected to these overarching, yet may not be enacted/made, universal truths. Finnis further classify these two conditions into a four-fold absolute limitations on any form of government, as they are essential: (i) to secure due recognition for the rights and freedoms of others; (ii) to meet the just requirements of morality in a democratic society; (iii) to meet the just requirements of public order in a democratic society; and (iv) to meet the just requirements of the general welfare in a democratic society.'[22] These fundamental duties reciprocate the rights of everyone, and therefore are basic to any legal system notwithstanding their explicit recognition in enacted/made law.

The answer to the second question arises from the social contract between citizens (as individuals and/or collectively) and the state. Fuller elaborates eight ways which could fail the law, thus making it clear that even a sovereign could fail in her/his/their job. That law enacted by a sovereign does not stand valid merely by virtue of being enacted by the sovereign, is a basic tent of natural law.[23] The law has to stand the test of morality in terms of its adherence to the social contract conditioned by the essential standards discussed above (under the first question). Rousseau elaborates this as a two-fold association involving 'a mutual undertaking between the body politic and its constituent members. Each individual comprising the former contracts, so to speak, with himself and has a two-fold function.'[24] The social contract does not submit unlimited power to the sovereign, its submission is defined by the contract. Locke explains: "Though the legislative, whether placed in one or more, whether it be always in being or only by intervals, though it be the supreme power in every commonwealth, yet, first, it is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of people. For it being but the joint power of every member of the society given up to that person or assembly which is legislator…'[25] Locke is firm on the limitations of the power of law-makers - that all power is only for the common good.[26] Accordingly, the power collapses when the contract is breached by either party. The powerful is not exempted, because the 'power' of the powerful rests on and as long as the terms of the contract are respected. Fuller has a clear answer to the instances where this actually happens: "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at al…"[27]

The argument leveled on behalf of the President that his authority to pardon a convict should not be reviewed by the judiciary (or any other arm of the government for that

22 John Finnis, n 7, p 213
23 Lon Fuller, The Morality of Law, Eight ways to fail to make Law, (1969)
24 Jean-Jacques Rousseau, The Social Contract, (1762)
25 John Locke, Two Treatises of Government (1823)
26 Ibid, Chapter I, p.106
27 Lon Fuller, The Morality of Law, The Consequences of Failure

matter), was clearly based on 'indivisible sovereign power' that Austin proposed. The court however, held that the powers vested in the President are subject to review by the Supreme Court by way of proceedings under Article 126 of the Constitution in appropriate circumstances.[28] This was substantiated by the argument that the president is the 'custodian' of the executive power of the people.[29] Fuller states that 'reason', rather than any authority of a person or a group, as Austin suggests, shapes the fundamental structure of a legal system.[30] This clearly means that the legitimacy of law lies on its rationality. Where the law itself mandates a punishment as severe as 'death' on a criminal convicted through a proper procedure by an authority mandated for the task, a reversal of it cannot be justified merely because such a reversal has been permitted by law or exercised by an Executive. In other words, the law does not become valid simply by virtue of being enacted/made law. The law must be rational, i.e., justifiable by logical and reasonable argument. Questioning the rationality and logic of the law rests upon the judiciary when questioned in a court of law, and on the people whose sovereignty the law-makers exercise.

This is linked to the third question, appropriateness of judicial review. By the very nature of socio-political underpinnings, especially the legacy of colonial concepts and biases in governance, judicial review has never been uncontroversial. A clear answer to the third question may be found in the secondary rules propounded by HLA Hart. Accordingly, the ultimate rule, i.e. the rule of recognition, provides the criteria by which the validity of other rules of the system is assessed.[31] According to Kelsen, the constitution of the democratic socialist republic of Sri Lanka as enacted in 1978 and as duly amended stands as the *Grundnorm*, or the apex Law on which the validity of all other laws depends.

Judicial review

It is now pertinent to examine the powers of the Supreme court to review Executive action. Judicial review has been defined as "the examination or review by the Courts, in cases actually before them, of legislative statutes and executive or administrative acts, to determine whether or not they are prohibited by a written Constitution or are in excess of powers granted by it, and if so, to declare them void and of no effect."[32]

The 1978 Constitution stands the apex law of the country by virtue of being a constitutional system as per Hart, and as the Grundnorm according to Kelsen's theory. The Constitution of Sri Lanka grants powers of judicial review to the Supreme Court.

28 Padman Surasena J in Duminda Silva case at p 31

29 Ibid p. 54

30 Lon Fuller, Anatomy of the Law, p 116

31 HLA Hart, The Concept of Law, (2012, 3rd ed), p. 105

32 Edward Conard Smith and Arnold Jhon Zurcher, Dictionary of America Politics, Barnes and Noble, (New York, 1959) p. 212

In these two instances, the jurisdiction to review Executive pardon rests (Contrary to Austinian theory) solely and exclusively with the Supreme court under two specific constitutional provisions: (i) Article 125 (1)[33] and (ii) Article 126.[34] Article 125 is relevant because the cause of action involves interpretation of a 'constitutional matter', with regard to administration of justice exercised by an institution established by the Constitution, i.e. President. It is the Constitution by virtue of being the Rule of recognition or the *Grundnorm* that establishes the office of the President, and not vice versa. According to Article 125, such instances come under the purview of the Supreme Court. On the other hand, Article 126 authorises the Supreme Court to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right. Executive pardon under both cases have alleged violation of fundamental rights.

Taking a clear naturalist position, the Supreme court highlighted the importance of people's rights guaranteed in the Constitution: "*Thus, I can state at the outset, that Articles 3 and 4 of the Constitution have made it unequivocally clear that the Fundamental Rights are part and parcel and embedded in the Sovereignty which is vested in the people. Thus, Fundamental Rights of the people cannot under any circumstance be pushed to a 'second row'. This is because according to Article 4, all five items set out in sub-Articles (a) to (e) i.e., their legislative power, their executive power, their judicial power, their fundamental rights and their franchise are all equal components of the Sovereignty of the People. The People can exercise and enjoy them in the manner set out in Article 4. Thus, none of the five components of the Sovereignty of the People is second to any other*".[35] The court rejected the Austinian illusion of illimitable and indivisible power of the sovereign when it said "This Court has consistently held that the President is not only bound by law, but it is also the duty of the President to uphold the law. The law here not only means the Constitution but every other law also. …Therefore, no one, including the President can ignore it. Why? Because the Parliament has exercised the legislative power of the people in as much as the President also exercises the executive power of the people. The sovereignty is vested in the people of this country and not in the President of the country."

33 Article 125 (1) "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution and accordingly, whenever any such question arises in the course of any proceedings in any other court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi-judicial functions…"

34 Article 126. (1) 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.

35 Padman Surasena J, in Duminda Silva case, atp. 15

Concluding comment

This brings us to yet another doubt: whether rule of law is always good. The dogma is that rule of law is better than the rule of men. The notion enjoys ideological popularity. Yet, it does not guarantee every aspect of the common good, and sometimes it fails to secure even core values or the substance of the common good.[36]

One of the eight fatalities of law that Lon Fuller recognizes is continuity and compliance between the stated content of the law and its administration.[37] Yet, it would be a mistake to think that the rule of law even with the continuity of its stated content and compliance would always be for the common good of the people. Finnis cautions that even a legally appointed regime could be "(i) exploitative, in that the rulers are out simply for their own interests regardless of the interests of the rest of the community; or (ii)ideological, in that the rulers are pursuing a goal they consider good for their community, but pursuing it fanatically, overlooking other basic aspects of human good in community; or (iii) some admixture of exploitative and ideological, such as the Nazi regime." [38] Obviously, none of these types of tyranny can find in its objective any rationale for adherence. This applies to a written constitution as well. The terms of a constitution therefore, "must be both restrained and amplified by the 'implicit' prohibitions and authorizations necessary to prevent its exploitation by those devoted to its overthrow."[39] Doing so, is a responsibility that 'accrues by operation of the law of nature'.[40]

Finnis identifies key features of a social order which can be termed as one ruled by law (as opposed to rule of a person). The last of the eight components is: "Those who have the authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance, and (b) do actually administer the law consistently and in accordance with its tenor."[41] This component of the Rule of Law focuses on institutional aspects, and requires independence of the judiciary; power of the judiciary to review laws, rules, and regulations; and encroachment of the sovereignty of the people by authoritative regulation.

These two judgements are neither isolated situations nor the last in the long line of cases involving abuse of power in the name of sovereignty. What the people can look up to in such situations is a judiciary which stands along the rule of virtue, than mere interpretation of laws. As revered forefathers have aptly stated "*It is a cardinal axiom*

36 Finnis J, Natural Law and Natural Rights (Clarendon Press, Oxford, 1980) 274
37 Fuller LL, The Morality of Law, (1964 Yale University Press) 34-37
38 Finnis J, Natural Law and Natural Rights, p 274
39 Finnis J, Natural Law and Natural Rights, p 275
40 ibid
41 Ibid p 270-271

that every power has legal limits. If the court finds that the power has been exercised oppressively or unreasonably, or if there has been some procedural failing, such as not allowing a person affected to put forward their case, the act may be condemned as unlawful.…Unfettered discretion cannot exist where the rule of law reigns. The same truth can be expressed by saying that all power is capable of abuse, and that the power to prevent abuse is the acid test of effective judicial review."[42]

42 Wade & Forsyth's Administrative Law (Twelfth Edition) page 16. Cited by Fernando J in Edward Francis William Silva President*'s Counsel and three others* v. *Shirani Bandaranayake and three others*, 1997 (1) SLR 92

Cracking the Code: Unveiling the Hidden Secrets of Forensic Document Analysis

K. K. Apsara*
Government Examiner of Questioned Documents

Your signature is a powerful representation of your identity. Do you truly understand its value? Like your DNA or fingerprint, your signature is uniquely yours. Both signatures and handwriting are distinct, reflecting the individuality of each person. That's why it's essential to appreciate and understand your own signature and writing style. Beyond signature and handwriting analysis, it's also important to be aware of other questioned documents that you may encounter in your lifetime. Knowing this can be crucial in safeguarding your identity and authenticity. Most people are unaware of this method: handwriting and signature matching techniques. These are facilitated by modern optical instrumentation systems and a forensic expert's experience in analyzing signatures and handwriting.

Sri Lanka's sole Forensic Science State Laboratory (EQD) includes a section that specializes in inspecting suspicious documents, particularly examining signatures and handwriting. This section operates under the purview of the Government's forensic department and is well-equipped to assess documents related to frauds or criminal activities.

The EQD Laboratory conducts a wide range of analyses, including questioned signature and handwriting analysis, stamp impression comparison, counterfeit document examination (such as forged stamps and lottery tickets), travel document examination,

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typewritten document examination, and the decipherment of alterations, additions, obliterations, and erasures. Additionally, the lab specializes in the examination of charred and soaked documents, matching tearing edges of documents, identifying printers, typewriters, and photocopiers based on machine defects, and conducting facial configuration analysis, among other forensic assessments.

The laboratory employs highly experienced experts who are well-versed in international standards, bringing their expertise on par with similar facilities in developed countries. These professionals undergo annual competency tests conducted by international proficiency testing providers, ensuring they stay at the forefront of their field. Their expertise plays a crucial role in investigating crimes, upholding justice, and preventing the wrongful conviction of innocent individuals within Sri Lanka's legal system. Their knowledge, experience, competence, and decision-making abilities collectively contribute to their unique mission. In the past, the authenticity of important documents was confirmed through fingerprints or unique marks made by individuals. Modern tools for handwriting and signature verification are aided by scientific instruments and the expertise of relevant professionals.

While writing may seem simple, it is actually the result of a highly intricate combination of complex mental processes, nerve functions, and muscle coordination. It is an acquired skill that no one masters instantly. A fundamental principle of handwriting is that no two people can write in exactly the same way, with every detail identical. Factors such as muscle function, wrist movements, finger flexibility, grip on the writing instrument, the way the instrument is held, the pressure exerted on the writing surface, and the writer's skill level are all unique to each individual. This uniqueness makes handwriting a personal identifier, and this principle is often used to identify the author of a written document, making it a valuable form of forensic evidence.

Signature and handwriting analysis is a comparative study that requires adequate and quality samples. For the identification of handwriting or signatures, a sufficient number of specimens is necessary. These specimens can either be requested, where the author or suspect provides the sample in front of an investigating officer, or they can be collected from documents written in the normal course of their work. The number of required specimens depends on the degree of variation of the writer, which is determined by the document examiner. Variation in someone's writing is a natural phenomenon and is a key principle of document examination. This is because the human body cannot function with the same precision as a machine at all times. Various internal and external factors can affect one's writing, such as age, medications, alcohol or drug consumption, stress, and certain medical conditions, etc.

Forensic scientists clearly understand that while a person's handwriting may vary, it remains unique to them. Whether it's an individual's signature or their handwriting, it holds distinct individuality. This fact is well-known to the person's closest relatives, and even to twins, siblings, or highly skilled artists. Exact imitation of handwriting or signatures by a criminal is impossible. Although general characteristics may appear similar, the intrinsic characteristics of handwriting and signatures differ from person to person, making these variations sufficient for identity verification. An expert in handwriting and signatures can discern subtle, often invisible, distinctive features within a manuscript or signature. These features enable them to make accurate determinations.

In the case of signatures, inherent characteristics are either naturally acquired or developed over a life- time. Handwriting is a means to differentiate one person from another, and it is defined by its inherent traits. Handwriting styles can be categorized into intentional or habitual, depending on whether an individual consciously alters their inherent traits or unknowingly maintains them.

However, a person who attempts to replicate another's handwriting often fails to alter the inherent characteristics unintentionally. Although an impersonator may mimic the external shapes and designs of letters, studying the inherent traits proves challenging. Handwriting is replete with distinctive features unique to each individual. Variations in writing pressure, pen movement patterns, direction, tilt, rhythm, line smoothness, character pacing, starting and finishing lines, letter design patterns, letter relationships, linearity and even curved aspects contribute to these characteristics. A hand- writing expert, trained to discern these attributes, develops the ability to recognize these mostly microscopic features. Many of these features are so deeply inherent in the individual's writing that they are controlled by the brain's primary processing centre, often unconsciously.

Today, there is an increasing need to identify criminals and drug smugglers operating in the underworld. Facial configuration analysis is a valuable tool used for this purpose. Facial recognition systems can be based on either morphological features or algorithms. In our laboratory, we perform facial configuration analysis using morphological features, which is proven to be the most reliable and accurate method.

This analysis can be conducted as either a 2D or 3D examination, with comparisons made through image-to-image or image-to-person analysis. During the facial identification process, we consider various elements of the face, such as the nose, ears, mouth, eyes, and jawline, along with their structural characteristics (e.g., nostrils, ear lobes, tear ducts), characteristic descriptors (e.g., relative positions, shape, symmetry, and proportions), and special facial marks (e.g., moles, scars, tattoos). Based on the assessment of these criteria and the relevant documentation, a conclusion is drawn.

The digital forensic laboratory, which operates under the supervision of the Government Examiner of Questioned Documents, also plays a pivotal role in the country's justice system. The work of the laboratory is organized into four primary sections: Digital Data Analysis, Digital Image Analysis, Digital Biometry Analysis, and Digital Audio Analysis.

1. Digital Data Analysis

This section is responsible for examining computers, mobile phones, CCTV DVRs, and other digital storage devices. The team recovers data, analyzes internet history, and conducts OS artifact analysis to trace user activities. In mobile devices, they extract and analyze chat data, location information, call logs, and messages. The section also retrieves data from CCTV DVRs, including log analysis, and examines multimedia files, documents, and executable files stored on digital devices.

2. Digital Image Analysis Section

The Digital Image Analysis section focuses on enhancing unclear images and videos to extract crucial information. This includes improving vehicle number plates from blurry CCTV footage and enhancing suspect images in video and photo evidence. Additionally, the section verifies the authenticity of images and videos to determine if they have been edited.

3. Digital Biometry Analysis Section

This section specializes in facial comparison, matching provided suspect images with individuals captured in CCTV footage. This capability is crucial in identifying suspects in criminal investigations.

4. Digital Audio Analysis Section

The Digital Audio Analysis section performs voice comparisons to identify individuals and assesses the authenticity of voice clips. They determine if a voice recording has been edited and can also identify the recording device used.

Through these specialized sections, the Digital Forensics Laboratory provides critical support to law courts, government institutions, and private organizations, ensuring that justice is served in Sri Lanka.

Just as DNA patterns vary from person to person, handwriting and signature patterns also exhibit variations among individuals. While there can sometimes be shared traits, particularly among close relatives in the same family, the outward appearance might suggest similar handwriting. However, even when letters appear very similar, the inherent characteristics unique to each person make their handwriting and signature control as mentioned above, complex.

Nothing But the Whole Truth: An Introduction to Forensic Psychiatry for the Sri Lankan Legal Field

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In the courtroom, truth is of paramount important, yet understanding the complex relationship between law and mental health is often challenging. Forensic psychiatry plays a key role in bridging this gap, helping the legal system understand and manage issues related to mental illness and criminal responsibility. Forensic psychiatrists ensure that legal professionals have the right information to make fair decisions, especially when mental health affects someone's legal accountability.

This article introduces legal professionals to forensic psychiatry by covering its history, modern applications, and ethical standards. Understanding forensic psychiatry is essential for assessing expert testimony and applying psychiatric insights to enhance justice. Forensic psychiatry provides valuable tools for making informed legal decisions, whether evaluating criminal responsibility, assessing witness competency, or shaping mental health policies. Additionally, this article will outline the general process of conducting a forensic psychiatric assessment. This will provide legal professionals with a clearer understanding of the evaluation process, facilitate accurate use of information, and ensure the necessary support for forensic psychiatrists during assessments.

Forensic psychiatry deals with the intersection of mental health and the law, including the management of mentally disordered offenders within various social systems (1). The American Academy of Psychiatry and the Law (AAPL) defines forensic psychiatry as the application of scientific and clinical expertise to legal matters, including civil, criminal, correctional, regulatory, and legislative issues, as well as specialized clinical consultations like risk assessment (2).

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A forensic psychiatrist is a medical doctor with advanced training in both general and forensic psychiatry. They first complete a medical degree (MBBS, MD, or equivalent), followed by postgraduate training in psychiatry and specialization in forensic psychiatry, achieving board certification from relevant bodies.

Forensic psychiatry is one of several psychiatric subspecialties, such as child, geriatric, addiction, neuropsychiatry, and community psychiatry. In Sri Lanka, forensic psychiatry is officially recognized as a subspecialty alongside geriatric and child psychiatry.

The role of a forensic psychiatrist differs from that of a general psychiatrist and other psychiatric subspecialties. While general psychiatrists focus primarily on patient care, forensic psychiatrists often serve a third party, such as a court, lawyer, or the criminal justice system (3). This shift means that forensic psychiatrists move from a therapeutic role to an evaluative one. They frequently work in settings like court clinics, prisons, jails, and maximum-security hospitals, where security and custodial concerns can take precedence over therapeutic goals.

Historical development of forensic psychiatry

The origins of forensic psychiatry can be traced back to ancient civilizations, where mental illness was already considered in legal matters. In Roman and Greek societies, philosophers like Aristotle noted that delusions might excuse unlawful acts if they were committed without intent. Aristotle made a distinction between voluntary and involuntary actions regarding their blameworthiness (4).

Roman law reflected this by suggesting that mentally ill individuals should not face additional punishment, with Emperor Marcus Aurelius famously stating, "the madman is sufficiently punished by his madness"(5). This awareness of mental illness in legal contexts was not limited to the Western world; ancient Indian laws from around 880 B.C. also provided special consideration for individuals with mental disabilities and minors under 15 (6).

Interestingly, the ideas foundational to modern forensic psychiatry were evident even in ancient times. Around 180 A.D., Mercer emphasized key forensic psychiatry concepts such as the importance of thorough assessment, addressing malingering (fake illness), avoiding decisions on punishment, and the need for clinical management, including restraint (6).

During the Enlightenment, these concepts resurfaced and began to influence European legal systems. However, it was not until the mid-1700s that doctors were specifically hired by the defense to report on the mental state of an accused person (7). From 1760 to 1845, criminal defendants in Europe increasingly used insanity as a defense, often relying on their own statements and those of family members, sometimes supported

by medical evidence—an early form of what we see today (6). Philosophers like Immanuel Kant contributed to the field by categorizing psychoses and advocating for psychologists' involvement in legal cases (8).

Several important cases helped to shape forensic psychiatry. In 1800, James Hadfield attempted to kill King George III due to delusions, highlighting the growing recognition of insanity defenses (9). The formalization of the insanity defense came with the McNaughten rule in England in 1843, which established a legal standard for excusing a defendant due to mental illness (9). This period saw psychiatric testimony begin to replace judges as the primary source of expert opinions. Influential figures like Isaac Ray and Emil Kraepelin advanced forensic psychiatry by focusing on psychiatric assessments to understand criminal behavior and the distinction between mental and brain disorders (6,10).

By the late 19th century, forensic psychiatry addressed complex cases involving conditions like psychopathy, also known as "moral insanity." High-profile cases, such as the assassination of President James Garfield, raised questions about mental illness and criminal responsibility (6). This era also saw the formation of medicolegal societies, such as the American Academy of Psychiatry and the Law (AAPL) in 1969, which continues to connect psychiatry and law (11).

Forensic psychiatry began to distinguish itself from general psychiatry due to institutional and ethical differences. By the 1980s, psychiatrists working in secure hospital environments or prisons in Europe developed a unique subspecialty identity (10). In the United States, psychiatrists focusing on legal assessments sought separate recognition as forensic psychiatrists through the AAPL (6). Crucially, forensic psychiatry was developed not to aid in punishment but to protect individuals with mental illness, ensuring they were not judged by the same legal standards as those without mental health issues (10).

In Sri Lanka, forensic psychiatry has a long history and was officially recognized as a subspecialty in the mid-2010s. It continues to play a vital role in bridging the gap between psychiatry and the law.

Role of forensic psychiatrist

Forensic psychiatry, despite varying in specifics across different countries due to differences in history, legal systems, and mental health frameworks, shares several common goals. It primarily focuses on providing expert opinions in legal matters, acting as a crucial link between law and psychiatry. Additional objectives include ensuring appropriate treatment for severely mentally ill individuals who become involved in delinquency, preventing relapse and recidivism among offenders with mental disorders, offering specialized clinical consultations, and contributing to policy-making processes.

As an expert witness

One key role of forensic psychiatrists is to serve as expert witnesses in court. This role involves using specialized knowledge to help the court understand complex issues related to mental health and legal responsibility. Forensic psychiatrists conduct evaluations, write reports, and testify in court.

The definition of an expert witness is consistent across different jurisdictions. In the United States, the Federal Rules of Evidence (Rule 702) define an expert witness as someone qualified by "knowledge, skill, experience, training, and education" to provide opinions on technical or specialized matters (12). In the UK, Part 35 of the Civil Procedure Rules (CPR) requires expert witnesses to offer independent, impartial opinions to assist the court (13).

In Sri Lanka, Section 45 of the Evidence Ordinance defines an expert witness as someone with specialized skills who can help the court understand matters related to foreign law, science, art, or various forms of identification, such as handwriting or fingerprint analysis (14). Forensic psychiatry falls under the category of science according to this definition.

Forensic psychiatrists play a crucial role in providing reliable testimony to aid judicial decision- making across various legal systems. However, it is important to acknowledge the limitations of their role. As Dr. Robert I. Simon aptly noted, "The expert witness is a hood ornament on the vehicle of litigation, not the engine" (15). This analogy highlights that while an expert witness adds significant value and credibility to a case, their role is secondary rather than central. The "engine" of litigation consists of the key elements that propel a case forward, including legal arguments, evidence, and judicial decisions. Although the expert witness provides specialized knowledge and insights, they do not control the direction or outcome of the case. Instead, they contribute to the case by offering expert opinions without determining its overall trajectory.

In practical terms, forensic psychiatrists' evaluations in criminal cases involve assessing the mental state of offenders, victims, or witnesses. In civil cases, their evaluations may pertain to any party involved or even third parties. These assessments can focus on various timeframes, such as the time of a crime, the present, or the future. For instance, evaluating an accused's criminal responsibility or a victim's capacity to consent to sexual activity involves examining their mental state at the time of the act. Conversely, assessing an offender's fitness to plead or a witness's testimonial capacity involves evaluating their current mental state. Risk assessments, which predict potential future violence, consider possible future mental states. Additionally, forensic psychiatrists may also conduct assessments on individuals who have already passed away, such as in retrospective evaluations of testamentary capacity or psychological autopsies.

Conducting evaluations

When conducting an effective forensic psychiatric assessment, forensic psychiatrists typically use a structured approach to address various psychiatric-legal issues. Rosner's framework is one such approach that organizes complex factors, ensuring a consistent and thorough evaluation (16). This method is widely used in forensic practice to guide evaluations.

Before beginning an assessment, forensic psychiatrists follow several crucial steps: confirming the referral details and ensuring that the questions are within their area of expertise. For instance, forensic psychiatrists are not trained to detect lies. Instead, they focus on evaluating whether descriptions or behaviors align with established psychiatric symptoms. Using phenomenological methods, they assess whether these symptoms are genuine or fabricated. Therefore, if a request is made to determine whether the referred person is telling the truth, the response should be based on the psychiatrist's expertise in evaluating psychiatric symptoms, not on detecting deceit. Forensic psychiatrists must acknowledge their limitations and clearly communicate what they cannot do.

Rosner's process involves four key steps: identifying the psychiatric-legal issue, understanding the legal criteria, gathering relevant data, and applying logical reasoning to form a sound psychiatric-legal opinion (16). Each case is unique, varying by legal context, jurisdiction, and timeframe.

Identification of psychiatric legal issues:

Clearly defining the psychiatric-legal issue relevant to the case is essential for an effective evaluation. Forensic psychiatrists address a wide range of psychiatric-legal issues, which can vary greatly from one case to another. For example, issues for a defendant may involve criminal responsibility, fitness to plead, or dangerousness, while issues for a victim of sexual abuse might include the capacity to consent to sex or the ability to provide testimony. Rosner, referencing the Standards for Fellowship Programs in Forensic Psychiatry, outlined key psychiatric-legal issues across civil, criminal, and regulatory contexts (16). Nonetheless, the specifics of each case may introduce additional, unique issues.

Table 1: Psychiatric-Legal Issues – Outlined by the Fellowship Programs in Forensic Psychiatry Joint Committee on Accreditation of Fellowships in Forensic Psychiatry, 1982.

Civil forensic psychiatry	Criminal forensic psychiatry	Legal regulation of psychiatry
• Conservators and guardianships • Child custody determinations • Parental competence • Termination of parental rights • Child abuse • Child neglect • Psychiatric disability determinations (e.g., for social security, workers' compensation, private insurance coverage) • Testamentary capacity • Psychiatric negligence and malpractice • Personal injury litigation issues	• Competence to stand trial • Competence to enter a plea • Testimonial capacity • Voluntariness of confessions • Insanity defense(s) • Diminished capacity • Sentencing considerations • Release of persons who have been acquitted by reason of insanity	• Civil involuntary commitment • Voluntary hospitalization • Confidentiality • Right to treatment • Right to refuse treatment • Informed consent • Professional liability • Ethical guidelines.

It is also important for the referrer, whether from the court or an attorney representing a client requiring an evaluation, to clearly outline the specific psychiatric-legal issues and questions they need answered in their referral. This clarity ensures that the forensic psychiatrist can provide a thorough and relevant evaluation tailored to the needs of the legal matter at hand.

Understanding Legal Criteria:

Understanding the specific legal criteria relevant to the jurisdiction where the case is heard is vital. These criteria vary between jurisdictions and must align with the issue at hand. For instance, in Sri Lanka, Section 77 of the Penal Code outlines the legal framework for assessing criminal responsibility (17), and Chapter XI, Section 118 of the Evidence Ordinance addresses the capacity to give evidence (18). Having a solid understanding of legal criteria provides a framework for assessment and informs the reasoning process. Forensic psychiatrists must be well-versed in relevant legislations.

Gathering Relevant Data:

Gathering and analyzing data relevant to legal criteria is crucial for a comprehensive forensic psychiatric assessment. This process involves collecting detailed information to form a complete picture of the individual's mental state and its relevance to the legal issues at hand. Key data sources include the individual's personal history, family members and eyewitnesses, police reports, and medical records.

For example, in evaluating criminal responsibility, the forensic psychiatrist must reconstruct the individual's mental state at the time of the alleged offense. This includes gathering the individual's description of the incident, reviewing medical records for their mental health history, including prior psychiatric diagnoses and treatments, and examining police reports for details on the incident and behavior. Insights from family members and eyewitnesses further clarify the individual's state of mind and actions. Additionally, visiting the field may provide context to accurately reconstruct the individual's mental state at that time.

Similarly, when assessing the capacity to consent to sexual activity, the focus shifts to reconstructing the victim's mental state at the time of the incident. This involves evaluating whether the individual understood the nature and consequences of the sexual act, whether they were aware of their ability to make a choice, and if any psychiatric symptoms influenced their decision-making. The assessment also includes determining if the individual was vulnerable to undue influence due to their symptoms. Relevant data includes the individual's account of the incident, personal history, education, sexual history, substance use, psychiatric history, and medical records, as well as police records. IQ and functional assessments can further aid in understanding the individual's intelligence and functional capabilities. Gathering and analyzing all this information ensures that the mental state reconstruction aligns with legal criteria.

In contrast, when evaluating fitness to plead, the emphasis is on the individual's current mental state and functional assessment, focusing on their present condition rather than their state at the time of the alleged offense.

Accurate and thorough gathering and analysis of relevant information are essential to ensure that the forensic psychiatric evaluation meets legal requirements. When courts and investigating police provide the necessary information and documents at the referral stage, the assessment process can be expedited. Tracing and gathering essential data can be time-consuming, and certain documents must be reviewed before the assessment can begin. At a minimum, understanding the charges or legal background of the case is critical; without this foundational information, the evaluation process becomes challenging, akin to navigating without a map.

Reasoning Process:

Applying relevant data to legal criteria through logical reasoning is fundamental to forming a sound forensic psychiatric opinion. The opinion must be supported by solid arguments, facts, and reasoning, ensuring that it remains both reasonable and well-founded. In legal settings, where opinions must be grounded in scientific evidence and systematic reasoning, a well-organized approach is key to clarity and coherence.

For instance, when assessing criminal responsibility, it's essential to demonstrate the logical connection between psychiatric symptoms at the time of the offense and the relevant legal criteria. In Sri Lanka, this means showing how symptoms impacted the individual's capacity to understand the nature of the act, recognize its wrongfulness, or appreciate that their behavior was contrary to the law.

In jurisdictions that follow the Model Penal Code Test for Legal Insanity, the assessment must show how the individual's symptoms impaired their ability to either appreciate the criminality of their conduct or conform their behavior to the law's requirements. Establishing these connections between psychiatric symptoms and legal standards must be clear and well-reasoned to meet legal expectations.

A well-developed forensic psychiatric opinion relies on thorough organization and reasoning, ensuring clarity, consistency, and a rational basis for psychiatric-legal conclusions, while also anticipating potential challenges during cross-examination.

Using a conceptual framework offers several key advantages in forensic psychiatric assessments. It guides the assessment process, facilitates communication among colleagues, clarifies ambiguous areas, identifies data gaps, and helps resolve disagreements among experts.

However, the conceptual framework is not a fail-safe method for deriving psychiatric-legal opinions. Rather, it serves as a tool for organizing extensive and complex data. In the hands of a skilled practitioner, it can produce high-quality results. In the hands of an unskilled practitioner, it may lead to subpar outcomes.

Report Writing

Report writing is a critical skill for forensic psychiatrists. It serves as the primary way they communicate their assessments and opinions to courts, attorneys, and other relevant agencies. Forensic psychiatric reports must translate complex medical concepts into clear, comprehensible language, addressing the specific psychiatric-legal issues at hand. The effectiveness of these reports often determines their impact on court decisions.

A well-crafted report is self-sufficient, with medical terms adequately explained It clearly distinguishes between facts and opinions, making the reasoning process behind

the psychiatrist's conclusions transparent. The report should demonstrate how the psychiatrist arrived at their opinions, ensuring clarity and precision in their communication (20) (21).

Testifying in Courts

Providing oral evidence as an expert witness in court is a crucial skill for forensic psychiatrists. During the trial, the forensic psychiatrist begins by presenting their findings through examination-in-chief by the prosecutor or attorney who retained them. They explain the methods used in their evaluation, their findings, and their professional opinions. After examination-in-chief, the forensic psychiatrist typically faces cross-examination by the opposing attorney, who may challenge their methods, conclusions, or credibility. It is essential for the forensic psychiatrist to focus on presenting their conclusions objectively rather than advocating for the interests of the retaining party (22).

Courtroom testimony by forensic psychiatrists often attracts public attention and scrutiny. Forensic psychiatrists must recognize that their role is to assist the court impartially, regardless of public interest or the prominence of the case. Maintaining humility and professionalism is crucial (20).

Given the complexity of psychiatric conditions, forensic psychiatrists may face challenges in providing clear testimony, especially when the law demands precise answers. In such cases, it is important for forensic psychiatrists to clearly explain these complexities to the court (1).

Objectivity and unbiased opinions are imperative, despite pressures from either the retaining or opposing party. Testimony can be easily misunderstood by the jury or the public, particularly in high-profile cases. Misinterpretation of psychiatric terms or findings can distort perceptions and impact the outcome of the case. Therefore, forensic psychiatrists must ensure their reports and testimony are clear and accurately conveyed to avoid misinterpretation in court (22).

Collaboration with the Legal System

Effective forensic psychiatry involves close collaboration with the legal system. This includes working alongside legal professionals, law enforcement authorities and other experts. Forensic psychiatrists also play a crucial role in educating the court, helping judges and juries to understand complex psychological concepts. Using plain language to explain psychiatric findings ensures that their reports and testimony are accessible and comprehensible to all parties involved.

Therapeutic Role

Forensic psychiatrists mainly work as expert witnesses, but they also have important roles in therapy. They treat people with mental disorders involved in legal issues. For example, they care for prisoners and those who have committed crimes but are deemed not guilty by reason of insanity. This type of treatment is sometimes called correctional psychiatry (1).

Since the 1970s, higher rates of mental illness among prisoners have been observed. One theory attributes this trend to the deinstitutionalization of mentally ill offenders, which has led to more mentally ill individuals ending up in prisons as mental hospital populations decrease (23). Strict drug laws and mandatory sentencing have also increased the incarceration of people with mental health issues, particularly those who relapse after probation violations (24, 25).

Changes in civil commitment laws now emphasize dangerousness over mental illness, resulting in reduced involuntary hospitalizations and shorter hospital stays. Consequently, many mentally ill individuals lack proper treatment in the community, raising their risk of incarceration (26). Additional factors include limited access to treatment and negative societal attitudes (25).

This trend is global, with high rates of mental illness in prison populations reported in the U.S. (28), Europe (29), and the UK (30), affecting both high-income and middle/low-income countries(31).

Serious mental conditions, such as schizophrenia, major depression, and bipolar disorder, are notably more prevalent in prisons compared to the general population, and antisocial personality disorder is particularly common among the incarcerated (32, 33). This underscores the need for improved mental health services in prisons and a better understanding of contributing policies.

In addition to working in correctional settings, forensic psychiatrists collaborate with general psychiatrists to manage the care of offenders in the community, including those on bail or under non-custodial orders. They ensure that offenders receive appropriate mental health care while also addressing the legal aspects of their cases.

Treating mentally ill offenders involves goals similar to those for other psychiatric patients but is more complex. It includes addressing both clinical needs and factors related to offending behavior, adding an ethical dimension unique to this type of care.

Risk assessment and employment assessment

Forensic psychiatrists contribute expertise beyond courtroom settings and offender treatment. They play crucial roles in risk assessments and employment evaluations.

In risk assessments, forensic psychiatrists evaluate the potential for future dangerous behavior in both criminal and civil contexts. Their assessments inform decisions regarding parole, sentencing, and release from psychiatric facilities by considering factors such as mental illness, substance use, past behavior, and social conditions. This helps ensure public safety and appropriate care.

For employment evaluations, forensic psychiatrists assess mental fitness for high-risk jobs, including law enforcement, aviation, and military roles. They determine whether candidates can meet job demands and maintain workplace safety. Additionally, they provide insights into the psychological impacts of workplace discrimination or harassment.

Policy Making, Advisory, and Advocacy Roles

Forensic psychiatrists play a vital role in shaping policies, advising institutions, and advocating for legislative changes related to mental health and criminal justice. They help create policies on the treatment of mentally ill offenders, juvenile justice, and correctional mental health, ensuring mental health considerations are included in legal and safety policies.

As advisors to government agencies and legal bodies, forensic psychiatrists help design mental health programs and training that reflect current scientific understanding. They also advocate for laws that protect the rights of mentally ill individuals and offenders, and promote better access to care. Their work aims to make the legal system more informed, compassionate, and effective, influencing both individual cases and broader mental health and legal systems.

Ethical considerations

Forensic psychiatrists, like all medical professionals, must adhere to a robust ethical framework. This commitment is fundamental to the profession, ensuring that their work benefits individuals, the public, and the judicial system, while upholding the field's integrity. Ethical practices are crucial for maintaining credible, unbiased, and trustworthy evaluations, which are essential for justice.

Ethical standards also safeguard the integrity and reputation of forensic psychiatry, enhancing its reliability and acceptance within both medical and legal communities. The significant power forensic psychiatrists hold in legal cases should be regulated both by law and by ethical standards. This dual regulation ensures impartiality, dedication to truth, and prevents misuse of authority.

Forensic psychiatry has evolved through ongoing debates about its ethical standards, leading to the development of modern principles. Central to these debates is the question

of where a forensic psychiatrist's primary responsibility lies. Seymour Pollack, a founding member of the American Academy of Psychiatry and the Law (AAPL), was instrumental in distinguishing forensic psychiatry from general psychiatry. In 1974, Pollack described the field as one that applies psychiatric knowledge to legal matters, focusing on legal outcomes rather than traditional patient care (34).

However, some experts challenged Pollack's approach, emphasizing the importance of maintaining core medical responsibilities. Ethicist Philippa Foot argued that forensic psychiatrists should uphold their professional duties, relying on psychiatric and medical expertise during evaluations (35). Similarly, Philip Candilis and colleagues pointed out that society expects physicians to uphold medical values even within the legal system (36). Bernard L. Diamond added that forensic psychiatrists must not blindly follow legal demands but rather consider the ethical implications and act with professional integrity (37).

Paul Appelbaum further emphasized the delicate balance between clinical expertise and legal obligations, ensuring that forensic evaluations contribute to the legal process without compromising ethical standards (38).

Alan Stone raised a critical debate regarding the ethical challenges inherent in forensic psychiatry. He questioned whether the field is fundamentally unethical, arguing that forensic psychiatrists are placed in a position where they might betray either their patients or the judiciary(39). Stone's concern centers on the potential conflicts of interest that arise from the dual role of forensic psychiatrists, who must balance their medical responsibilities with their legal obligations. This duality can lead to ethical dilemmas, as the role requires forensic psychiatrists to maintain a level of detachment from the patient-centered focus that characterizes traditional clinical practice.

In response to Stone's critique, others have developed robust ethical frameworks specifically tailored to forensic psychiatry. Paul Appelbaum, for instance, grounded the field's ethics in the principles of truth-telling, respect for individuals, and justice (40). He argued that while forensic psychiatrists must serve the legal system, they can do so without compromising these core ethical values. Griffith added to this by proposing a narrative approach, which considers the power dynamics involved in legal processes and the voices of marginalized individuals (41). This perspective emphasizes the need to humanize the individuals being assessed, recognizing their stories and the social contexts that affect their behavior and legal circumstances.

Philip Candilis and colleagues further built on these ideas by combining ethical principles with the traditional role of medicine as a healing profession. They argued that forensic psychiatry can uphold values such as integrity and compassion while balancing

the often-conflicting demands of the legal system (36). These scholars collectively stressed that the complexity of forensic psychiatry requires practitioners to navigate these tensions with a high degree of professional responsibility, ensuring that ethical standards guide their work.

In practice, ethical standards in forensic psychiatry are often stricter than legal requirements. While courts may determine what is legally permissible, they do not set the ethical guidelines for forensic practice. The psychiatric profession, on the other hand, can deem certain actions unethical and impose penalties even when those actions are legally allowed (42, 43). This serves to uphold high professional standards, ensuring that forensic psychiatrists do not merely follow legal directives but also adhere to broader ethical principles.

An illustrative case is that of Dr. James Paul Grigson Jr., also known as "Dr. Death." Grigson frequently testified in capital punishment cases, predicting the future dangerousness of defendants with near certainty, often without conducting thorough evaluations. While his testimony was legally admissible, it raised serious ethical concerns because it lacked the caution and rigor expected in psychiatric assessments. In 1995, the American Psychiatric Association (APA) expelled Grigson for violating ethical guidelines that mandate honesty and thorough examination (44). This case underscores the role of the psychiatric profession in enforcing ethical standards that exceed legal demands.

Pollack (45) and Diamond (37, 46) further emphasized that forensic psychiatrists should avoid taking on cases that conflict with their ethical views on the legal system. They argued that psychiatrists have an obligation to uphold medical ethics, even when this conflicts with legal demands. Weinstock (47) echoed this stance, suggesting that forensic psychiatrists' ethical duties to the individuals they evaluate may outweigh their duty to the legal system. In such situations, psychiatrists might need to withdraw from cases if pursuing the legal truth would violate their ethical commitments.

This ethical tension becomes particularly pronounced when psychiatric evaluations are used in interrogations or counter-terrorism efforts, where concerns about torture or coercion may arise. In these scenarios, forensic psychiatrists must steadfastly refuse to participate, adhering to medical ethics regardless of the external pressures they may face (1).

Given these considerations, the American Academy of Psychiatry and the Law (AAPL) and similar organizations have established specific ethical principles for forensic psychiatrists that extend beyond general medical ethics. These principles include:

- **Respect for Persons**: Upholding the dignity and autonomy of individuals during evaluations.

- **Honesty**: Ensuring transparent and unbiased communication.
- **Justice**: Promoting fairness and equity in assessments.
- **Social Responsibility**: Considering the broader societal impact of their work.

Honesty is central to forensic psychiatry, which is why the article is titled "Nothing But the Whole Truth." Forensic psychiatrists must provide truthful and accurate evaluations and testimonies, ensuring that courts receive reliable information. They are expected to remain objective, presenting facts impartially and without being influenced by external pressures or expectations. Acting as a "hired gun," where an expert tailors their opinions to fit the hiring party's desires, is unethical and contrary to the forensic psychiatrist's duty to present the whole truth (48).

Additionally, forensic psychiatrists should avoid exaggerating or distorting facts to support any agenda and must base their testimony on robust data and scholarly evidence (42). To build credibility, ethical experts must acknowledge facts that may be unfavorable to their opinions, clarify the limitations of their perspectives, and recognize situations where their opinions might change. Their role is to offer impartial, evidence-based opinions while avoiding conflicts of interest and ensuring that their statements do not mislead the court. Although experts can advocate for their views, their primary duty while testifying is to maintain the integrity of their testimony and uphold honesty (42).

Forensic psychiatrists often face complex ethical challenges, particularly when balancing their obligations to the court with their responsibilities to the individuals they assess. Their role may require stepping beyond the traditional doctor-patient relationship, which can create ethical tensions. In these situations, it is crucial to adhere to principles of respect and truthfulness. Adopting a narrative ethics approach, which includes compassion and an understanding of power dynamics, can help navigate these complexities. By following established ethical standards and maintaining robust professionalism, forensic psychiatrists can meet the demands of the legal system while staying true to their core values.

Conclusion

Forensic psychiatry serves a unique and essential role at the intersection of law and mental health. Forensic psychiatrists use their expertise to help courts and legal professionals to understand mental illnesses and its impacts on criminal responsibility, fitness to plead, and other legal issues. By providing impartial evaluations and expert testimony, they offer unbiased and scientifically grounded opinions that support fair justice.

Honesty, transparency, and ethical behavior are fundamental in this field. Forensic psychiatrists face complex ethical challenges and must maintain their integrity, ensuring their work contributes to a fair and balanced legal process. They must stay committed to the truth, even under external pressures.

Through their work, forensic psychiatrists not only protect the rights of individuals with mental illness but also enhance the legal system's understanding and compassion. By adhering to the principle of "nothing but the whole truth," they ensure that their evaluations and testimonies promote justice, fairness, and respect for everyone involved.

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Part - II

FREEDOM OF SPEECH AS A PARLIAMENTARY PRIVILEGE AND JUDICIAL INDEPENDENCE IN SRI LANKA

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Abstract:

Parliamentary privileges and judicial independence in Sri Lanka are two fundamental pillars of democracy that occasionally come into conflict. However, in recent years, much concern has arisen about the potential overreach of parliamentary privileges that may undermine the autonomy and authority of the judiciary. As far as the importance of parliamentary privileges is concerned, there is no doubt that freedom of speech is central to Parliament's role and it is fundamental to the effective functioning of Parliament. However, this is the most controversial privilege, which has been highlighted and debated more than ever before in the Sri Lankan history over the past few years. The analysis reveals that, despite the prevailing clear legal provisions on the subject, freedom of speech is being misused to undermine the independence of the judiciary. This suggests the need to foster a culture of respect for the judiciary among Members of Parliament. However, while parliamentary privileges are essential for legislative autonomy, sometimes unchecked privilege may undermine judicial independence, risking constitutional violations. Hence, the article concludes by advocating for clearer constitutional safeguards and some other remedies to ensure that both parliamentary privileges and judicial independence are maintained without undermining each other.

Key Words: Judicial independence, parliamentary privileges, freedom of speech, Constitution, separation of powers, rule of law, democratic governance.

MP- Minister of Parliament

SC- Supreme Court

ICJ- International Court of Justice

JSA- Judicial Service Association

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1.0 Introduction-

The concepts of freedom of speech as a parliamentary privilege and judicial independence are essential to the functioning of any democratic system. Even if, parliamentary privileges are intended to protect the integrity and independence of Parliament, ensuring that Members of Parliament (MPs) can perform their legislative roles without undue influence or fear of reprisal, there have been debates and concerns over the potential misuse of these privileges.

A trend of some parliamentarians making statements that undermine the independence of the judiciary under the guise of parliamentary privileges has increased in recent years, creating significant tension between them. Therefore, this article attempts to identify the scope of these two concepts along with relevant legal provisions, their importance, significant situations or cases where judicial independence was undermined by parliamentary privileges - especially by the freedom of speech. It also aims to identify the reasons for their conflicts and the effects thereof. However, this article primarily focuses on the aftermath and implications of the conflicts between these two pillars in a democratic system of governance, as well as the judiciary's role in safeguarding the rule of law amidst such conflicts. Moreover, this article aims to provide suggestions for avoiding these conflicts as well.

2.0 Parliamentary privileges and freedom of speech in Sri Lanka-

Most Parliaments grant their members special powers and immunities which are exemptions from the normal application of the law and they are called "privileges". These privileges enable members of the Parliament to perform their functions without undue interferences or influences. Parliamentary privileges are necessary and important because they uphold the independence, authority and dignity of Parliament by preventing interference from outside bodies and the other branches of government. Also, they allow effective debate and quality law making.

The Constitution of Sri Lanka provides that the provisions of the Parliament (Powers and Privileges) Act No.21 of 1953 will continue to apply until such time as Parliament makes other provisions[1]. According to Article 32(3) of the Constitution, the President, in the discharge of his function of attending Parliament, shall be entitled to all the privileges, immunities and powers of a Member of Parliament (other than the entitlement to vote) and shall not be liable for any breach of the privileges of Parliament or of its members. The Act of 1953, as amended from time to time, declares and defines the powers, privileges and immunities of Parliament and its members. As per section 7 of the 1953 Act, not only Parliament enjoy all of the privileges contained in the Act,

1 Article 67 of the Constitution

but it also enjoys any extra immunities that may have belonged to the British House of Commons at the time of the Act's enactment. Section 9 of the Act provides that; "All privileges, immunities and powers of Parliament shall be part of the general and public law of Sri Lanka, and it shall not be necessary to plead the same, but the same shall in all courts in Sri Lanka be judicially noticed."

As far as the parliamentary privileges are concerned, freedom of speech is central to Parliament's role. As provided in section 3 of the Parliament (Powers and Privileges) Act, "There shall be freedom of speech, debate and proceeding in Parliament and such freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament." The effect of this privilege, which was directly borrowed from UK Bills of Rights (1689), is to oust any jurisdiction of the courts to interfere in the internal workings of Parliament. Accordingly, this privilege allows MPs to speak openly and frankly on public matters, a critical feature in democratic governance. However, this freedom is not absolute. While the privilege protects MPs within Parliament, statements made outside of parliamentary proceedings are not covered, leaving room for legal accountability.

In Sri Lanka, these protections are extended to all members, and a Member of Parliament includes the President, the Speaker and any member presiding in Parliament or in Committee[2]. Special protections are also extended to individuals who give evidence before Parliament or a committee. Like members, they will not entail criminal or civil liability for anything they say in such evidence[3].

In terms of the Parliament (Powers and Privileges) Act, Parliament or Parliament and the Supreme Court as the case may be, may punish individuals for breaches of these privileges.

2.1 Freedom of speech and what constitutes 'proceeding in Parliament'?

Even if, section 3 of the Parliament (Powers and Privileges) Act provides freedom of speech to MPs, the term, 'proceeding in Parliament' is not defined anywhere in the Act. Even though it is difficult to find identical case law where it has been defined, it is clear that parliamentary privileges apply only to statements and actions that are part of formal parliamentary proceedings. Statements made outside Parliament, even if related to parliamentary matters do not enjoy this immunity.

Furthermore, this freedom also extends beyond actual speech to any documents presented in Parliament. This includes petitions, bills, resolutions, motions and

2 Section 2 of the Parliament (Powers and Privileges) Act.

3 Such protection is not extended, however, if the evidence provided by an individual violates section 190 of the Penal Code or constitutes an offence under the Parliament (Powers and Privileges) Act, 1953. This does not apply to members.

committee reports, etc. Individuals authorized by Parliament to make publications regarding its proceedings also have the privilege of freedom of speech. Such publications must be "bona fide and without malice". However, Parliament's authorisation must have been granted. The author of a newspaper report, unauthorized by Parliament, is not protected even if the report is an accurate account of proceedings. This principle was established in the case of *Hewamanne v. De Silva*[4].

However, what constitutes 'proceedings in Parliament' is an evolving area of law.

In the Indian case of *Raja Ram Pal v. Hon. Speaker, Lok sabha* (2007) Supreme Court of India clarified the scope of parliamentary privileges and their limits. The court held that any action taken by MPs that falls within the scope of their official duties, conducted as part of parliamentary business is immune from judicial scrutiny. However, it also stated that parliamentary privileges are not absolute and that judicial review can apply when the rights of individuals or the principles of natural justice are violated.

The courts in India have interpreted the term "in the course of the business of the Parliament" as encompassing all acts that are part of the formal and official proceedings of Parliament, ensuring that MPs can conduct legislative business freely, while also maintaining a check of misuse of these privileges. Also, the right to freedom of speech of Members of the Indian Parliament is subject to certain limitations. For an instance, members cannot discuss the professional conduct of any judge of the Supreme Court or High Court unless this is upon a motion, presenting an address to the President, calling for that judge's removal[5].

2.2 Standing Orders of Parliament-

When it is discussed about the parliamentary privileges, Parliament's Standing Orders are also important. They are the agreed rules under which proceedings and operations of Parliament and conduct of MPs are regulated. Standing Orders have become an important source of parliamentary procedure and they have the status of rules under the Constitution. Both are essential components for ensuring the effective functioning of Parliament and protecting its members.

It is clear that freedom of speech of MPs in Sri Lanka is protected under parliamentary privileges and regulated through specific Standing Orders of Parliament. Standing Orders 78, 78A, 79, 83, 91 and 107 are some important Standing Orders in relation to freedom of speech. Accordingly, while MPs enjoy the privilege of freedom of speech within Parliament, this right is not absolute and is subject to certain rules aimed

4 (1983) 1 SLR 1.

5 The Constitution of India (1949): article 121

at maintaining decorum and order during parliamentary proceedings. Standing Order 79, grants the speaker of Parliament the authority to enforce rules of order and discipline during debates. If a MP makes an inappropriate or irrelevant remark, the Speaker has the power to intervene and require the MP to withdraw the statement or cease speaking. This provides a check on how MPs exercise their freedom of speech.

2.3 The Code of Conduct for Members of Parliament-

In 2018, Parliament has introduced the Code of Conduct for Members of Parliament with the objective of assisting the exercise, perform and discharge their powers, functions and duties in order to fulfill their responsibilities to the Parliament, to their constituents and the public at large. Later, it has been approved by the majority members of Parliament.

The Code of Conduct shall be read with the provisions of the Parliament (Powers and Privileges) Act No, 5 of 1978 and the Standing Orders of Parliament[6]. Part V of the Code provides 'Rules of Conduct' for Members of Parliament. Among these Rules of Conduct, one rule provides that the Members shall adhere to the rules of Parliament to give effect to the concepts of the democratic government, abide by the letter and spirit of the Constitution and uphold the doctrine of Separation of Power and Rule of Law[7]. Another Rule is that MPs shall adhere 'to exercise, perform and discharge by them of their powers, functions and duties of public office and also to enjoy the privileges which they are entitled to under any law diligently, with civility, dignity, due care and honour[8]. Also, the Code of Conduct provides rules regarding the Members' attendance, behavior in parliament and civility as well[9]. Moreover, the application of the Code of Conduct shall be a matter for Parliament acting in accordance with the Standing Orders of the Parliament and the Committee on Ethics and Privileges may investigate any matter relating to the adherence of a Member to the provisions of this Code[10].

2.4 Law relating to Contempt of Court -

Very recently, Parliament has enacted Contempt of a Court, Tribunal or Institution Act No.08 of 2024 and it includes provisions for contempt directed at courts, tribunals and other institutions, while regularizing the procedural law of prevailing contempt of court law. Also, Article 15 of the Act states that the provisions of the Act shall prevail over other laws (subject to the provisions of the Constitution). Accordingly, it might be

6 Rule 2c
7 Rule 9c
8 Rule 9f.
9 Part VIII.
10 Rules 33 & 34.

argued that, while the MPs enjoy special legal protection (when carrying out their duties within the Parliament) under the Parliament (Powers and Privileges) Act, which includes immunity from legal action for statements made in Parliament, the Contempt of Court, Tribunal or Institution Act No.08 of 2024 holds every person accountable for actions or statements that undermine the authority of courts and even MPs are not immune under this Act.

3.0 Judicial independence-

Judicial independence refers to the individual, as well as to the institutional independence required for decision making. Generally, it refers to the principle that the judiciary should be free from external pressures, influence or control from the other branches of government, namely the executive and legislative bodies, as well as from the private or political interests. It ensures that judges can make decisions based solely on the law and their interpretation of it, without fear of reprisal or outside interferences.

It is well known that judicial independence is primarily based on the doctrine of separation of power and it is considered as the cornerstone of an independent and impartial justice system. The principle of separation of powers is designed to prevent the concentration of power in any one branch of the government and to provide checks and balances among the branches to ensure that they function independently and effectively. In Sri Lanka, the theory of separation of powers is engraved in Articles 3 and 4 of the Constitution of 1978. Articles 4 of the Constitution, describes as follows, the mode in which the powers of government are to be exercised;

(a) The legislative power of the people shall be exercised by Parliament.

(b) The executive power of the people shall be exercised by the President.

(c) The judicial power of the people shall be exercised by Parliament through courts.

The court held, in *In Re The Nineteenth Amendment to the Constitution*[11] that, "…This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another".

Also, the 1978 constitution has a separate chapter for the judiciary and a separate sectional heading within it titled as "Independence of the Judiciary". This chapter deals with appointments, disciplinary control, salaries, retirement and removal of judges. Also, Article 116 provides special provisions with regard to interference with the judiciary.

11 (2002) 3 SLR 85.

Moreover, by now the concept of independence of the judiciary as a safeguard of individual liberty has accepted in all liberal democratic societies. It has received considerable attention at national, regional and international levels. For an instance, Article 1 of the United Nations Basic principles on the Independence of the judiciary requires that judicial independence 'be guaranteed by the State and enshrined in the Constitution or the law of the country', and says that 'it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary". The Bangalore Principles of Judicial Conduct that were endorsed in 2003 are intended to complement the UN's basic Principles on the Independence of the Judiciary and the role of lawyers. The first of its principles states that "Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects."

4.0 Parliamentary privileges versus judicial independence in Sri Lanka-

In Sri Lanka, the balance between parliamentary privileges, especially the right to free speech in the legislature, and judicial independence has been a contentious issue. Over the years, several cases and incidents have raised concerns about how parliamentary privileges can undermine judicial independence. Here are only a few notable recent incidents.

1. **Case against Ranjan Ramanayake**: In 2021, actor-turned-politician Ranjan Ramanayake was sentenced to prison for contempt of court due to his remarks criticizing the judiciary[12]. However, prior to this, in 2017, he made similar remarks under parliamentary privilege during a debate, where he accused judges of corruption. While Ramanayake's later remarks outside of Parliament led to legal action, his initial comments made under parliamentary immunity were seen as part of a broader culture where MPs could criticize and potentially undermine the judiciary without facing consequences. This incident fueled concerns that parliamentary privileges were being used to shield MPs from accountability, even when their statements were aimed at weakening public confidence in the judiciary.
2. **Three Contempt of Court Cases against late MP, Sanath Nishantha**- After, MP, Sanath Nishantha, while addressing a press conference, made remarks criticizing the judiciary in relation to the bail process for suspects involved in anti-government protests in 2022, Judicial Service Association (JSA) and two lawyers initiated cases against him for contempt of court alleging that the particular minister had tarnished the honour and image of the judiciary

12 SC Rule No. 01/2018

by expressing such critical views[13]. However, while the cases were pending, on 02.02.2024 they were withdrawn due to the untimely death of the particular MP.

3. **Criticisms against Mullaithivu Magistrates' judicial functions**- In August 2023, a Member of Parliament criticized the magistrate of Mullaithivu, making personal remarks and order delivered by him, in a Parliamentary debate. After this incident, the Bar Association of Sri Lanka issued a public statement condemning the same and Mullaitivu lawyers protested against the parliamentarian's remarks. Even the ICJ expressed concern about this as an attack on the independence of the judiciary in Sri Lanka, under the cover of parliamentary privilege. As pointed out by the ICJ's Secretary General, "There is a developing trend to use the cover of parliamentary privilege to engage in rhetoric that interferes with the independence of the judiciary. This sets a dangerous precedent."[14] It should be noted that the particular parliamentarian delivered this attack against the judge in violation of standing order 83 of the Sri Lankan Parliament- according to which the personal conduct of any person engaged in the administration of justice shall not be raised except upon a substantive motion.

4. **Referring judges' conduct to the Parliamentary Committee on Ethics and Privileges**- In March 2023, another Member of Parliament requested the Speaker of Parliament to refer the conduct of the judges of the Supreme Court who gave the interim order pertaining to Local Government Election as a breach of parliamentary privileges. The Speaker accepted the request and made the referral to the Parliamentary Committee on Ethics and Privileges. The ICJ considered that these actions by the government constitute a serious an unwarranted encroachment on the independence of the judiciary and judicial function. According to the ICJs' Legal and Policy Director, "Refusal to respect an interim order made by the Supreme Court and referring it for an inquiry by Parliament breaches the separation of powers and sets a dangerous precedent in a country where the independence of the judiciary is already fragile."[15]

5. **Criticisms of the President**- In June 2024, the President (then) Ranil Wickramasinghe, speaking in Parliament, criticizing the recent SC determination on the Gender Equality Bill referred to the court as having engaged in 'judicial cannibalism'. According to the President, "The Supreme

13 DailyMirror Online Sat, 28 Sep 2024 available at https://www.dailymirror.lk/a

14 Availabe at https://www.icj.org/sri-lanka-parliamentary-privilege-usedto-undermine-independenceof-the-judiciary/

15 Available at https://www.icj.org/sri-lanka-parliamentary-privilege-usedto-undermine-independenceof-the-judiciary/

Court has ignored a certain section which the Gender Equality Bill has addressed. It has eaten up all the judgments including one which had been given by a bench of ten judges with regard to women's rights. It has engaged in judicial cannibalism. The court has also ignored an amendment to the Penal Code by the Chief Justice." Also, the President expressed that 'Parliament could not agree with the Supreme Court ruling' and proposed to appoint a parliamentary select committee to review the determination.[16]

6. **Criticisms against the judiciary by the Minister of Justice**- In June 2024, consequent to a highly controversial speech made by the Minister of Justice (then) in the Parliament, leveling serious allegations against the judiciary, Judicial Service Association (JSA), representing the Magistrates and District Judges of the country issued a public statement condemning the same. Thereafter, there was an attempt to call the Secretary and President of the Judicial Service Association before the Parliamentary Privileges Committee by the Minister of Justice on the ground that the press release issued by the JSA has infringed upon parliamentary privileges. Eventually, even the Judicial Service Commission had responded to the allegations leveled by the Minister of Justice against the judiciary in Parliament[17]. This incident sparked a significant concern and debate among the legal community and society, as the Minister of Justice of the country made such allegations against the judiciary without following due process, breaching the Standing Order relating to *sub judice* rule, and further eroding public faith in the judiciary. Also, this incident was considered as a serious assault upon the independence of the judiciary by a Member of Parliament, under the cover of parliamentary privileges. The Bar Association of Sri Lanka and the Colombo Law Society also issued media statements condemning the statement made by the Minister of justice. On the other hand, this situation marked a historic event in the judicial history of the country, as a situation where the judiciary stood in order to protect the independence of the judiciary.

7. **Interpretation of the President**- In July 2024, President (then) Ranil Wickramasinghe, while participating in a program of providing freehold land deeds at Mahiyanganaya, stated that judicial power remains within Parliament and the judiciary should not interfere with the executive power of Parliament.

16 Available at economynext, Saturday June 22,2024 available at economynext.com, dailymirror.lk, http://www.colombotelegraph.com

17 Available at https://www.sundaytimes.lk/240630/news/judicial -services-association-decides-to-condemn-justice-minister-statement-561799.htmln and https://www.sundaytimes.lk/240630/news/jsc-challenges-justice-ministers-allegations-against-judiciary-562732.html

> Further, he reiterated his longstanding view that the judiciary should not interfere with the executive power of Parliament. Similar comments were made by the President in the Parliament as well. These comments by the President have drawn widespread criticism and has been deemed a threat to the independence of the judiciary by the legal community as well.[18]

It may be argued that these incidents illustrate a recurring theme in Sri Lanka's political history, where parliamentary privileges, especially the right to free speech, are sometimes invoked to shield MPs from legal scrutiny while criticizing the judiciary, in order to protect their interests, assert political power or influence public opinion. Also, it may be further argued that the events discussed above have already tarnished the good image and honour of the Sri Lankan judiciary to a certain extent, leading to an erosion of public faith in an independent judiciary as well.

5.0 A general overview of aftermath and implications of the conflicts between Parliamentary privileges and judicial independence-

In general, conflicts between parliamentary privileges and judicial independence in Sri Lanka have significant aftermaths and implications for governance, rule of law, democratic processes, constitutionalism, human rights and civil liberties.

It is clear that the balance between parliamentary authority and judicial independence is crucial for effective governance. Conflicts between Parliament and the judiciary create institutional friction that can lead to the erosion of the checks and balances required for a stable democratic system. If one branch dominates the other, it may disrupt the separation of powers, allowing either the legislature or judiciary to act without proper accountability. Also, if Parliament consistently disregards court oders, or if the judiciary frequently intervenes in legislative matters, the smooth functioning of government can be hampered. In such a scenario, policy-making and the implementation of laws can become unpredictable, inefficient and politized.

As far as the negative impact on the rule of law is concerned, if Parliament disregards court orders by claiming immunity under parliamentary privileges, the authority of the judiciary to act as the guardian of the Constitution and the rule of law is diminished. Also, frequent conflicts between Parliament and the judiciary can result in inconsistent interpretations of the law. For an instance, when Parliament passes laws or takes actions that the judiciary deems unconstitutional, but Parliament refuses to abide by court rulings, this may lead to legal uncertainty. Citizens and institutions may no longer have a clear understanding of their legal rights and obligations.

18 (Available at http://www.newswire.lk, newsfirst.lk, http://www.ft.lk, http://www.colombotelegraph.com,)

Moreover, conflicts between Parliament and the judiciary can harm democratic processes in several ways. In a functioning democracy, the judiciary serves as a check on parliamentary excesses, and *vice versa*. When conflicts arise, particularly when Parliament encroaches on judicial independence, this balance of power is undermined. The lack of checks and balances allows for potential abuses of power, weakening the democratic governance. Also, prolonged conflicts between Parliament and the judiciary reduce public confidence in the impartiality and fairness of both institutions. When the public perceives that Parliament or the judiciary is acting in self-interest or political bias, the trust essential to democratic participation and legitimacy is compromised.

If judicial independence is threatened parliament and the executive may act with fewer checks on their power, leading to potential abuses such as corruption, authoritarianism or disregard for fundamental rights. On the other hand, if the judiciary overreaches and involves itself too heavily in political matters, it may be perceived as obstructing the will of the people, as expressed through Parliament. This can lead to political gridlock and a questioning of the judiciary's impartiality.

Furthermore, constitutionalism or adherence to the Constitution as the supreme law of the country can be weakened when parliamentary privileges and judicial independence are in conflict. In Sri Lanka, the Constitution outlines the roles of both Parliament and the judiciary. However, when these roles are contested, several issues arise. If Parliament disregards constitutional provisions on judicial independence or if the judiciary oversteps in regulating parliamentary processes, this can trigger constitutional crises. This was evident in instances such as the impeachment against the Chief Justice in 2013, where the Parliament and judiciary were at loggerheads, raising questions about which institution had ultimate authority.

Also it is clear that a judiciary independent from political pressure is crucial in protecting human rights and civil liberties. Conflicts with parliamentary privileges may threaten these rights in several ways. An embattled judiciary may not be able to robustly defend fundamental rights, especially if Parliament seeks to limit judicial review or ignore court orders. This can lead to violations of civil liberties, as parliament or the executive may act without legal restraint.

6.0 Should Judges react?

It is questionable whether judges should launch counter-attacks against the attacks of some politicians that undermine the independence of the judiciary and public faith in it. It is well known that, from the nature of judges' office, they cannot reply to criticism, and cannot enter into public controversy like other professionals. As it was stated by Lord

Denning,"……*Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what the occasion requires, provided that, it is pertinent to the matter in hand. Silence is not an option when things are ill done.*"[19]

However, judges in situations where there is a threat to undermine judicial independence through the use of parliamentary privileges must carefully navigate the balance between respecting the separation of powers and protecting the integrity of the judiciary. Every time judges should remain steadfast in upholding the rule of law and any threat to judicial independence should be addressed within the legal framework, ensuring that judicial decisions are based solely on legal principles and not influenced by external pressures. Also, Judges should remain judicial restraint and avoid engaging in political controversies. They should focus on delivering fair and impartial judgments, avoiding actions that could be perceived as retaliatory or biased.

Moreover, where appropriate, judges can communicate through formal channels, such as judicial opinions, public statements or in coordination with the Judicial Service Commission, to express concerns about any attempt to undermine judicial independence. This should be done carefully to maintain the dignity and impartiality of the judiciary. If parliamentary actions directly threaten judicial independence, judges may seek legal remedies through higher courts or constitutional channels.

Also, judges may refer to international legal standards and seek support from international judicial organizations, which advocate for the protection of judicial independence as a fundamental principle of democracy and the rule of law.

In essence, judges must defend judicial independence through lawful and principled means, ensuring that their actions reinforce the judiciary's role as an impartial arbiter of justice.

7.0 Conclusion and recommendations-

As it was discussed previously, it is clear that the prevailing legal provisions, Standing Orders and decided case laws together have provided a clear definition of what constitutes freedom of speech as a privilege in parliamentary proceedings. Additionally, the Code of Conduct for Members of Parliament offers a solid framework for regulating the behaviour of Parliamentarians. However, despite this, use of parliamentary privileges by some MPs and the Executive to undermine the independence of the judiciary has increased in the past few years like never before in the Sri Lankan history. Nevertheless, it seems that the whole problem is not the inadequacy of legal provisions; rather, it suggests the need for fostering a culture of respect for the judiciary among MPs.

19 *R v Commissioner of Police of the Metropolis, ex parte Blackburn[(1968) 2 Q.B.150.*

However, while freedom of speech in parliament is essential, clear limits must be established to prevent MPs from undermining judicial independence in any way. There should be no room for escaping through loopholes in the prevailing legal provisions. Additionally, all relevant legal provisions should be devoid of ambiguities as much as possible.

As discussed earlier, it might be argued that while the Parliament (Powers and Privileges) Act provides immunity from legal action for statements made in parliament, the Contempt of Court, Tribunal or Institution Act holds individuals accountable for actions or statements that undermine the authority of courts or tribunals, and it applies to MPs as well. However, this is a matter for interpretation by the higher courts in the future. Nevertheless, Sri Lanka could introduce a comprehensive law defining the limits of parliamentary privileges, especially with regard to criticizing the judiciary in Parliamentary proceedings. At the same time, Sri Lanka's contempt of court laws should be strengthened and clarified to address instances where parliamentary speeches directly interfere with ongoing court proceedings or cast unjustified aspersions on the judiciary. The law could include special provisions for dealing with contemptuous speech made in Parliament while respecting the parliamentary privileges. Likewise, if MPs make such contemptuous statements in Parliament, there should be provisions allowing for an independent body to review these statements and refer them for contempt proceedings, where necessary. Such a mechanism must, however, respect parliamentary independence while ensuring judicial authority.

While the prevailing Code of Conduct for MPs in Sri Lanka includes principles and ethical standards that align with the preservation of key democratic values and ethical behaviour, it should be further strengthened to include clear standards regarding respect for judicial independence in parliamentary proceedings, with specific provisions to prevent the misuse of parliamentary privileges to intimidate or undermine the judiciary under any circumstances. Also, an independent committee within Parliament could monitor compliance with the Code of conduct. However, absence of an independent body to investigate alleged breaches of the rules of the Code may raise concerns about bias or lack of impartiality and it should be remedied.

With regard to constitutional safeguards for judicial independence, amendments to the Sri Lankan Constitution could more explicitly protect the judiciary from undue influence by other branches of government, while maintaining proper checks and balances among them. For an instance, in the above mentioned SC determination on Gender Equality Bill issue, the point raised by the President (then) was that the said SC determination violates the power of Parliament under Article 4 of the Constitution and should appoint a select committee to look into the matter. This suggests that

the Constitution should be more explicit in demarcating the separation of powers, particularly in protecting the judiciary from interference by either the executive or legislative branches. This would include clear protections against parliamentary comments that damage the impartiality or reputation of judges as well.

Also, conducting legal awareness programs and workshops for MPs on the separation of powers, judicial independence and the role of the judiciary in a democratic system could foster a culture of respect for the courts. MPs need to understand the consequences of undermining judicial independence and the importance of their own responsibilities within the legislative sphere.

The Speaker of Parliament could be given enhanced powers to regulate parliamentary debates, ensuring that speeches or action that undermines judicial independence are curtailed. The Speaker could be tasked with ensuring that debates are conducted within the confines of parliamentary propriety, without infringing on judicial independence. The Speaker could also play a role as a neutral arbiter between parliament and the judiciary in cases of conflict, ensuring that both sides respect the separation of powers.

Also, strengthening the mechanisms through which the public can challenge parliamentary overreach, including through public interest litigation, could ensure that any abuse of parliamentary privileges that undermines the judiciary is subject to judicial scrutiny. Additionally, Civil Organizations and legal advocacy groups should play an active role in monitoring parliamentary conduct and its impact on judicial independence. These groups could provide oversight, raise awareness and initiate legal challenges when necessary to protect the judiciary from undue parliamentary interference.

Moreover, a free and independent media can act as a watchdog over parliamentary behavior, ensuring that any attempts to undermine judicial independence are exposed and debated in the public domain, thereby promoting transparency.

By implementing these legal and constitutional reforms, and resorting to other remedies, Sri Lanka can work towards striking a more balanced relationship between parliamentary privileges and judicial independence, safeguarding both essential democratic values.

Finally, it is important to conclude by recalling the following quote from Justice Cader in the case of *Hewamanne v. De Silva*;[20]

> "*Parliament is a responsible body and can well be expected to preserve and foster the dignity of the Courts in the interest of the public. But an equal duty rests on the Courts to safeguard the same dignity*."

20 Ibid at 2.

The new anti-corruption regime in Sri Lanka is standing with UNCAC to combat corruption

(Anti-Corruption Act, No.9 of 2023 of Sri Lanka; A Comparative Analysis)

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Background

Corruption is a global phenomenon. Fighting against corruption is one of the main challenges that all countries are facing right now. Because corruption affected to overall development of the states. OECD[1] define corruption as "the abuse of public or private office for personal gain." According to the 29th annual Corruption Perception Index (CPI), the level of corruption in the world is on the rise. The United Nations Secretary General recently noted that the annual cost of international corruption amounts to USD 3.6 trillion in the form of bribes and stolen money, one of the biggest impediments to achieving the Sustainable Development Goals. Indeed, states recognized that for preventing corruption should require strong legislation, law enforcement mechanisms, awareness for prevention, and participation by all members of society. As a result of many efforts taken by the states, the first internationally binding document for preventing corruption, the United Nations Convention Against Corruption[2], was created. The Convention convinced states to build a robust domestic legal framework to combat corruption. Despite being a state party to the convention, Sri Lanka has suffered significantly from corruption under all regimes. At the UK anti-Corruption Summit, Sri Lanka identified grand corruption and should give important attention to asset recovery areas in the anti-corruption mechanism.[3] Sri Lanka ranked 115 among 180 countries on the Corruption Perceptions Index in 2023. Since 2020, Sri Lanka's score has been declining every year reaching a very high rate of corruption. It has dampened economic growth and lowered the quality of life for most Sri Lankans. Corruption leads to many social and political problems in Sri Lanka which provoked the nationwide protests in 2022. Thus, there was a need for a modern law on anti-corruption. Then, by enacting Act No 9 of 2023 on corruption, Sri Lanka's government, with a hand in the IMF, began to process a structural benchmark for the fight against corruption.

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1 Organization for Economic Co-operation and Development

2 United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005)

3 GFAR Progress Report on Sri Lanka- December 2019, Transparency International Sri Lanka, https://uncaccoalition.org/files/Asset-Recovery-Sri-Lanka-GFAR-2019.pdf, accessed 18/05/2024

What does corruption mean?

According to the Black's Law Dictionary corruption means 'The act of an official fiduciary person who unlawfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and right of others.'[4] However, corruption could not be defined in anti-corruption laws. Because the scope of corruption gradually developed with the effects of domestic needs, political influences, and international obligations. According to the basic elements, the World Bank define corruption as 'The abuse of public power for a private gain.' However, as it is limited only to public power, moving away from its OECD definition of corruption as 'the abuse of a public or private office for personal gain'.[5] Moreover giving another wide definition Transparency International's defined corruption as 'the abuse of entrusted power for private gain'. Meanwhile, it has been recognized that corruption involves a variety of illegal activities and can take many forms. According to that UNCAC has not given certain definition to the corruption and it rather defines specific acts of corruption such as, Bribery, Embezzlement, Trading influence, Abuse of function, illicit enrichment, Money laundering, and Concealment. With effect of this international development, the Anti-Corruption Act also gives wide definition to corruption in accordance with UNCAC. Moreover, public and private sector briber covered by the Act.

The legal framework of the United Nations Convention Against Corruption (UNCAC)

UNCAC is the first global legally binding instrument against corruption, covering a wide range of anti-corruption measures, including prevention, criminalization, international cooperation, and asset recovery. Its broad scope and detailed provisions provide a comprehensive framework for countries to address corruption at all levels and cooperate internationally to tackle this global challenge. The convention's implementation is crucial in promoting transparency, accountability, and good governance worldwide. As preventive measures, UNCAC requires states to establish measures promoting integrity, transparency, and accountability in the public sector. This includes codes of conduct for public officials[6], transparent procurement systems, and merit-based hiring. Moreover, States must create independent anti-corruption bodies to oversee and implement anti-corruption policies and strategies.[7] In addition to those the convention encourages

4 'Corruption Definition & Legal Meaning, *U. S. V Johnson* (C.C.) 20Fed. 082; *State v Ragsdale,* 59 Mo. App. 003; *Wight v. Rinds Kopf,* 43 Wis. 351; *Worsham v Murchison*, 00 Ga.719, U. S. v. Edward (C. C.) 43 Fed. 07

5 'What is Corruption and Why Should we Care?', University Module Series: Anti-Corruption, United Nations Office on Drugs and Crime, https://www.unodc.org/e4j/en/secondary/index.html, accessed 22/08/2024

6 United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005), art 4

7 United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005), art 5

states to develop standards and safeguards to prevent corruption in the private sector, such as promoting corporate governance and preventing conflicts of interest.

In establishing criminalization and law Enforcement, UNCAC obligates states to criminalize various forms of corruption, including bribery (both domestic and foreign), embezzlement, abuse of office, and money laundering.[8] Furthermore, States must ensure effective law enforcement mechanisms to investigate and prosecute corruption-related offenses. This includes enhancing cooperation between domestic agencies and with international counterparts. UNCAC facilitates international cooperation by requiring states to provide mutual legal assistance in the investigation, prosecution, and adjudication of corruption cases. The convention encourages states to extradite individuals charged with corruption-related offenses to other countries[9], ensuring that perpetrators cannot escape justice by fleeing across borders. Considering assets recover as a core principle, UNCAC contains detailed provisions aimed at helping countries recover assets stolen through corruption[10], especially for developing countries that have been victims of large-scale corruption. The convention provides for the return of confiscated assets to the country of origin, ensuring that the proceeds of corruption are restored to the rightful owners.

In addition to all measure stated in, UNCAC promotes technical assistance, including training, research, and information-sharing, to help countries build their capacity to prevent and combat corruption.[11] Indeed The convention encourages the exchange of information and best practices among states to enhance the effectiveness of anti-corruption measures globally.

The Evolution of Anti-Corruption Law in Sri Lanka

The evolution of anti-corruption law in Sri Lanaka has involve over several decades, shaped by political, social and economical factors. In the Colonial Period there was limited focus on corruption as a legal issue, with most administrative and legal structures reflecting British colonial priorities. However, the seeds of modern anti-corruption measures were sown during this time, laying the groundwork for future developments. Following its independence in 1948, Sri Lanka made significant legal steps to combat corruption. The Bribery Act of 1954[12], was the first anti-corruption legislation in

8 United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005), Chapter III

9 United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005), art 44

10 United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005), art 53

11 United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005), Chapter VI

12 The Bribery Act, No.11 of 1954,

Sri Lanaka. Bribery of public officials was criminalized by the Act, which laid down penalties for those found guilty. It marked the formal recognition of corruption as a significant problem requiring legislative action. In 1975 the Declaration of Assets and Liabilities Law, No. 01[13] was established and it requires certain categories of public officials and their close family members to declare their assets and liabilities. By establishing institute to operate the anti-corruption law the Commission to Investigate Allegations of Bribery or Corruption Act[14] was enacted with an amendment to the Constitution and the Bribery (Amendment) Act No.19 of 1994. The establishment of CIABOC was a significant step in strengthening anti-corruption effort in the country. Meanwhile Sri Lanka became a signatory to the United Nations Convention Against Corruption in 2003 and ratified in 2004. With effect of this international anti-corruption evolution the Right to Information Act, passed in 2016 as a major development in the fight against corruption. This Act has been used as a tool to uncover corrupt practices and hold officials accountable. Furthermore, the Money Laundering Act[15] passed in 2006, also criminalized the act of laundering money obtained through illegal activities, including corruption.

However, the effectiveness of these laws is limited by challenges such as political interference, lack of comprehensive statutory coverage and lack of awareness of public on corruptions. Then corruption was embedded in society in many ways. Therefore, it was recognized that there should be a new law to combat corruption. On the other hand, with grand corruption situation the country has been under pressure to align its domestic laws with international standards, leading to new legislation on anti-corruption. As a result of that the Anti-Corruption Act, No.9[16] was enacted in 2023. Now, this Act serves as Sri Lanka's primary anti-corruption law.

Comparative analysis of the Anti-Corruption Act No.09 of 2023

In Sri Lankan anti-corruption legal regime made significant progress in its fight against corruption over the past years. As a result of that the new Anti-Corruption Act, No.9 of 2023, was enacted repealing three main acts that had provided the legal basis of the anti-corruption legal regime in the country. The main purposes of the Act are to establish an independent commission to combat bribery and corruption and to give effect to the UNCAC and other internationally recognized norms, and standards in domestic law.

In view of the legal framework of Sri Lanka, the preamble of the Anti-Corruption Act No. 9 has shown that it is primarily applicable to the articles of the UNCAC in

13 Declaration of Assets and Liabilities Law, No.1 of 1975

14 Commission to Investigate Allegation of Bribery or Corruption Act, No. 19 of 1994,

15 Prevention of Money Laundering Act, No.5 Of 2006

16 Anti-Corruption Act, No.9 of 2023

Sri Lanka.[17] It appears that, drawing on the experiences of Singapore and Hong Kong, Sri Lanka's new anti-corruption law incorporated important legislative provisions based on UNCAC and Jakarta principles. To achieve these objectives, the Act featured the four key mandates that were underlined by the UNCAC, as follows: Prevention, Investigation, Prosecution and Recovery of Stolen Assets. To operate these mandates, CIABOC was established as an independent body, which was also emphasized in UNCAC.[18] The Act introduced several provisions aimed at ensuring its greater independence and effectiveness of the Commission. According to Section 3(4) of the Act, only a court or tribunal is entitled under the law to direct or supervise the functions and performance of the commission other than any institute or any person Unauthorized interference to the Commission was criminalized further.[19] The Act provided a transparent process to appoint commissioners by the President based on recommendations of the Constitutional Council, which includes representatives from multiple sectors, ensuring a balanced and impartial selection.[20] Indeed, Commissioners must meet strict qualifications, including legal, administrative, and financial expertise, ensuring that appointees are capable and impartial. The fixed tenure of Commissioners, coupled with clear grounds for removal, prevents arbitrary dismissals and promotes their independence.[21] The Commission has the authority to recruit its staff independently, ensuring that its personnel are chosen based on merit rather than political considerations and also Commissioners and staff of the Commission are granted immunity from legal action for actions taken in good faith while performing their duties. This legal protection allows them to carry out their responsibilities without fear of personal liability or harassment through legal means.

However, the Act strengthens the independence of CIABOC by enhancing its structural, financial, and operational autonomy, independence bodies of the Hong Kong and Singapore were established more independent in line with UNCAC in their anti-corruption regime. The CIPB[22] of Singapore and the ICAC[23] of Hong Kong enjoy complete financial autonomy, whilst the CIABOC is some far dependent on the government

17 Anti-Corruption Act, No. 9 of 2023, preamble 'An Act give effect to certain provision of the United Nations Convention Against Corruption and other internationally recognized norms, standard, and best practice; To provide for the establishment of an independent commission to detect and investigate allegations of bribery, corruption and offence related to the declaration of assets and liabilities and associated offence….'

18 United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005), art 6(2)

19 Anti-Corruption Act, No. 9 of 2023, sec 3(5), 'Every person who, without legal authority, interferes or attempts to interfere with the exercise or performance of the powers or functions of the Commission as referred to in subsection (4) of this section shall be guilty of an offence punishable by the High Court'

20 Anti-Corruption Act, No. 9 of 2023, sec 4

21 Anti-Corruption Act, No. 9 of 2023, sec 6

22 Corruption Practice Investigation Bureau

23 Independent Commission Against Corruption

for funding. However, the nomination of commissioners is also influenced by the president's political intent. In Hong Kong, appointing members to the ICAC with the assistance of independent advisory committees provides significant legal protection to defend the ICAC's activities from undue influence.

Prevention is one of the key tools stressed by the UNCAC to member states in the anti-corruption law process. The Anti-Corruption Act No.9 outlined many legislative measures to assure prevention. The CIABOC has given enormous responsibility for launching all preventative measures in both public and private sectors.[24] This responsibility involved implementing laws and policies, monitoring, and raising public awareness. The Commission examines all laws, practices, and processes of any public authority in order to identify corruption[25] and provide advise on how to promote anti-corruption measures in the workplace.[26] Furthermore, the Commission makes recommendations to the government for future anti-corruption legislation measures.[27] When it comes to Singapore and Hong Kong, both the public and private sectors have a well-established code of conduct that serves as a significant preventive measure against corruption. This experience was also included into the new Act by establishing codes of conduct for the prevention and elimination of bribery and corruption in both the public and private sectors. In Hong Kong the legal framework governing the activities of the ICAC allowed it to access government information for the purpose of corruption prevention studies. The ICAC, while formulation a system of regular checks, also gives consultant advice to government department on new legislation, policies, and procedures prior to their adoption. The cases relating to corruption are obtained from complaints received from numerous sources, including a 24-hour hot-line report center and cases that are referred by government departments.[28] Although the CIABOC has granted monitoring powers for the implementation of anti-corruption measures in public authorities, it should be developed as an efficiency mechanism, including regular checking processes, and it is strongly recommended that Hong Kong implement a 24-hour monitoring system for corruption activities. Make public awareness also introduced by the Act as one of

24 Anti-Corruption Act, No. 9 of 2023, sec 40

25 Anti-Corruption Act, No. 9 of 2023, sec 37, 'The Commission shall have the power to examine the laws, practices, and procedures of any public authority in order to discover acts of corruption and methods of work or procedures which, in its opinion, may be conducive to corruption.'

26 Anti-Corruption Act, No. 9 of 2023, sec 38, 'The Commission shall have the power to advise and assist any public authority on ways and means in which acts of corruption may be eliminated and how to promote the integrity and good repute of public administration.'

27 Anti-Corruption Act, No. 9 of 2023, sec 39

28 C. Raj Kumar 'Human Rights Approaches of Corruption Control Mechanisms - Enhancing the Hong Kong Experience of Corruption Prevention Strategies', San Diego International Law Journal, Volume 5, Issue 1 2004, Article 9, https://core.ac.uk/download/pdf/214373922.pdf accessed 26/04/2024

preventive measure.[29] However, social background for public awareness should be developed with media and non-governmental institutional assistance, as Singapore has done with strong media backing to build public knowledge of anti-corruption policies.

The Act's introduction of new offenses such as private sector bribery[30], bribery of a foreign public official[31], trading in influence[32], and enchase penalties can all be viewed as vital preventive measures. Furthermore, acknowledged corruption encompassing a variety of bribes and criminal acts, as well as a wider definition of public officials, are strongly encouraged in the anti-corruption effort.

The CIABOC has given wide investigations powers by the New Anti-Corruption Act of Sri Lanka. The former commission could only launch an investigation on a third-party complaint. The new Commission now begins the inquiry by self-reporting or whistleblowing, as well as its own investigation, based on material acquired in earlier investigations. Sections 41–64 of the Act offer broad investigating authorities for the CIABOC, such as, arresting person without warrant, search and seize power on suspected vehicle, premises, documents, accounts, examine the persons during the investigations, obtaining the assistance of the experts, take samples from suspects, and seek orders from courts. Among these, the Act has provided innovative provisions that grant extraordinary investigative powers in accordance with the UNCAC. Section 55 of the Act empowers the Commission to utilize the special investigation procedures specified in the section. Furthermore, the Commission has joint investigation powers, which allow it to conduct an inquiry with any investigating authority in or outside Sri Lanka on the bilateral or multilateral agreement or arrangement.[33] Indeed, the Commission has given powers to share information discovered during investigations with any institution or agency of a foreign state or an international organization established by the government of a foreign state on the agreement or arrangement through enhanced international cooperation, with a focus on UNCAC.[34] In light of these powers, the CIBOC is comparable to the CIPB and ICAC, both of which are regarded as powerful anti-corruption authorities.

Furthermore, the Act grants the Commission full prosecution powers as a new introduction. Due to a lack of prosecutorial power, the former commission had to rely on other authorities. This undermined the criminalization of corruption activities. Therefore, new Act has given the power to the Director General of the Commission

29 Anti-Corruption Act, No. 9 of 2023, sec 35, 'The Commission shall take all possible measures to enhance the awareness of the public and disseminate information to the public on detrimental effects of corrupt conduct and enlist and foster public support in combating any such corrupt conduct.'

30 Anti-Corruption Act, No. 9 of 2023, sec 106

31 Anti-Corruption Act, No. 9 of 2023, sec 105

32 Anti-Corruption Act, No. 9 of 2023, sec 104

33 Anti-Corruption Act, No. 9 of 2023, sec 61

34 Anti-Corruption Act, No. 9 of 2023, sec 63

institute the proceeding before Magistrate's Courts or High Courts and Director General has power to sign the Charge Sheet or the Indictment. If necessary, the Commission may request to the Attorney General or any other Attorney-at-Law to conduct the prosecution.[35] Moreover, the Director General may with the sanction of the Commission and the permission of the High Court withdraw the Indictment before the judgment. The Act also established a deferred prosecution agreement, which allows the Commission to enter into an agreement with the person mentioned in Subsection 8 of Section 71, subject to the Act's provisions, to suspend and defer the criminal proceeding for a certain period of time.[36] This concept is incorporated into the UNCAC, and member states such as Singapore and Hong Kong have implemented it into their domestic legislation.

Another significant mandate of the Act is Recover of stolen assets from corruption. The UNCAC stressed the need of recovering stolen assets as a core principle. As a developing country which had high level of corruption rate and huge amount of financial damage caused by corruption, Sri Lanka has been grappling with an unprecedented economic and social crisis since recent years. Therefore, the legal farmwork of recovering stolen assets should be an essential part of the anti-corruption legal regime in Sri Lanka. However, Sri Lanka continuously to lack a proper law on assets recovery. To fill this legal void, the new Anti-Corruption Act was enacted in 2023. The legal framework provided by the Act for recovering stolen assets from corruption can be divided into three main strategies, as follows, Convictional based recovery, (Section 114 of the act), Non convictional based recovery (Civil Recovery) (Section 115 of the Act), Declaration of Assets of public officials (Sections 79-89). In Convictional based recovery process, after conviction of the accused High court has power to other than other penalties to imposed fine is equal to amount which value of the gratification which accused had or amount which acquired by briber or procced of bribery. Furthermore, this fine can recover by civil writ or by sold properties which acquired on the date of commission of the offence.[37] In addition to that the court has power to forfeited such assets of offence.[38] Section 109 introduce innovative liability for property or money which person has or had not acquired which cannot part of his known income consider as property acquired by any of offence until contrary is proved. Indeed, after convictions, such property or money also liable to confiscation.[39] This process included the ability to trace, freeze, and seize properties, as well as issue forfeiture orders over them. As a new provision introduced by the act constitutes non-conviction-based forfeiture of property by Section 115. The

35 Anti-Corruption Act, No. 9 of 2023, sec 65
36 Anti-Corruption Act, No. 9 of 2023, sec 71
37 Anti-Corruption Act, No.9 of 2023, sec. 114
38 Anti-Corruption Act, No.9 of 2023, sec. 114(5)
39 Anti-Corruption Act, No.9 of 2023, sec. 109(8)

Director General may seek a non-conviction-based forfeiture order from the High Courts and, if convinced prima facie on the balance of probabilities that the property gained by any of the offences under this Act, may award an order of forfeiture over such property. This clause also provided access to inquiries for legitimate claims. Furthermore, the Commission may make a request to the High court seeking prohibition Order with property outside in Sri Lanka. Aside from this Article, there is no other provision granting authority to deal with interstate claims for the recovery of stolen assets.

The Act has introduced new efficient Assets Declaration system including with Centralized Electronic System.[40] Through this new electronic system it is efficiently can trace the unlawful wealth gaining for enforce liability and recover those stolen assets. Furthermore, the Act has allowed public access for this electronic system.[41] It also helps to acquire information from officials about undeclared assets, if any. In addition to that by giving broader meaning to the public official including the President and the Prime Minister, imposed responsibility to reveal their assets periodically.[42] According to this clause, the Executive, Legislative, and Judiciary, all three primary authorities, are under trace of illegal financial gains.

The UNCAC mainly emphasized that recovery of stolen asses should be a fundamental part of anti-corruption legislations. Strongly demonstrating that the UK created the Proceeds of Crime Act[43] to operate all aspects of law in recovering stolen assets. Recovery of stolen assets parts of all other legislation, such as The Criminal Finance Act[44], Bribery Act[45] connected with the Proceeds of Crime Act. However, while the Sri Lankan Act specifies the recovery of stolen assets as its primary goal, it does not have a separate chapter for it, and just a few legislative measures address the process of recovering stolen assets. The Proceeds of Crime Act determined the amount of confiscation order by exposing six years of illegal conduct and the convicted person's acquired properties. Also, the suspect bounded with the reveal his assets and the criminal conduct. If he failed the court has enforce punishments separately for that. This legal basis instills considerable dread in the people on engaging in corrupt activities. However, the Anti-Corruption Act considers only the amount of gratification based on the specific offence

40 Anti-Corruption Act, No.9 of 2023, sec. 87, 'There shall be a data base maintained by the Central Authority for the purpose of securing information in electronic form relating to assets and liabilities of every person to whom this Part applies'

41 Anti-Corruption Act, No.9 of 2023, sec. 88, 'The centralized electronic system shall automatically generate redacted version of every declaration of assets and liabilities which is accessible to the general public withing one month of its submission through the official website of the Commission.'

42 Anti-Corruption Act, No.9 of 2023, sec. 80(1), 'the provision of this part shall apply to every person belonging to anyone of the following classes or description: - (a) the President, (b) the Prime Minister, (c) Member of the Parliament…...'

43 Proceed of Crime act 2002

44 Criminal Finance Act 2017

45 Bribery Act 2010

or the amount of property discovered by the courts when determining the amount of fine. Furthermore, codification proceeding is mandatory when prosecution request confiscation order in UK, but in Section 114 which provided convictional based confiscation of the Anti-Corruption Act not mandatory one.[46]

Moreover, The UNCAC strongly urged States Parties to strengthen inter-state collaboration in the asset recovery process. However, while the Anti-Corruption Act of 2023 primarily aims to give effect to the UNCAC provision locally, this part of the law was not effectively incorporated by the Act. Section 54 of the Act states that the commission can obtain prohibition order over property outside of Sri Lankan jurisdiction from the High Court, but there is no method for dealing with it further under any provision. Furthermore, if section 63 of the Act refers to international cooperation, this part only includes exchanging investigative information and reporting on the agreement with other States. The Act makes no provision for dealing with foreign states' requests to recover assets hidden in Sri Lanka.

Furthermore, the new Anti-Corruption Act included provisions that protect the human rights of all parties connected in the anti-corruption process. In Chapter V of the Act included provisions to protect informers to the Commission[47], protection of whistleblower[48], safety of persons assisting the Commission[49], immunity to witness[50], protection of victims' right[51], and demonstrating the Act's human rights viewpoint. Furthermore, the Act ensures transparency and accountability in the anti-corruption process by holding CIABOC accountable, giving public access to essential procedures, allowing the Right to Information Act to be used, and preserving the rights of the parties involved.

Conclusion

As Lee Kuan Yew, former Prime Minister of Singapore sated 'We have to keep our own house clean. No one else can do it for us.' Therefore, in order to successfully implement this new law, the government of Sri Lanka has a major responsibility to ensure the social background. Although the Anti-Corruption Act introduced many effective provisions, fully successfulness crucially depends on the efficient and effective contribution of all authorities in the country. In Singapore, their social background, which is free of

46 Anti-Corruption Act, No.9 of 2023, sec.114(5), 'Notwithstanding anything to the contrary in any other provision of this Act, where court convicts a person court may, for any offence under this Act, make order that any movable or immovable property found to have been acquired by the commission of such offence or by the proceeds of such offence or by the proceeds of such offence, be forfeited to the state free from all encumbrances:'

47 Anti-Corruption Act, No.9 of 2023, sec. 73

48 Anti-Corruption Act, No.9 of 2023, sec. 74

49 Anti-Corruption Act, No.9 of 2023, sec. 75

50 Anti-Corruption Act, No.9 of 2023, sec.76

51 Anti-Corruption Act, No.9 of 2023, sec. 78

political influence, is a major factor in the success of the implementation of the Anti-Corruption law. Therefore, in order to guarantee that the Act is applied fairly, Sri Lanka must adhere to the same social and political background as Singapore. The same is true for citizens, who play an important role in ensuring the success of this law. Finally, we must learn to construct a corruption-free country for overall development, everyone should work together to combat corruption.

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The grounds for judicial review of administrative decisions; A briefly analysis with Doctrine of Ultra- Vires, Legitimate expectations and Proportionality

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Introduction

The primary purpose of the administrative authorities and its organs should be to respect the sovereignty of the people and to protect the dignity and fundamental rights of the individual upon social justice with the economic and social development of the community. In a democratic country, under the doctrine of the separation of powers, the judicial system must act its role to justice by ensuring public trust to perform its function of administering justice in an independent, impartial, transparent, dependable, efficient and timely manner. Furthermore, the judiciary of the country should uphold the power which includes equality, non-discrimination, and the broadest possible access to justice. Therefore, the judiciary has an important role to protect of the constitution and human rights standards as well as powers, duties and accountability of the government organs.

"Judicial review of administration is, in a sense, the heart of administrative law. It's clearly the most applicable way of inquiring into the legality of a public authority. The aspects of an sanctioned decision or act of the administrative authority that may be scanned by the judicial process are the legality of the public authority, the extent of a public authority's legal powers, the acceptability and fairness of the procedure, the substantiation considered in arriving at the administrative decision and the motives underpinning it, and the nature and scope of the discretionary power. The reviewing court which has a sufficiently wide jurisdiction can invalidate an administrative act or decision on any of these grounds."[1] According to the above facts, as a result of the rapidly development of the administrative justice system, the law relating to grounds of judicial reviewing has developed several principles through the judicial activism such as doctrine of Ultra-vires, Unreasonableness, Proportionality, Legitimate expectation, illegality, procedural unfairness, and irrationality.

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1 'Administrative law: Additional Information' William Alexander Robson, Professor of Public Administration, University of London, 1947–62. Author of *Justice and Administrative Law;* coauthor of *Great Cities of the World.*Sidney and Beatrice Webb Professor of Public Policy, London School of Economics. Author of *Political Authority and Bureaucratic Power.<https://www.britannica.com/topic/administrative-law/Judicial-review-of-administration>* accessed 14 September 2024

Although, there are many grounds for challenging the validity of administrative decisions which have been evolved over the time through the judicial activism mainly three grounds are used for this evaluation.

Accordingly, this paper is basically focused to the basic trinity of doctrine of Ultra-vires, legitimate expectations and Proportionality. The first part seeks to analyze those three grounds and their peculiarities using legal principles and case laws, while the second part deals with the Sri Lankan law and adjudication process and related case laws on those grounds and finally the overall conclusions and recommendations.

The ability to question the legality of administrative decisions through judicial review grounds

Administrative law is the body of law that governs the administration and regulation of government organs. It lays down the principles governing the powers and duties exercised by administrative authorities and affirm the rights of the people in relation to administrative decisions and actions. At the present context, administrative law has been the legal scope that acts as the regulatory mechanism for the application of the discretionary power given to administrative authorities for the public interest and the welfare of the people. However, the primary purpose of the administrative law is to control the administrative power within their legal boundaries with prima facie intention of upholding the rule of law and to ensure fundamental rights of the people and protecting the peoples against the abuse of such administrative power.[2]

However, the administrative power which confines a public authority to the power conferred by the parliament can be challenged by a common law theory of judicial review.[3] Specially, the inheritance power of the courts to enforce the rule of law does not depend on legislative intent or instruction. In the administrative law, judicial review is the principal mechanism used by the courts to enforce the exercise of administrative functions and it seeks to ensure that administrative authorities exercising powers and functions lawfully and fairly within their boundaries not abusing their powers. It provides mechanisms for redress of grievances as a result of decisions, actions or omission of government. Consequently, the primary means of limiting discretionary power of that administrative authorities' is through the grounds of judicial review. Because the courts exercise the inherent judicial power of the people through judicial review, they can ascertain whether administrative actions or omission are lawful or unlawful, provide a suitable remedy with an appropriate resolution to safeguard individuals and their rights, and allow citizens to examine the legitimacy of administrative decisions through decision review.

2 H. W. R Wade & C.F Forsyth, Administrative Law, 10thed, Oxford: Oxford University Press, 2009 at p.4

3 Chamila S. Talagala, THE DOCTRINE OF ULTRA VIRES AND JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, Bar Association Law Journal of Sri Lanka, Volume XVII, 2011

This mechanism is also important in preventing administrative authorities from abusing their power. It lays the foundation for the governing authorities to operate within their own legal framework and drive towards the aspirations of the people. It is not merely concerned with the merits of decisions and focuses on the process by which decisions were made and actions taken in which someone challenges the lawfulness of a government decision. Judicial reviewing grounds question legality or validity of decisions taken by a public authority.

Administrative authorities are only the agents of the people who carry out the public interest and welfare and are not the owners but only the trustees of the public property. Therefore, they must play their duties and roles within the legal powers and its boundaries. The doctrine of the Ultra-vires is considered to be central principle of Administrative Law. However, within the development of the legal platform of the administrative law, Courts have identified other grounds of judicial review such as Unreasonableness, Irrationality, Proportionality, Legitimate Expectation and Public Trust Doctrine in determine to challenge the decisions of the administrative authorities. The judicial review grounds are important to make sense to create an interpretative as well as independent judicial landscape that addresses and protect fundamental rights and duties of administrative bodies of legality sovereignty and democracy.

Administrative authorities play major role to implementation of government policies and/or enforcement of duly enacted laws. Normally, Administrative authorities have received their powers by parliamentary Acts and their responsibility is to exercise the power within the four corners of the Act. In addition to that Administrative authorities have discretionary power to make necessary administrative decisions. However, these authorities are responsible for the day to day oversight and regulation of various industries and sectors, ensuring that laws and regulation effectively enforce and that the public interest is protected. Therefore, the main object of the administrative law is to keep the governmental power within their frontiers and to protect the common citizens from any abuse of governmental power exercised by the administrative authorities.

A country that is democratic should have an independent judiciary to uphold the fundamental goals of democracy. The judiciary should also have the authority to challenge decisions made by administrative authorities based on the principles of constitutionalism, especially when those authorities act illegally or abuse their power. If administrative authorities misuse their authority or make improper administrative decisions, an independent judicial system ought to be able to look into or evaluate those actions. Judicial review grounds offer the fundamental framework for this.

Analyze of the trinity of selected ground of reviewing administrative decisions through the case law in the Common Law Jurisdiction and Sri Lanka

The grounds of judicial review have been developed by the unique and creative work of the judiciary. It has focused on safeguarding fundamental rights while upholding the rule of law, checks and balances between each of the components of government in accordance with the doctrine of separation of powers at the same time. It is also the judiciary's responsibility to serve as a safeguard on the other organs of the government. The constitution of the democratic socialist republic of Sri Lanka of 1978 acknowledged the theory of separation of powers. This implies that the three branches of the state, the legislative, executive, and judicial are equal. Although they serve different purposes, it is their responsibility to uphold democratic foundation of the nation through the balance of powers. Stabilizing the authority of an autonomous judiciary was the main goal of the separation of powers. Sri Lankan judicial review grounds have been developed based on how the fundamental ideas of administrative law have evolved throughout time. Sri Lanka approaches this issue with a written constitution that incorporates ideas such as the rule of law. Therefore, this part of the article deals with a few judicial review grounds and their evolution in the context of common law and Sri Lanka.

The Doctrine of Ultra-Vires

Some academics, such as A.V. Dicey, Wade, and Forsyth, have primarily concentrated on maintaining parliament's sovereignty and Ultra-vires as the exclusive grounds for judicial review in the judicial review debate. The "doctrine of Ultra-vires" refers to the legal foundation that courts use to conduct judicial review in cases where there is a claim that administrative authorities are acting outside the scope of their authority. The Latin term "Ultra-Vires" translates to "beyond powers" or "without powers." Nonetheless, the courts have strengthened and expanded the use of "Ultra-Vires" to establish it as a solid legal doctrine in an effort to prevent administrative bodies from abusing their authority and to compensate the parties who are impacted.[4]

In order to protect the interests of company shareholders, the English common law established the doctrine of Ultra-vires in the nineteenth century. Thereafter, it has been attached to the administrative law as its root. Because, the courts found it difficult to challenge the authority of the legislature as a result of the application of concepts like parliamentary sovereignty and the separation of powers[5]. The doctrine of Ultra-vires principle which was firmly established by the House of Lords in the decision of **Ashbury Railway Carriage and Iron Company Ltd Vs. Riche**[6] was later borrowed

4 H.W.R Wade & C.F Forsyth, Administrative Law, 10th ed, Oxford: Oxford University Press, 2009 at p.4

5 S.A.de Smith, Judicial Review of Administrative Action, [4th ed] London; Stevens, 1980

6 [1875]LR 7 HL

into administrative law. In administrative law, the doctrine of Ultra-vires suggests that discretionary powers must be used for the intended purpose. When the theory was first introduced, its sole purpose was to make sure that the legal powers of administrative authorities were not abused or exceeded. In the event that they did, the courts ruled that those actions were Ultra-vires and so invalid. [7]

Based on the aforementioned information, the ultra-virus theory is one of the centrally important principles in the subject area of administrative law. According to the doctrine, an authority can only use the authority that the law has granted it. When an authority acts within the parameters of the authority granted to it, it is acting intra vires; when it acts outside these parameters, it is acting extra vires. There are two facets to the Ultra-vires doctrine: procedural and substantive.[8] Substantive ultra-virus denotes that the relevant authorizing act does not grant the rule-making authority any substantive authority to make the relevant rules. It questions about the breadth, depth, and range of authority granted by the original statute to enact delegated laws. Procedural Ultra-vires refers to the administrative authority's failure to adhere to the necessary procedure as stipulated by the original act or the general norm.

It is further stated that an administrative authority's actions may be declared invalid on the basis of substantive Ultra-vires if they are carried out without authorization, excessively with authority, or abusively with authority. When an administrative authority violates mandatory regulations outlined in laws or natural justice principles, those actions may be declared unlawful due to procedural Ultra-vires. The first thing the courts must determine when applying the doctrine of Ultra-vires is whether the act's procedure-specific provision is directory or required. Rules only become void when they are not followed in accordance with the required procedure. [9] Important cases in this area are **Ridge Vs. Baldwin White**, [10] **Collins Vs. Minister of Health**,[11] and **Padfield Vs. Minister of Agriculture, Fisheries, and Food**. [12] The doctrine of Ultra-vires is given to Lord Reid in the landmark case of **Anisminic Vs. Foreign Compensation Commission**.[13] It is the cornerstone of judicial oversight over administrative action as well as the fundamental theory of administrative law.

7 Chamila S. Talagala, THE DOCTRINE OF ULTRA VIRES AND JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, Bar Association Law Journal of Sri Lanka, Volume XVII, 2011

8 'The Doctrine of Substantive Ultra Vires' (Lawteacher.net, March 2021) <https://www.lawteacher.net/free-law-essays/constitutional-law/the-doctrine-of-substantive-ultra-vires-constitutional-law-essay.php?vref=1> accessed 11 March 2021

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10 [1964]AC 40

11 [1939]2KB838

12 [1968] AC 997

13 [1969] 2 WLR 163

Legitimate Expectation

In recent years, one of the most emerging grounds for judicial review has been the legitimate expectation. In this ground, the court will examine whether a public authority's decision violated a citizen's reasonable expectation. It denotes a move away from the more conventional justifications for contesting public body judgments, such as procedural violations and legal misdirection. A genuine expectation claim is essentially predicated on the idea that, in cases where a public body makes a statement about what it will or won't do, anyone who has fairly depended on that statement should be able to enforce it, including through the legal system if needed. The public body's statement must be unequivocal, unambiguous, and without qualification in order for a valid expectation to exist. It is acceptable to interfere with reasonable expectations in public interest and public policy ground.

The reasonable expectation theory serves as a safeguard against administrative authorities using their discretionary powers to undermine legitimate expectations that people have for themselves, expectations that such authorities have constructed through their previous actions. The idea therefore aims to ensure that administrative authorities are held accountable for their promises and undertakings.[14] A doctrine of the safeguarding of reasonable expectations has emerged. The adoption of the genuine expectation theory is a good measure to guarantee the equitable exercise of discretion. Natural justice has served as the primary framework for the development of the legitimate expectation theory.

The word "legitimate expectation" was first used in the **Schmidt Vs. Secretary of State for Home Affairs**[15] case. The concept of legitimate expectation was later acknowledged as a component of judicial review in public law in the case of **O'Reilly Vs. Mackman**[16] , enabling anyone to contest the legitimacy of decisions on the basis that the decision-maker "had acted out with the powers conferred upon it." Although at first ambiguous, landmark decisions like **Council of Civil Service Unions Vs. Minister for the Civil Service**[17] and **R Vs. North and East Devon Health Authority, Ex Parte Coughlan**[18] have clarified the essence and bounds of the notion of justifiable expectation.

14 Chamila S. Talagala, THE SCOPE OF THE DOCTRINE OF LEGITIMATE EXPECTATION AS A GROUND OF JUDICIAL REVIEW OF ADMINISTARTIVE ACTION, Bar Association Law Journal[Vol XV] 2009

15 Schmidt v Secretary of State for Home Affairs [1968] EWCA Civ 1, [1969] 2 Ch. 149 at 170–171, Court of Appeal (England and Wales).

16 O'Reilly v Mackman [1983] UKHL 1, [1983] 2 A.C. 237, H.L. (UK).

17 Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6, [1985] A.C. 374, H.L. (UK).

18 R v North and East Devon Health Authority, ex parte Coughlan [1999] EWCA Civ 1871, [2001] Q.B. 213, C.A. (England & Wales).

Proportionality

Proportionality can be identified as another important concept in the current administrative law. In the case Of **R Vs. Goldsmith**, Lord Diplock stated that "You must not use a steam hammer to crack a nut if a nut cracker would do".[19] This remark accurately states that the decision-maker should refrain from overusing their discretionary authority when making decisions. The principle of proportionality captures the commonsensical idea that, when the government acts, the means it chooses should be well adapted to achieve the ends it is pursuing.

One of the most crucial justifications for judicial review is proportionality. It has developed from the idea of unreasonableness and has been a ground for many years. Judges have evolved the idea of proportionality over time, making it more of a general legal standard. Both statutory and governmental public entities have a broad variety of discretionary powers. Restraints, however, limit the exercise of discretion. It must be used for the benefit of the general public and in the public interest. The situation is made worse by the variety of authorities and officials who have discretionary powers, as these powers are routinely misused or abused in numerous ways. Historically, the courts have used judicial review to supervise the use of discretionary powers. Although the judiciary was extremely circumspect when using its judicial review authority, new advancements in administration forced the courts to adopt new strategies to control the exercise of administrative discretion. According to the principle of proportionality, a public authority must keep a balance between the means by which he pursues his objectives and the goals itself. [20]

The Existing Legal Framework of Sri Lanka

The Ceylon Charter of 1802 is where Sri Lanka's judicial review process began. It was later discovered in the Ceylon Charter of Justice (1833), the Courts Ordinance, Administration of Justice Ordinance No. 11 of 1868, and other documents. The ultimate goal of these Ordinances was to grant the Supreme Court the authority to investigate whether decisions made by lower courts or other quasi-judicial organizations have been made "according to the Law." The Court of Appeal does this by granting the writs of Certiorari, Prohibition, Procedendo, Mandamus, and Quo-warronto. This implies that the court of appeals has complete jurisdiction to access and review the documents of lower courts, organizations, or individuals handling such tasks. The issue of the aforementioned "according to the Law" then came up, and it was resolved in two major

19 R vs. Goldsmith (1983) 1 WLR 151, p 155

20 'Proportionality as a Ground of Judicial Review' (Lawteacher.net, March 2021) <https://www.lawteacher.net/free-law-essays/constitutional-law/proportionality-as-a-ground-of-judicial-review-constitutional-law-essay.php?vref=1> accessed 11 March 2021

cases: **Nakkuda Ali Vs. Jayarathna**[21] and **Abdul Thasim Vs. Edmond Rodrigo**[22]. The two examples that were mentioned "according to the Law" indicate that English law is meant by the "Law." As a result, the court had the authority to issue writs in accordance with English law.

In the Sri Lankan legal system, a judiciary based on an independent orientation of administrative decision-making cannot be identified as an independent entity that has developed on its own. The 1978 Constitution is the fundamental law of Sri Lanka. The Sri Lankan Constitution states that the courts thoroughly examine administrative activity using two sets of rules. These rules are: (1) Fundamental Rights Jurisdiction under the process outlined in Article 126 read with Article 17 of the Constitution; and (2) Writ Jurisdiction under Articles 140 & 154 [P] [4] [b] of the Constitution.[23] The cases of **Sirisena Cooray Vs. Tissa Dias Bandaranaike**, [24] **Weragama Vs. Eksath Lanka Kamkaru Samathiya and Others**, [25] and **Atapattu Vs. Peoples Bank**[26], are significant when examining the Sri Lankan case law jurisdiction. Therefore, under the Constitution of Sri Lanka it claims for fundamental rights may also be used to obtain judicial review of administrative action. Nevertheless, grounds of judicial review have been discussed by judges as a binding part in the context of the writ and fundamental rights jurisdictions of current law and have been developed over time by the Judicial Activism. It can be pointed out as a positive feature that has been done in the role of judges in fulfilling the basic expectation of administrative law.

Furthermore, the concept of legitimate expectation is frequently observed in fundamental rights cases in Sri Lanka. In certain instances, a court will utilize genuine expectation a basis for judicial review utilized in administrative law to ascertain the specifics of a breach of fundamental rights protected by the 1978 Constitution. Important cases in Sri Lankan law include **Dayarathne Vs. Minister of Health and Indigenous Medicine**,[27] **Sirimal Vs. Board of Directors of the Co-operative Wholesale Establishment**,[28] **Siriwardana Vs. Seneviratne, and others.**[29] The modern mechanism that the Sri Lankan fundamental case law jurisprudence system has constructed integrates the idea of legitimate expectations with the idea of fundamental rights inside the fundamental mechanism of determining these cases.

21 [1951] AC 66
22 (1947) 48 N. L. R. 121
23 Chamila S. Talagala, THE DOCTRINE OF ULTRA VIRES AND JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, Bar Association Law Journal of Sri Lanka, Volume XVII, 2011
24 [1999]1 SLR 1
25 [1994]1 SLR 293
26 [1997]1 SLR 208
27 (1999) 1 SLR 393
28 (2003) 2 SLR 23
29 (2003) 2 SLR 23

The Public trust doctrine, however, emerged as a new mechanism to evaluate the merits of administrative decisions in the current Sri Lankan legal framework through the cases of **Heather Therese Mundy Vs. Central Environmental Authority,**[30] **Sugathapala Mendes and Others Vs. Chandrika Bandaranayake Kumarathhunga and others (Waters Edge),**[31] and **Bulankulama Vs. The Secretary, Ministry of Industrial Development (the Eppawala case)**.[32] Judges' roles within the country's administrative legal framework should include safeguarding fundamental rights, preventing the abuse of administrative authority decisions, upholding the principles of a fair trial, and providing appropriate guidance to enable the achievement of goals while operating within established parameters. However, Public representatives, administrative bodies, and employees of administrative agencies are representatives, not owners of public property, but trustees. Therefore, they must exercise the power within their legal framework in the pursuit of public rights and social aspirations. Therefore, "Judicial review is a great weapon in the hands of the judges" to control discretion power which has been granted to the administrative authorities to achieve final goal of the administrative legal system.

Conclusion

In the final view of the article, it is clear that Judicial review grounds such as Unreasonableness, Irrationality, Proportionality, Legitimate Expectation and Public Trust Doctrine can be used as a weapon to control as well as keep the governmental power within their frontiers and to protect the common citizens from any abuse of governmental power exercised by the administrative authorities. When there is a power abuse activism or decision, an aggrieved party or person must be able to come to the court for seeking to redress the decision. If the court unnecessarily interfere to administrative decision it can be harm to the impartiality of the judiciary and it may be influence to the separation of power. Not only that, but it may cause to damage to the check and balance system of the country. Therefore, the public confidence and the awareness of the above judicial review grounds should be developed in the general public. If so, the elected legislature and executive will take unpopular, yet progressive decisions in every moment to protect public interest and public wellbeing.

When the court interferes the administrative decision which is taken by the governmental authorities through the judicial review grounds has to be taken into consideration very carefully. Not only that, There should also be a system of punishment

30 Heather Mundy v. Central Environmental Authority and Others SC Appeal 58/2003, SC Minutes of 20th January 2004.

31 SugathapalaMendis and Others v. C.B. Kumarathunga and others (Waters Edge) S.C. (F/R) No. 352/2007, Supreme Court Minutes 7th August 2009

32 S.C. Application No 884/99 (F.R)

aimed at preventing such request to the parties who seek an intervention to the court asking for relief without logical and prima facie evidence. By making and adopting a system which was mentioned above, the sovereignty of the people is protected in democratic system, it will be possible to protect constitutionalism in the country based on the check and balance system by creating and administrative system pattern that works within the legal for the benefit of the public.

"Law is not a mausoleum. It is not an antique to be taken down, dusted, admired and put back on the shelf. It is like an old but vigorous tree, having roots in history, yet continuously taking new grafts and putting out new sprouts and occasionally dropping dead wood. It is essentially a social process, the end product of which is justice and hence it must change with changing social values. Otherwise there will be estrangement between law and justice and law will cease to have legitimacy."[33]

33 Justice- P. N. Bhagwati, Motilal Padmapat v State of Uttar Pradesh AIR 1979 SC 621; 118 ITR 326.

JUSTICE NIMAL GAMINI AMARATHUNGA MEMORIAL AWARD

WINNING ARTICLE

Beyond the Code: How Artificial Intelligence is Redefining Legal Boundaries

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Abstract

This study delves into the diverse implications of artificial intelligence (AI) in the legal field, focusing on both civil and criminal liabilities tied to AI technologies. It discusses how AI serves as an effective tool in criminal investigations, enhancing the efficiency and accuracy of law enforcement. The analysis also covers AI-assisted legal practice, where innovative technologies are transforming traditional legal methods, including research and client engagement. Additionally, the paper looks at the incorporation of AI in administrative law, stressing the importance of regulatory frameworks that promote accountability and equity. The research further examines the effects of AI on intellectual property rights, particularly concerning issues of authorship and ownership. Finally, it explores the changing role of AI in the workplace, considering its dual function as both an employer and an employee, along with the related legal and ethical challenges. Overall, the study emphasizes the urgent need for legal frameworks to evolve in response to the swift progress of AI technology, ensuring that justice and rights are maintained in an increasingly automated world.

1. Introduction

As artificial intelligence (AI) progresses rapidly, its incorporation into various sectors including the legal field and raises important questions regarding liability, regulation, and ethical issues. AI represents a new digital edge poised to significantly influence the world.[1] This study explores the intricate implications of AI within the legal framework, focusing on its roles in both civil and criminal areas. By enhancing criminal investigations and reshaping traditional legal practices, AI offers both opportunities and challenges that require careful attention. The growing application of AI in administrative law emphasizes the critical need for strong regulatory frameworks to guarantee accountability and fairness. This research also considers the effects of AI on intellectual property rights,

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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 10 August 2024.

particularly concerning authorship and ownership challenges, as well as the changing role of AI in the workplace. Through this analysis, the study highlights the need for legal systems to evolve alongside rapid advancements in AI technology, ensuring that justice and individual rights are upheld in an increasingly automated world.

2. Civil and Criminal Liability of AI

If an artificial intelligence machine causes damage due to an error, it's unclear who should be held accountable.[2] For example, if a self-driving car injures a pedestrian, it's uncertain who is liable for the accident.[3] Similarly, if a robot doctor makes a wrong diagnosis, it's ambiguous who bears responsibility.[4] The Sri Lankan government has actively promoted e-health in recent years, particularly during the COVID-19 pandemic. Artificial intelligence is a significant component of e-health, with potential applications in diagnostics and decision support.[5] However, it raises important questions about accountability. In this context, it is crucial to determine who is responsible if an AI system makes an error.[6]

In law, holding someone accountable for causing harm serves several important functions. It is often necessary for securing compensation and plays a key role in society's process of attributing blame for wrongful actions. The legal system has various mechanisms for holding individuals responsible for the damage they inflict. However, the emergence of autonomous intelligent machines poses challenges to this framework. There are pressing questions about whether we can blame a robot for its errors and whether we can seek compensation from malfunctioning machines. If there is no effective way to hold a machine accountable for the harm it causes, it raises the issue of who should be held responsible.[7]

2 Kingston, J. K., Research and Development in Intelligent Systems XXXIII: Incorporating Applications and Innovations in Intelligent Systems (Springer 2016) 269.

3 Lin, P. (2016) 'Why Ethics Matters for Autonomous Cars'. <https://doi.org/10.1007/978-3-662-48847-8_4.> accessed 10 August 2024; And also, in Hevelke A, Nida-Rümelin J. 'Responsibility for crashes of autonomous vehicles: an ethical analysis' vol 2 Science and Engineering Ethics [2015] 619 <https://doi.org/10.1007/s11948-014-9565-5> accessed 10 August 2024.

4 Kooli, Chokri & Al Muftah, Hend. 'Artificial intelligence in healthcare: a comprehensive review of its ethical concerns' vol 1(2) Technological Sustainability [2022] 121. And also, in Maliha G, Gerke S, Cohen IG, Parikh RB. 'Artificial Intelligence and Liability in Medicine: Balancing Safety and Innovation' vol 99 (3) Milbank Quarterly [2021] 629.

5 Kuwaiti, Ahmed & Nazer, A & Al-Reedy and others 'A Review of the Role of Artificial Intelligence in Healthcare' [2023] 13 (6) Journal of Personalized Medicine 95 <https://doi.org/10.3390/jpm13060951> accessed 10 August 2024.

6 Nuredin, Abdulmecit, 'The Legal Status of Artificial Intelligence and The Violation of Human Rights. International Scientific Journal Sui Generis vol 2 (1) [2023] <https://doi.org/10.55843/SG2321007n> accessed 12 August 2024.

7 Scherer, Matthew U., 'Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies' [2015] vol. 29 (2) Harvard Journal of Law & Technology 354.

Some argue that the developers of these intelligent machines should bear the responsibility. In the case of conventional machines, like a hair dryer that causes harm, we typically look to the manufacturer for accountability. However, intelligent machines differ from traditional hardware in ways that complicate the assignment of responsibility to their developers. This raises the question of whether it is fair to hold developers or users liable for damage caused by autonomous machines, especially when they have taken all reasonable precautions but something still goes wrong. In certain legal contexts, strict liability exists, which incentivizes ensuring product safety. However, it might be considered unjust to impose strict liability on devices that inherently cannot be fully controlled, as this could discourage the development and use of such technologies.

The situation becomes even more complex if the developer is no longer around but the system they created continues to learn and evolve. In such cases, determining responsibility is challenging. While legal accountability for harm will play a role in regulating AI, it is unlikely to be sufficient to address the damages caused by machines, necessitating alternative approaches. For instance, the law could require developers to obtain insurance to compensate individuals harmed by AI when no one else can be held legally responsible. Mandatory insurance already exists in some areas, such as healthcare. Additionally, regulations could mandate that developers or users implement precautionary measures to mitigate potential risks from arising in the first place. In the future, the law will evolve to recognize electronic persons, allowing for genuine accountability of machines for their actions.

3. AI as a Tool for Criminal Investigations

In criminal justice system a person charged with a penal offence has the right to be presumed innocent until proved guilty.[8] Fair trial is a universally accepted human right. According to Article 10 of the UDHR, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[9] In order to have a fair trial proper investigation should be made. Machine Learning (ML) is now used to conduct criminal investigations more efficiently and effectively.[10]

Police investigations are important before a case reaches court, as they establish the foundation for legal proceedings and influence the verdict. It is essential for law enforcement to gather and present evidence of a crime. One effective method for

8 Universal Declaration of Human Rights (UDHR) 1948, art 11 (1); The Constitution of Sri Lanka 1978, art 13 (5).

9 UDHR, art 10; The Constitution of Sri Lanka 1978, art 13 (3).

10 Travaini GV, Pacchioni F, et al. Machine Learning and Criminal Justice: A Systematic Review of Advanced Methodology for Recidivism Risk Prediction. [2022] 19 (17) International Journal of Environmental Research and Public Health <https://www.mdpi.com/1660-4601/19/17/10594> accessed 12 August 2024.

obtaining information is through the use of AI technology.[11] For instance, AI-enabled CCTV systems can help detect criminal activity.[12] These cameras should complement traditional investigative methods. However, authorities must carefully consider how surveillance is conducted. While visual recordings are typically necessary, audio recordings are particularly sensitive regarding privacy and require thorough scrutiny before use.[13] Additionally, the scope of surveillance is important; showing patterns of criminality in a specific public area, such as a street or train station, may justify the use of cameras, even if permission is granted for only part of that area.[14]

The primary function of these cameras is to identify individuals. This often necessitates capturing clear identifying features, such as facial details or distinctive clothing. However, there are risks associated with the interpretation of identification data, particularly regarding ethnicity and gender. Facial recognition tools can make errors, leading to potential misidentifications and concerns about unnecessary surveillance. AI-enabled CCTV allows law enforcement to monitor individuals quickly, efficiently, and discreetly in public spaces.[15] Before granting permission for such surveillance, relevant authorities should conduct a thorough assessment.

AI is also effectively used to detect financial fraud, which is prevalent in banks and financial institutions.[16] This includes various types of fraud, such as financial statement fraud, credit card fraud[17], mortgage fraud, and insurance fraud, each requiring tailored AI detection methods.[18] While most companies prepare financial statements honestly, some may manipulate data to gain advantages, such as inflated stock prices or lower taxes. AI has proven useful in analyzing financial statements to identify those likely to

11 Snaphaan, Thom & Hardyns, Wim, 'Environmental criminology in the big data era' [2019] 18 (5) European Journal of Criminology 713 <https://journals.sagepub.com/doi/10.1177/1477370819877753> accessed 10 August 2024.

12 Binns, R., January. 'Fairness in machine learning: Lessons from political philosophy' [2018] In Conference on fairness, accountability and transparency 149 <https://arxiv.org/abs/1712.03586> accessed 12 August 2014.

13 Surden, Harry, 'Artificial Intelligence and Law: An Overview' [2019] vol. 35 Georgia State University Law Review <https://ssrn.com/abstract=3411869> accessed 12 August 2024.

14 Jacobs, G., van Houdt, F. & coons, 'Studying Surveillance AI-cologies in Public Safety: How AI Is in the World and the World in AI' [2024] 22(2) Surveillance & Society 160. <https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/16104> accessed 15 August 2024.

15 ibid 162.

16 Ali, Abdulalem & Razak, Shukor & Othman, et al. 'Financial Fraud Detection Based on Machine Learning: A Systematic Literature Review' [2022] 12 (19) Applied Sciences. 9637 <https://doi.org/10.3390/app12199637> accessed 15 August.

17 Sharma, Pratyush & Banerjee, Souradeep & Tiwari, Devyanshi & Patni, Jagdish. 'Machine Learning Model for Credit Card Fraud Detection- A Comparative Analysis' [2021] 18 (6) The International Arab Journal of Information Technology 789.

18 Rojan, Zaki. 'Financial Fraud Detection Based on Machine and Deep Learning: A Review' [2024] 13 (3) Indonesian Journal of Computer Science 1 <http://ijcs.net/ijcs/index.php/ijcs/article/view/4059> accessed 12 August 2024.

contain false information. Similarly, AI can flag suspicious activities related to credit card fraud, helping to protect merchants, banks, and consumers.[19]

4. From Briefs to Bots: Transforming Legal Practice with AI

In Sri Lanka, the main sources of law are statutory law and case law, with the majority of current laws passed by Parliament. Digital versions of these laws are vital resources for lawyers. Although attorneys may generally understand many laws, digital formats can significantly improve their efficiency and effectiveness. It's important to examine how artificial intelligence can help create advanced tools for future lawyers. If statutory law can be transformed into computer code, AI could manipulate that data. This would enable an AI-driven statutory law system to respond to legal inquiries, benefiting both experienced lawyers and trainees.

AI-assisted law practice is revolutionizing the legal field by incorporating advanced technologies into various legal tasks. From conducting research and reviewing documents to predicting case outcomes and interacting with clients, AI tools are improving efficiency, accuracy, and access to legal services.[20] One of the most impactful uses of AI in law is in legal research. Traditional research methods can be labor-intensive, often requiring extensive time to sift through case law and statutes. AI tools can swiftly analyze large volumes of legal data, pinpoint relevant cases, and summarize critical information, thus greatly reducing the time lawyers spend on research.

Additionally, AI can enhance document review through natural language processing (NLP), enabling it to assess contracts and discovery documents. These tools can highlight relevant clauses, detect inconsistencies, and identify potential risks, allowing lawyers to concentrate on more strategic aspects of their work. AI algorithms can also evaluate historical case data to forecast outcomes based on various factors such as jurisdiction, case type, and presiding judge. This predictive capability enables lawyers to better gauge the likelihood of success in litigation, allowing for more informed client advice and strategic planning.

AI systems simplify contract management by automating the drafting, negotiation, and monitoring of contracts. Smart contracts, utilizing blockchain technology, can automatically execute agreed terms when certain conditions are met, thus minimizing the need for intermediaries and boosting efficiency. AI chatbots and virtual assistants are increasingly enhancing client interaction. These tools can respond to common

19 Siddhartha Bhattacharyya, 'Data mining for credit card fraud: A comparative study' [2011] vol 50 (3) Decision Support Systems 602 <https://www.sciencedirect.com/science/article/abs/pii/S0167923610001326?via%3Dihub> accessed 10 August 2024.

20 Olubiyi, Ifeoluwa & Oyedeji-Oduyale et al, 'Artificial Intelligence and the Law: an overview' [2024] 12 (1) Abuad Law Journal 1-27 <https://www.researchgate.net/publication/382406383_artificial_intelligence_and_the_law_an_overview> accessed 12 August 2024.

questions, arrange appointments, and provide basic legal information, improving client engagement while freeing up lawyers to focus on more complex issues. Additionally, AI can make legal services more accessible to marginalized communities by offering low-cost or free automated legal advice, thus promoting equal access to justice.

Despite the many advantages, AI also brings forth ethical challenges. Concerns around data privacy, algorithmic bias, and potential job displacement for legal professionals are significant issues that must be addressed. Legal practitioners must ensure responsible use of AI tools and adherence to ethical standards. The outlook for AI in legal practice is promising, with ongoing developments likely to further enhance legal services. Continuous advancements in machine learning, NLP, and data analytics are expected to yield even more sophisticated AI tools capable of assisting lawyers with increasingly complex tasks.

AI-assisted law practice is transforming the legal profession by equipping lawyers with powerful tools to enhance efficiency, accuracy, and client service. By adopting these technologies, law firms can maintain competitiveness in a changing legal landscape while upholding ethical standards and safeguarding client rights. As AI technology continues to evolve, its integration into legal practice will likely deepen, creating new opportunities for innovation and greater access to justice.

5. AI and the Future of Administrative Justice

Citizens expect public services to be quick, efficient, and easily accessible. Automation of work procedures in public authorities can help meet these expectations. Streamlining administrative processes can make them faster and more efficient, allowing access from home. Additionally, programming machines to focus solely on objective facts can reduce the risks of corruption and abuse of power. AI technology can assist in automating increasingly complex tasks, thus addressing both social and legal demands for good administration. Some evaluations suggest that these automated systems may even outperform human administrators.[21]

Implementing AI technology in administrative law faces several practical challenges.[22] While AI can independently identify correlations in large datasets, this strength can also be a drawback. It becomes difficult to predict outcomes and provide clear explanations for results. AI systems may inadvertently reinforce existing biases and stereotypes. Because the outcomes depend on numerous correlations, pinpointing which specific data points influenced the results can be challenging. As AI models become more complex,

21 Eze, Blessing Obianuju, 'The Future of Artificial Intelligence and the Administration of Law and Justice in Nigeria' [2024] Social Science Research Network <https://ssrn.com/abstract=4689396> accessed 15 August 2024.

22 Yeung, Karen, 'Algorithmic Regulation: A Critical Interrogation' [2017] London School of Economics and Political Science <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2972505> accessed 15 August 2024.

it becomes harder to clarify the significance of individual data points, potentially allowing biases and flaws to go unnoticed.

Moreover, explaining administrative decisions to citizens can become problematic, which undermines standards of good administration. Since we often don't fully understand how AI systems make decisions, ensuring fairness in those decisions becomes a concern. The law must ensure that administrative authorities provide fair and transparent decision-making.

Another set of challenges relates to the lack of human involvement in the administrative process. This raises issues of accountability for inaccurate results and the need for citizens to feel that their concerns are genuinely heard by humans. Additionally, there are concerns about personal integrity: how much information should the government collect and analyze about its citizens, and to what extent should it use this data to influence or manipulate behavior? Thus, each use of AI must be carefully evaluated in relation to the applicable laws, such as the Personal Data Protection Act, No. 9 of 2022, which outlines provisions for personal data processing and sets specific requirements for automated decision-making.[23] The section 18 of the Act explains about how to review an automated individual decision making as mentioned below,

> *"18. (1) Subject to section 19, every data subject shall have the right to request a controller to review a decision of such controller based solely on automated processing, which has created or which is likely to create an irreversible and continuous impact on the rights and freedoms of the data subject under any written law."*

While AI applications are not perfect and some limitations may be acceptable, they hold significant potential to enhance the efficiency of public authorities. However, this potential can only be realized if AI is implemented in ways that adhere to the principles of good administration.

6. AI's Impact on Traditional IP Laws

Artificial intelligence is utilized in various fields today, including creating artwork and paintings, designing jewelry, fashion models, and clothing, producing digital replicas of organs and other objects, generating recipes, discovering new pharmaceuticals, formulating fragrances, designing sculptures, and composing music tracks. As a result, intellectual property laws play a crucial role in the realm of artificial intelligence.

The four main types of intellectual property rights are copyright, industrial designs, trademarks and patents. Copyright protects an author's expression in literary and artistic works. Industrial designs safeguard the appearance of a product. Trademarks

23 Data Protection Act, No. 9 of 2022, s 18

distinguishes goods and services. Patents protect inventions. Intellectual property law was originally designed with human creativity in mind, without considering other potential creative entities. Innovation relies on incentives provided by intellectual property rights, raising the question of who should be recognized as the creator when AI is involved in the creative process.[24]

AI has the capability to develop software that is protected by copyright. In certain jurisdictions, computer programs may also qualify for patent protection if they demonstrate a technical effect.[25] 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.[26] In other words, AI computational models are not eligible for patents unless they produce technical effects that extend beyond the standard interaction between the program and the computer.[27] However, in some countries including Sri Lanka, computer programs are not eligible for patent protection[28] in both statutory law and in case law[29] 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,*[30] *In Merrill Lynch's Application*,[31] *In Gale's Application,*[32] *Aerotel Ltd v. Telco Holdings Ltd,*[33] *AT and T Knowledge*

24 Ubaydullayeva, Anna 'Artificial Intelligence and Intellectual Property: Navigating the Complexities of Cyber Law' [2023] vol 1(4) International Journal of Law and Policy 1 <https://irshadjournals.com/index.php/ijlp/article/view/57> accessed 12 August 2024.

25 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.

26 European Parliament Resolution of 20 October 2020 on Intellectual Property Rights for the Development of Artificial Intelligence Technologies, para-G.

27 Akhter Ali, Mohd & Kamraju, M. 'Impact of Artificial Intelligence on Intellectual Property Rights: Challenges and Opportunities' [2023] vol 1(1) Osmania University Journal of IPR 21 August 2024 <https://ouipr.in/oujipr/vol1/iss1/2/> accessed 12 August 2024.

28 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.

29 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.

30 [1997] EWCA Civ 1174, (1996) RPC 511 (Aldous LJ).

31 [1989] RPC 561.

32 [1991] RPC 305.

33 [2007] R.P.C. 7 [8] [31] (Jacob LJ).

Ventures LP and CVON Innovations Limited v. Comptroller General of Patents.[34] The view of Australian Court could be seen in *Apple Computer Inc v. Computer Edge Pty Ltd*[35] and *Research Affiliates LLC v Commissioner of Patents.* The issue was discussed in Canada in *Apple Computer, Inc. v. Mackintosh Computer Ltd*,[36] and also in Europe in *In the Matter of Vicom*.[37]

To have rights and obligations, an entity must possess legal personality. Currently, legal personality is granted only to human persons and legal persons, such as foundations, associations, and corporations. AI entities lack legal personality and therefore cannot hold rights or obligations, including ownership of intellectual property rights. In most jurisdictions, only human beings can be credited as authors or inventors. This creates challenges when AI generates creative work, as it cannot be recognized as the creator or owner, complicating the identification of individuals or companies that can be held liable for actions taken by AI.[38]

AI technology can assist authorities in granting intellectual property rights and help rights holders detect infringements and enforce their rights more effectively. Companies are increasingly using AI to identify infringing content online. This development raises fundamental questions about how technology will transform legal proceedings in the future.

7. Artificial Intelligence in the Workplace: AI as an Employer and Employee

Analyzing the relationship between AI and employment law is important, as AI is present in workplaces through algorithmic processes and robots, integrating AI with robotics and the Internet of Things (IoT).[39] Currently, there is no specific legislation regulating AI in the workplace, and courts have not established case law in this area. This leaves the legal status of AI at work somewhat ambiguous.[40]

It's essential to investigate employment protections when AI replaces human workers and to consider how AI can be classified as an employer. Workplace safety is another key concern when humans work alongside robots. The integration of AI and robotics will lead to job displacement while also creating new roles. AI can render some workers

34 [2009] EWHC 343.

35 [1984] FSR 481.

36 [1990] 2 S.C.R. 209 at 215.

37 [1987] 2 EPOR 74.

38 Jane C. Ginsburg & Luke A. Budiardjo, 'Authors and Machines' [2019] vol 34 Berkeley Tech. L. J. 343

39 Bian, Zhiqing, 'Research on the Impact of Artificial Intelligence on the Labor Market' [2024] vol 24 Highlights in Business, Economics and Management 1036.

40 Top, Dan, 'Artificial Intelligence and the Future of Labour Law' [2020] vol 8 (2) Acta Universitatis Sapientiae Legal Studies 245 <https://acta.sapientia.ro/en/series/legal-studies/publications-acta-legal/legal-studies-contents-of-volume-8-no-2-2019/artificial-intelligence-and-the-future-of-labour-law> accessed 20 August 2024.

redundant, and labor law does not prevent employers from replacing human workers with AI and robots. As employers decide to implement these technologies, workers must adapt to working alongside them; refusal to do so may provide grounds for termination based on individual performance issues. Workers need to stay updated on technological advancements in their roles, highlighting the importance of retraining initiatives for those in jobs likely to disappear.[41]

An algorithm or robot can function as a manager to the extent that its actions can be attributed to a human manager who has the authority to direct work. Employment contracts can specify that an algorithm represents the employer's will and provides binding instructions to employees. The employer retains legal responsibility for the algorithm's actions, and all instructions must comply with labor laws and contract terms.

Regarding health and safety, the introduction of AI and robotics presents both challenges and opportunities. Employers are obligated to ensure a safe work environment, and robots can assist workers in hazardous jobs, making it practical for employers to implement such technologies. However, the unpredictable nature of robots may also introduce new mental health risks, and employers must take steps to mitigate these risks. Health and safety laws require employers to provide training on new technologies, and any injury caused by a robot would be considered an occupational injury. Therefore, these laws need to be updated to address the implications of human-robot interactions.

AI may also play a role in hiring, firing, and workforce management, which raises concerns about both direct and indirect discrimination. Algorithms must be programmed to avoid discriminatory practices, and employees should be informed about surveillance measures in advance. AI systems must respect employees' privacy rights at work. Everything that labor law prohibits for a human employer also applies to algorithms. Employers are legally accountable for the actions of AI and robots. Therefore, the implementation of AI and robotics in the workplace must comply with health and safety regulations, anti-discrimination laws, data protection legislation, and workers' rights to personal integrity.[42]

8. Conclusion

In conclusion, the integration of artificial intelligence (AI) into the legal field presents a complex landscape of opportunities and challenges that necessitate careful examination. As AI technologies continue to evolve, they are reshaping essential aspects of law, from criminal investigations to administrative processes, and influencing

41 Bessen, James E., 'AI and Jobs: The Role of Demand' [2017] Boston University School of Law, Law and Economics Research Paper No. 17-46 <https://ssrn.com/abstract=3078715> accessed 10 August 2024.

42 Hadady-Lukacs, Adrienn, 'The Future of Work-Artificial Intelligence and Labour Law' [2024] vol 15(3) DANUBE 188 <https://sciendo.com/article/10.2478/danb-2024-0011> accessed 20 August 2024.

the dynamics of intellectual property rights. The potential for AI to enhance efficiency and accuracy in legal practices is promising; however, it also raises critical questions about accountability, ethical considerations, and the protection of individual rights.

To navigate this rapidly changing environment, it is imperative that legal frameworks adapt to accommodate the unique challenges posed by AI. Establishing robust regulations that ensure fairness, transparency, and accountability will be essential in mitigating risks associated with AI deployment. Furthermore, ongoing dialogue among legal practitioners, technologists, and policymakers is crucial to foster responsible AI use that upholds the principles of justice and equity.

As we move forward, the legal profession must embrace innovation while remaining vigilant about the implications of AI. By doing so, we can harness the transformative potential of AI technology to enhance legal services, improve access to justice, and ultimately create a more equitable and efficient legal system in an increasingly automated world.

A Critical Analysis on Community Based Correction Order in the Criminal Justice Administration System of Sri Lanka with Reference to Sentencing Policy

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SUP.ADL.District Judge - Dambulla

Introduction

Criminologists argue that the primary responsibility of prisons is to reintegrate convicts into society as law-abiding citizens with good behavior patterns during the relevant punishment period. However, the modern prison system has not been able to fulfill this responsibility as expected. Incarceration has a disabling effect on inmates, especially young offenders who are more likely to become experienced offenders.

In Sri Lanka, institutional rehabilitation activities have been largely hampered due to administrative problems and the high cost of maintaining prisons. Modern criminologists have proposed that community-based correctional procedures are more suitable for addressing the challenges associated with rehabilitating convicts in prison and integrating them back into society. This approach has gained widespread acceptance, particularly for new and young offenders with limited criminal experience.

Community service programs have been implemented in various regions across the globe, such as California's Alameda County in 1966, the United Kingdom's parliaments enacting legislation in the early 1970s, and more recently, community service has been incorporated into the legal systems of several Western, Asian, and African countries. Community Service Orders (CSOs) are programs that entail placing convicted offenders in unpaid positions with non-profit or tax-supported agencies to perform work for the general community and societal good as an alternative to depriving an individual of their liberty.

Definition and purpose of community-based correction orders

The CSO has been widely recognized as a valuable and innovative form of non-custodial punishment in the current century. CSOs are primary punitive sanctions that involve unpaid work. Pease[1] defines CSOs as penal sanctions that serve in unpaid positions

1 Pease K, "Community Service Orders." Crime and Justice, vol. 6, 1985, pp. 51–94. JSTOR, http://www.jstor.org/stable/1147496 Accessed 7 Nov. 2023.

with non-profit or governmental agencies. Harris[2] elaborates on the community service program as a sentencing option or condition that places convicted offenders in unpaid positions with non-profit or tax-supported agencies to perform a specified number of hours of work or service within a given time limit. Claster (1992)[3] describes CSOs as court orders that require the guilty party to serve or work for a specified period of time without remuneration within a charitable or community-based organization. Clear and Braga (1995)[4] further explain that community service involves work carried out by convicts for a public agency or non-profit organization to repair any damage resulting from the crime or to provide compensation to the community for the convicted offender's actions.

Community sentences are penalties imposed on offenders by criminal courts that do not involve imprisonment and are sometimes referred to as "non-custodial" or alternatives to prison[5]. As an alternative to custody, community sentences require offenders to "repay" their debt to society[6]. However, the sentencing should be reasonable, especially in terms of the number of hours required to serve, regardless of the offender's status, condition or the apparent difference in costs compared to incarceration[7]. Community sentences range from supervisory probation orders, CSO, rehabilitation programs, halfway houses, electronic tagging and home curfews to shaming in the community[8].

Community sentences around the world can be classified into three categories: self-regulatory penalties involve some form of public admonition or reprimand that is assumed to be sufficiently humiliating to be an effective deterrent. Supervisory sentences are imposed when courts believe that the offender is unable to refrain from committing crimes without support or surveillance and may include rehabilitation, reparation, and incapacitation. Efforts to improve community sentences have been ongoing since the 1970s as an alternative to imprisonment[9].

In Sri Lanka, subsequent to the enactment of The Community Based Corrections Act, No. 46 of 1999, the terminology of 'community service order' (CSO) has been superseded

2 Harris M. K, Community Service by Offenders, Washington, D.C: American Bar 1980.

3 Claster, D.S., (1992). Bad Guys and Good Guys: Moral Polarization and Crime. Greenwood Press, Westport CT.

4 Clear, T.R. and A.A. Braga, (1995). Community Corrections in Crime. Wilson, J.Q. and J. Petersillia (Ed.). ICS Press, San Francisco.

5 Worrall, Anne (2001). The Sage Dictionary of Criminology. In McLaughlin, E. and Muncie, J. (Ed.). London. Thousand Oaks. New Delhi: SAGE.

6 Caputo, G.A. (2004). Intermediate Sanctions in Corrections, USA : University of North Texas Press.

7 Samuri, M.A. (2012). 'Community Service Order for Juvenile Offenders: Theoretical and Legal Framework." In Research Journal of Applied Sciences 7 (2): 126 – 131, Medwell Journals, 2012.

8 Hughes, G. (2001). 'Community Corrections' in E. McLaughlin and J. Muncie (Eds.) The Sage Dictionary of Criminology. London Thousand Oaks New Delhi: Sage Publications. : Worrall, Anne (2001). The Sage Dictionary of Criminology. In McLaughlin, E. and Muncie, J. (Ed.). London. Thousand Oaks. New Delhi: SAGE.

9 Whitehead, P. and Statham, R. (2006). The History of Probation: Politics, Power and Cultural Change 1876-2005, Shaw & Sons: Kent.

by the term 'Community Based Correction Order' (CBCO). This amendment was made to reflect the expanded scope of the CSOs, which encompasses a range of interventions beyond community service. These interventions include counselling programs, drug treatment, and vocational training, among others. The introduction of this legislative amendment has thus broadened the range of options available to the Sri Lankan criminal justice system for the rehabilitation and reintegration of offenders into society. There is a global trend of introducing community-based punishment and rehabilitation in lieu of prison-based retribution and deterrence.[10] The preamble of The Community Based Corrections Act, No. 46 of 1999 articulates the following statement:

> *"An act to make provision for the imposition of community based correction orders by courts in lieu of sentences of imprisonment; for the appointment of a commissioner of community based corrections; and for matters connected therewith or incidental thereto".*

In accordance with the statutory provisions, in cases where imprisonment is not deemed mandatory or the prescribed penalty does not exceed a term of imprisonment exceeding two years, the court may elect to issue an order in lieu of imposing a sentence of imprisonment or fine. In such instances, the court may opt to issue a CSO, which affords the offender the opportunity to fulfil the requirements of the court order while remaining integrated within society.

The Community Based Corrections Act delineates the underlying rationales for CSOs, which encompass a multifaceted approach aimed at addressing the offender's criminal behavior. These reasons include facilitating an assessment of the offender's criminal conduct, enabling the offender to acknowledge and manage their drug dependency, and providing opportunities for the offender to engage in programs tailored to address their criminal behaviour. The overarching objective of these measures is to foster the offender's rehabilitation and reintegration into society, while also promoting public safety.

Historical Background of Community Service Orders in Sri Lanka

The implementation of CBC as an alternative to imprisonment in Sri Lanka dates back to the 1970s when the country experienced sudden and unexpected overcrowding in its prisons. As a result, several reforms were introduced, including the "Home Leave", "Release on License Scheme", and "Release on License". However, it was not until 1973 that the concept of CSO as an alternative to prison sentences was formally introduced in Sri Lanka.

10 https://www.parliament.lk/uploads/documents/paperspresented/performance-report-department-of-community-based-corrections-2017.pdf

The inception of the current legislation pertaining to CSOs in Sri Lanka can be traced back to the Administration of Justice Law No.44 of 1973. The relevant provisions concentrating CSOs are currently stipulated in section 12 of the Primary Courts Procedure Act and section 18 of the Code of Criminal Procedure Act, (CCPA) 15 of 1979, as amended by the CCPA (Amendment) Act No. 49 of 1985[11]. These provisions were subsequently replaced and enacted in Community Based Correction Act No. 46 of 1999, which currently serves as the legal framework for unpaid CSOs in Sri Lanka.

In 1999, it was reported that the rate of overcrowding in prisons had increased by 461.7 per cent. In response to this issue, Dr A.R.B. Amerasinghe, retired Supreme Court Judge and Chairman of the Law Commission of Sri Lanka, proposed to the government of Sri Lanka the implementation of community-based corrections, as practised in Western Australia, as a means of alleviating prison overcrowding. A team of experts from Western Australia conducted a feasibility study to determine the viability of introducing community-based correction orders in Sri Lanka. The conclusion of the study was to introduce the community-based correction process, then implemented in Western Australia, to Sri Lanka as a pilot project to address the prevalent issue of prison congestion. The basis for this feasibility study was the research entitled "Community Service Sentence," conducted in 1997 by Mr. Kamal Peiris, Attorney-at-Law, who was then Assistant Secretary to the Law Commission. This research was based on the findings of a previous study entitled "Default of Fine and Imprisonment," carried out in 1997 by Dr. Anton A. Tissera and Wenura Gunawardena, which focused on the Welikada Prison. The findings of this study revealed that out of 889 prison inmates incarcerated in the Welikada Prison in December 1997, 769 inmates (86.5%) were imprisoned due to sentences imposed by courts as a result of their failure to deposit fines ordered by the courts upon conviction. The financial value of such fines ranged between Rs.100/- and 100,000/-, and nearly 50% of inmates were incarcerated due to their failure to deposit fines, the financial value of which was even less than Rs.3,500/-

In order to facilitate the implementation of community-based corrections in Sri Lanka, a training program was conducted under the guidance of Mr. Robert Cater, the Director General of Community Based Corrections in Australia, in collaboration with AUS-AID. The program was designed to align the process of community-based corrections in Sri Lanka with that of West Australia. The training was attended by a group of six Sri Lankan officials, including Mr. Suhada K. Gamlath, who later became the founder Commissioner of Community Based Corrections in Sri Lanka. Subsequently, the Community Based Corrections Act, No. 46 of 1999 was enacted in Parliament on December 10, 1999, to enable the implementation of community based correction order

11 Section - 2

(CBCO) in Sri Lanka. The first CBCO was issued by the Magistrate's Court, Maligakangda on February 17, 2000, following the enactment of the aforementioned Act.

The CBC Process was introduced as a pilot project by the Ministry of Justice in 1999. The project was launched on February 17, 2000, as an experimental initiative in three magistrate's courts, namely Hulftsdrop, Fort, and Maligakandha. Due to its success, the project was upgraded to a unit in 2003, and subsequently converted into a department on July 1, 2008, under the Ministry of Rehabilitation and Prison Reforms. The Minister of Justice and Judicial Reforms has issued several gazette notifications since 2000, specifying appointed dates for specific judicial divisions. The initial gazette notification included two judicial divisions, namely Colombo and Colombo Fort. The expansion of the CBCO given by the courts led to the inclusion of three judicial divisions in 2001, three in 2005, and an additional 32 in 2007. Presently, this process is being implemented across 125 magistrate and circuit courts island-wide.

In accordance with the legislation stipulated by the aforementioned Act, the issuance of unpaid CBCOs may be utilized as a substitute for fines that do not exceed three thousand rupees or imprisonment that does not exceed a duration of two years[12]. This decision is based on a range of factors, including the nature of the offence and the characteristics of the offender[13]. CBCO represent a departure from traditional prison sentences and have been shown to be a more effective form of punishment for minor offences from a corrective standpoint. Furthermore, they offer a more cost-effective alternative to short-term imprisonment.

The Assistance to Protection of Victims of Crime and Witness Act, No. 4 of 2015 has introduced a novel legal concept, whereby convicted individuals may be ordered to pay compensation to the victim of the crime or witness concerned, in addition to any penal sanction imposed for the offence. Section 28(1) of the Act provides that every High Court and Magistrate's Court may issue such an order, with the compensation amount capped at one million rupees or twenty per cent of the maximum fine payable for the offence, or both. Moreover, section 28(4) of the Act stipulates that in the event of a convicted person failing to make the payments imposed under subsection (1), the Presiding Judge of the High Court or Magistrate shall determine and pronounce a default term of imprisonment that the convict must serve in lieu of non-payment. However, if the Presiding Judge or Magistrate determines that the convicted person does not possess the necessary financial resources to make the payment, a community-based correction order may be entered instead.

12 Section 5(1) of the Community Based Corrections Act, No. 46 of 1999

13 Section 5(2) of the Community Based Corrections Act, No. 46 of 1999

The present study identifies three distinct modalities of service delivery under the rubric of unpaid CSO, namely community work corrections, special rehabilitation programs for drug offenders, and work under trained supervisors. Unlike residential programs, these interventions allow offenders to engage in rehabilitative activities while remaining within the community.

This program takes into account various factors or criteria, including but not limited to the offender's age, social history and background, medical and psychiatric history, educational background, employment history, previous convictions, financial circumstances, special needs, family background, and other sources of income. Additionally, the program considers the potential benefits that may be derived from courses, programs, treatment, or other forms of assistance that could be made available to the offender, as well as the potential benefits that may be gained from the assigned work.

Legal framework and implementation of community based correction orders

A. Procedures and processes for implementing community based correction

Section 6(1) of the legislation confers upon the court the discretionary power to solicit a pre-sentence report from the Commissioner subsequent to finding an individual culpable of an offense, but prior to pronouncing a sentence. The primary objective of this report is twofold: firstly, to assess the appropriateness of a community based correction order as a rehabilitative measure for the offender, and secondly, to ascertain the availability of requisite facilities for the execution of said order. Moreover, the report serves as a means to obtain expert advice regarding the most suitable conditions that should be attached to the proposed order. In order to facilitate the preparation of the report, the court is empowered to adjourn proceedings, stipulating a specific date, time, and location for the subsequent sentencing.

Section 6(6) delineates the specific particulars that must be encompassed within the pre-sentence report. These particulars encompass, inter alia:

a) The age of the offender.
b) The social history and background of the offender, inclusive of the identities and ages of dependents.
c) The medical and psychiatric history of the offender.
d) The educational background of the offender.
e) The employment history of the offender.
f) Any additional offenses for which the offender has been convicted, charged, or indicted.

g) The extent to which the offender has adhered to prior sentences or is presently complying with any ongoing sentence.

h) The financial circumstances of the offender.

i) Any distinctive needs of the offender.

j) The employment history of the offender's spouse and their corresponding income.

k) The courses, programs, treatment, or other forms of assistance that could potentially be made available to the offender, thereby facilitating their rehabilitation.

l) The facilities accessible for the performance of unpaid community work.

According to Section 7 and 8 of the Community-Based Correction Act, it is stipulated that no community-based correction order shall be granted to an offender unless the offender provides written consent, in the prescribed format, for the implementation of such an order. Prior to granting a community-based correction order, the court is obligated to elucidate the purpose and impact of the proposed order in a manner that is easily comprehensible to the offender. Furthermore, the court must apprise the offender of the potential consequences that may ensue if they fail, without reasonable justification, to comply with the conditions specified in the proposed order. Additionally, the court is required to explicate the procedure through which the proposed order can be modified.

Section 14(1) of the Community-Based Correction Act establishes that the failure of an offender, without reasonable justification, to comply with any condition of a community-based correction order is considered an offense, with a potential fine of up to five thousand rupees upon conviction after a summary trial. Under Section 14(2), the Commissioner is required to initiate legal proceedings by submitting a written report to the Court that issued the community-based correction order, indicating the offender's non-compliance. Upon receipt of the report, as outlined in Section 14(3), the court has the authority to issue a summons or arrest warrant and conduct a trial following the procedures set forth in the Code of Criminal Procedure Act No. 15 of 1979 for summary trials. Section 14(4) grants the court the power to modify or cancel the community-based correction order upon convicting an individual for an offense under subsection (1), provided the order is currently in effect. In the event of order cancellation, as stated in Section 14(5), the court may handle the offender's case for the original offense(s) in any manner it could have done if the offender had been found guilty, subject to the provisions of subsection (6). When dealing with an offender following order cancellation, as specified in Section 14(6), the court must consider the extent of the offender's compliance with the order's conditions prior to cancellation.

B. Roles and responsibilities of key stakeholder

The Department of CBCs has been established in accordance with the CBCs Act No. 46 of 1999. This department oversees the implementation of community corrections processes in 125 magistrate and circuit courts, with regional community corrections offices established in these courts. To support these efforts, 118 community corrections officers and 122 work supervisors have been employed. Furthermore, 496 development officers have been assigned to Divisional Secretariats for social development and family development of offenders, in order to facilitate the community reformation process.

The role of community correction officer

The role of the Community Correction Officer is of paramount importance in the context of minor offenders who have been convicted by the Court for minor offences. The officer assumes the role of a mediator in a well-established intervention plan aimed at altering and preventing the criminal behaviour of such offenders. The primary objective of this intervention plan is to ensure that the offender is safely integrated back into civil society while exercising the most meaningful and protective ways and means.

The Community Correction Officer is required to pay special attention to the nature and gravity of the offence committed by the offender, as well as the circumstances surrounding the commission of the offence. Additionally, the officer must consider the potential risks that the offender may pose to society and the special needs of the offender.

In order to discharge these duties accurately, precisely, and properly, the community-based correction officer must make suitable and pragmatic decisions as the case may be. This requires the officer to respect and honour the direct guidance and direction provided by the Commissioner under the prevailing legal provisions. Furthermore, the officer must possess subject-wise knowledge in the fields of Criminology, Sociology, Law, and counselling in Psychology to effectively carry out their duties.

The role of work supervisor

The process of community-based corrections is a crucial aspect of the criminal justice system, aimed at rehabilitating offenders and reintegrating them into society. The Work Supervising Officer plays a pivotal role in this process, assuming responsibility for a range of supervisory activities, including court and office duties, as well as home supervision. By working in tandem with the Community Correction Officer and Development Officer, the Work Supervising Officer ensures that the correctional plan is executed in a manner that aligns with the objectives of community-based corrections.

The role of development officer

The present discourse aims to elucidate the role of the Development Officer in the context of community-based corrections. The Development Officer is a professional who works in collaboration with the Department of Community Based Correction and is stationed at a Divisional Secretariat. The primary objective of the Development Officer is to facilitate the correctional process and ensure that offenders who have been subjected to a community-based correction order undergo a positive transformation in their behaviour. This is achieved through a range of duties that are aimed at addressing the underlying causes of criminal behaviour and empowering the offender and their family.

One of the key responsibilities of the Development Officer is to compile social reports and development plans for the offender. These reports provide a comprehensive understanding of the offender's background, including their social, economic, and psychological circumstances. The development plans, on the other hand, outline the steps that need to be taken to address the underlying causes of the offender's criminal behaviour. These reports and plans serve as the basis for the subsequent interventions that the Development Officer undertakes.

The Development Officer is also responsible for providing assistance to the offender through treatment, supervision, and counselling. These interventions are tailored to the specific needs of the offender and are based on social reports and development plans. The aim of these interventions is to help the offender overcome their criminal behaviour and develop the skills and competencies necessary to lead a productive and law-abiding life.

Effectiveness and impact of community based correction orders in the criminal justice system

CBCOs have emerged as a valuable tool within the criminal justice system in Sri Lanka. These orders provide offenders with an opportunity to engage in meaningful work within their communities, promoting rehabilitation, addressing underlying causes of criminal behavior, and fostering a sense of accountability. Additionally, CBCOs offer a cost-effective alternative to incarceration, allowing for the allocation of resources to other critical areas of the criminal justice system.

Rehabilitation and Skill Development:

One of the key advantages of CBCOs is their potential to promote rehabilitation and reintegration. By engaging offenders in meaningful work, these orders provide individuals with the chance to develop new skills, gain a sense of purpose, and contribute positively to society. Research has shown that CBCOs are particularly effective for non-violent

offenders, offering a chance for personal growth and reflection without the negative consequences associated with imprisonment. This approach helps break the cycle of criminal behavior and reduces the likelihood of reoffending.

Restorative Justice and Community Engagement:

CBCOs in Sri Lanka align with the principles of restorative justice. Offenders are given the opportunity to make amends for their actions by directly contributing to the community. By completing tasks such as cleaning up public spaces, assisting local charities, or supporting vulnerable populations, offenders not only repair the harm caused by their offenses but also foster a sense of accountability and responsibility. Moreover, CBCOs enable offenders to reconnect with their communities, establishing positive relationships that support their successful reintegration.

Addressing Underlying Causes of Criminal Behavior:

Many offenders in Sri Lanka come from disadvantaged backgrounds or struggle with issues such as substance abuse or mental health problems. CBCOs provide access to support services and resources that can help address these underlying issues. Offenders may be connected with counseling services, job training programs, or substance abuse treatment centers, facilitating a holistic approach to rehabilitation. This comprehensive support can have a significant impact on reducing recidivism rates and promoting long-term positive change.

Cost-Effectiveness:

Compared to incarceration, CBCOs offer a cost-effective alternative within the criminal justice system. Incarceration requires substantial financial resources, whereas CBCOs necessitate minimal financial investment while still holding offenders accountable for their actions. This cost-effectiveness allows for the allocation of resources to other critical areas, such as rehabilitation programs and support services. By utilizing CBCOs, Sri Lanka can optimize its resources and enhance the overall effectiveness of the criminal justice system.

Challenges and Limitations of Community Based Correction Orders in Sri Lanka

I. Disregard for the regulations stated in the Act

The current implementation of Section 6(1) (a) and Section 7 of the Community-Based Corrections Act is not being strictly followed, leading to a suboptimal functioning of the system. According to this practice, offenders are supposed to be referred to the community correction officer upon request by either the Attorneys-At-Law or the offenders themselves. However, all offenders referred by the court are included in the

community-based correction program, regardless of the suitability of their cases. On average, five offenders receive such referrals per day, and it is noteworthy that all these offenders are interviewed by a single officer in order to prepare their pre-sentence report.

Under this practice, the community correction officer is compelled or sometimes willingly chooses to file the pre-sentencing report on the same day, and the court proceeds to pronounce the order on the same day as well. This expedited process is adopted to circumvent time constraints and manage the workload. However, this practice deviates from the intended outcome stipulated by the Act.

II. Stakeholders' lack of support and negative attitudes.

The success of a project is closely tied to the attitudes of the individuals involved. However, an analysis of field research papers, documentaries, and insights from legal professionals and community corrections officers has revealed that certain stakeholders, including judges, attorneys-at-law, community correction officers, offenders, and the general public, exhibit unfavorable attitudes towards the community corrections process.

The community corrections system has not yet been acknowledged as a means of rehabilitating offenders and preventing repeat offenses, as it is often perceived as an alternative to imprisonment. This perception is further reinforced by judges who do not consider community corrections orders as primary sentencing methods, but rather as a last resort. Additionally, offenders may feel ashamed when given a CBCO, while the general public may view it as a minor punishment, thus undermining the intended deterrent effect of punishment. These misconceptions and negative attitudes are counterproductive to the objectives of the Community Based Corrections Act.

Moreover, the attitudes of legal professionals towards CBCO make it difficult to dispel these misconceptions among the general public. Community corrections officers have also observed that attorneys-at-law rarely request CBCO, and the courts allocate minimal attention to these interventions, possibly due to time constraints. The year 2020 witnessed a surge in cases across all courts on the island, exacerbated by the COVID-19 pandemic, fuel crisis, and economic downturn, resulting in a backlog of work for the courts. Consequently, the courts have been unable to adhere to the provisions of the Act.

III. Lack of knowledge

The lack of knowledge among stakeholders regarding the CBCA and its associated CBCOs is a significant concern. Stakeholders, including legal professionals, community correction officers, and offenders, exhibit a limited understanding of the purpose and nature of CBCOs, which hampers the effective implementation of community-based corrections.

Legal professionals, who play a crucial role in the criminal justice system, often lack awareness of the CBCA and the specific provisions related to CBCOs. This lack of knowledge can result in inadequate legal representation for offenders and a failure to advocate for the appropriate use of CBCOs as a sentencing option. Without a comprehensive understanding of CBCOs, legal professionals may not effectively communicate the benefits and objectives of community-based corrections to their clients.

Community correction officers, who are responsible for supervising and monitoring offenders serving CBCOs, also face a knowledge gap. Many officers may not possess a thorough understanding of the CBCA and the specific requirements and expectations associated with CBCOs. This lack of knowledge can hinder their ability to effectively guide and support offenders in their rehabilitation process. It is essential for community correction officers to receive comprehensive training and education on the CBCA and CBCOs to fulfill their duties effectively.

Offenders themselves often have limited knowledge about CBCOs and their potential benefits. Many offenders view CBCOs as a humiliating experience and may prefer paying fines or facing imprisonment instead. In practice, not only offenders but also other stakeholders are labeled as "CBCOs" in legal proceedings and public settings, primarily to address labor shortages. This perception stems from a lack of understanding about the rehabilitative nature of CBCOs and their potential to address underlying issues such as economic, social, and familial challenges. Without proper knowledge, offenders may not fully engage in the rehabilitative measures provided by CBCOs, undermining the effectiveness of community-based corrections.

Addressing the lack of knowledge among stakeholders regarding CBCOs is crucial for the successful implementation of community-based corrections. Efforts should be made to provide comprehensive education and training programs for legal professionals, community correction officers, and offenders. These programs should focus on increasing awareness about the CBCA, the purpose of CBCOs, and the potential benefits of community-based corrections. By enhancing knowledge and understanding, stakeholders can better support the effective implementation of CBCOs and contribute to the overall success of community-based corrections.

IV. Criticism on the Department of Community Corrections

The Department of Community Corrections faces criticism for insufficient staffing levels and limited budget allocation, which directly impact the effectiveness of community corrections programs. The department often experiences a shortage of trained personnel, leading to heavy workloads for existing staff and making it challenging to provide individualized attention and support to offenders. This lack of personnel hampers

the department's ability to effectively monitor and address the needs of offenders, potentially compromising the success of rehabilitation programs.

In addition, the limited budget allocation restricts the department's capacity to develop and implement comprehensive rehabilitation programs, provide necessary resources, and offer adequate training for staff. Insufficient funding also hinders collaboration with community organizations and access to external support services, which are crucial for successful reintegration. The department's inability to meet the diverse needs of offenders and provide them with the necessary tools for rehabilitation is a direct consequence of the limited budget allocation.

Furthermore, the lack of resources and funding within the Department of Community Corrections affects the access to educational and vocational training for offenders. These programs play a vital role in equipping offenders with the skills and knowledge needed for successful reintegration into society. However, due to resource constraints or inadequate program development, many offenders do not have access to quality educational and vocational training opportunities. This limitation hampers their ability to find stable employment and contribute positively to their communities, increasing the likelihood of reoffending.

Moreover, the department often falls short in addressing the underlying issues that contribute to criminal behavior and promoting successful reintegration. Rehabilitation programs should not only focus on punishment but also address the root causes of criminal behavior, such as substance abuse, mental health issues, or lack of social support. However, the department may lack the necessary resources, expertise, or programmatic approaches to effectively address these underlying issues. This failure to provide comprehensive support and treatment impedes the successful reintegration of offenders into society and increases the risk of recidivism.

Amendments Needed to Enhance the Community Based Correction Act

In a recent investigation into the Community Based Correction Act No. 46 of 1999 in Sri Lanka, it has been revealed that the current legislation lacks a comprehensive procedure for effectively managing individuals who have been convicted under recently enacted legislation or who are subject to alternative terms and subsequently placed under community corrections instead of their original terms. This glaring procedural gap has become evident in cases where individuals ordered to pay compensation under sections 28(1) and (4) of the Assistance to Protection of Victims of Crime and Witness Act, No. 4 of 2015, are placed under community correction due to their inability to fulfill their financial obligations.

The existing Community Based Correction Act fails to provide clear guidance on how to address such circumstances, leaving the Community Based Correction Department responsible for handling these cases without a proper solution. This lack of guidance has resulted in a lack of active engagement from the department in finding a resolution.

Numerous accused who have been convicted of offenses have expressed their concerns regarding the current schedule of the Community Based Correction Act. Specifically, they have highlighted the provision that mandates a minimum of 50 hours (7 days) of unpaid community service, working 8 hours per day, as the penalty for offenders who fail to pay a fine of Rs.1000/-. This penalty system has proven to be ineffective, as offenders often choose to pay the fine, borrow money, or engage in further criminal activities to fulfill their financial obligations after being released from court. This issue is particularly prevalent among individuals with a history of reoffending, who view imprisonment as a more profitable alternative to paying a fine. Corrections officers recommend revising the schedule of the Act to address these concerns effectively.

From the authors' perspective, it is crucial to recognize that a CBCO is intended as a correctional method rather than a profit-making endeavor. In Sri Lanka, individuals given a CBCOs are required to undergo various correctional methods, including vocational training, counseling programs, religious activities, and medical treatment, among others. These comprehensive measures aim to improve the economic status of offenders and prevent them from engaging in criminal activities as a means of livelihood.

To address the procedural gaps and challenges faced in managing individuals convicted under recently enacted legislation or subject to alternative terms, amendments to the Community Based Correction Act No. 46 of 1999 are urgently needed. By revising the schedule of the Act to ensure a fair and proportionate penalty system, the effectiveness of CBCOs can be enhanced, promoting rehabilitation and reducing the likelihood of reoffending. It is imperative to recognize that community service orders encompass a range of correctional methods that contribute to the holistic development and economic improvement of offenders.

In light of these findings, it is recommended that the legislature takes immediate action to address the deficiencies in the Community Based Correction Act. This includes providing clear guidance on managing individuals placed under community corrections, actively engaging the Community Based Correction Department in finding solutions, and revising the penalty system to ensure a fair and effective approach to rehabilitation. By implementing these amendments, Sri Lanka can strengthen its community-based correctional system and foster positive change within the criminal justice system.

Confiscation: A Judicial Perspective Analysis

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Introduction

In Sri Lanka legal context of confiscation, there are many enactments which contain confiscatory provisions for the vehicles and other items which are connected in the commission of the offence or have been used in the commission of the offence. Mostly in criminal trials it has become a necessity part of the case and the intention of the legislature is to give effect to such provisions. Currently, the following enactments are embedded with the confiscatory provisions.

1. *Animal Act (Section -3A)*
2. *Forest Ordinance (Section -40)*
3. *Fauna and Flora Protection Ordinance (Section -64)*
4. *Explosive Act (Section -28)*
5. *Immigrants and Emigrants Act (Section -51)*
6. *Offensive Weapons Act (Section -14)*
7. *Poisons, Opium and Dangerous Drugs Ordinance (Section -79)*
8. *Agrarian Development Act (Section -33)*
9. *Coast Conversation and Coastal Resources Management Act (Section -28)*
10. *Excise Ordinance (Section -54)*
11. *Fisheries and Aquatic Resources Act (Section -51)*
12. *Tobacco Tax Act (Section -15)*
13. *Betting on Horse-Racing Ordinance (Section -12)*
14. *Mines and Minerals Act (Section 63b).*

Mode of Inquiry

At an inquiry the Registered Owner of the vehicle is called to give evidence as to why his vehicle should not be confiscated by the court. At this juncture I would like to express my views on the cardinal principle of every person shall be afforded with an opportunity to show cause his stance in terms of the accepted principle and recognized laws.

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In the case of **Manawadu vs. AG (1987)**[1], Chief Justice Sharvananda, observed as follows:

"*Upon Conviction of the guilty parties the property involved can be confiscated upon Inquiry*"

Dixson CJ in **Commissioner of Police vs. Tanes (1957-58)**[2] underlined this canon of interpretation:

"It is deep rooted principle of the law that before anyone can be punished or prejudiced in his person or property by any judicial or quasi – judicial procedure he must be afforded adequate opportunity of being heard"

In an inquiry as to why the vehicle alleged to be used in the commission of the Offence shall not be forfeited or confiscated by the Court of Law, the first or foremost obligation of the registered owner of the Vehicle is to establish the Ownership of the vehicle which subjected the Vehicle Inquiry. The following judicial precedents reiterate the importance of the aforementioned necessity.

In the case of **Imiya Mudiyanselage Aruna Chandan vs. OIC Giriulla** [3], Justice Iddawala held that:

"*The legislature has unequivocally cast a burden on a claimant of a vehicle Inquiry under the forest ordinance to dispense the burden of proving to the satisfaction of the court that he having ownership of the vehicle concerned, had taken all precautions to prevent the use of such vehicle for the commission of the offence*"

In the case of **Orient Financial services Corporation Ltd vs. RFO, Ampara (2013)**[4], Justice Priyasath Dep has iterated that:

"When it comes to showing cause as to why the vehicle should not be confiscated, only the person who was in possession and control of the vehicle could give evidence to the effect that the offence was committed without his knowledge and he had taken necessary steps to prevent the commission of the offence"

I am also mindful of the passage by His Lordship Justice Neil Iddawela in the judgement of **Rajapaksha Dewage Asanga kumara Chandrasena vs. OIC, Katugastota**[5], where it was held that:

"From the evidence given by the appellant, it is unclear whether the appellant was in actual possession and control of the vehicle to regard him as the owner under the section 40 of the Forest ordinance".

1 2 SLR 30
2 68 CLR 383
3 CA (PHC) 24/2017 dated 03.03.2022
4 1 SLR 208
5 CA (PHC) 111/2018 dated 01.11.2022

It is settled law that the mode of proof in an inquiry of this nature is in the balance of probability. Hence, the registered owner of the vehicle has to satisfy the court that he has taken due precautions that needs to be considered in favor of the vehicle owner in a case of this nature.

Interpreting the term, the 'Balance of Probability' Lord Denning in the case of **Miller Vs Minister of Pensions (1947)**[6] observed that:

"If the evidence is such the tribunal can say we think it more probable than not the burden is discharged"

In the case of **Ceylinco Leasing Corporation Ltd Vs Harison**[7], it was held that:

"The vehicle cannot be confiscated if the owner establishes on a balance of probability that he has taken all precautions to prevent the use of the vehicle for the commission of the offence and the vehicle has been used for the commission of the offence without his knowledge."

Forest Ordinance as amended

At this juncture, it is imperative to draw attention to Legal Provisions and the judicial precedents as to the evaluation and analysis of the evidence adduced by a registered owner as to why his vehicle shall not be confiscated at the inquiry conducted under section 40(1) of the Forest ordinance as amended.

As such, the legislature has unequivocally cast a burden on a claimant of a vehicle inquiry under the Forest Ordinance to dispense the burden of proving to the satisfaction of the Court that he, having ownership of the vehicle concerned, had taken all precautions to prevent the use of such vehicle for the commission of the offence. It must be noted that the requirement of proving that all precautionary measures have been taken by such third party making a claim against a confiscation, is unique to the Forest ordinance in comparison with other legislations with similar provisions. He must prove that he took all precautions to prevent the use of such vehicle for the commission of the forest offence. The legislature intent of imposing such a stringent threshold in section 40 of the Forest ordinance as amended in 2009 is to converse the forest cover and preserve the green nature of Sri Lanka. ***(Dewapurage Kamal deshapriya Vs OIC, Pannala)***[8], In the case of ***Vidanage Nalaka Sandun Kumara Vs OIC, Kamburupitiya***[9], *and Justice Neil Iddawela* observed that:

"The petitioner only pleads his ignorance of such use of his vehicle by the accused. However, this does not suffice to satisfy the Court of the high standard of care expected from an owner that all precautions have been taken to avert the very incident that has transpired"

6 2 AER 372
7 CA (PHC) APN 45/2011
8 CA (PHC) 139/2015 dated 20.09.2022
9 CA (PHC) 09/2021 dated 01.10.2022

In the case of **Abubakarge Jaleel vs. OIC, Anti-Vice, Anuradhapura**[10]**,** Justice Salam *held that:*

"I do not think that he can practically do many things than to give specific instructions. The owner of the lorry cannot be seated all time in the lorry to closely supervise for what purpose the lorry is used"

"It has to be borne in mind that an order of confiscation of property whether movable or immovable leads to deprivation of property rights of a citizen. In as much as the court has to approach the issue relating to the liberty of the subject by giving a strict interpretation of the law and the same approach has to be aimed at resolving the issues relating to the legality of the confiscation orders as well…"

In the case of **N. Saman kumara and another vs. Attorney General**[11]**,** Justice K.T. Chitrasiri held that**:**

"It is the burden of the owner of the vehicle which was used to commit an offence under Forest Ordinance to establish that he had taken precautionary measures to prevent the use of the said vehicle for the commission of the offence"

Further held;

"Mere verbal instructions given to the driver as to the manner in which the vehicle is to be used is not sufficient to establish that the owner has taken the necessary precautions to prevent the offence being committed as required in the proviso to Section 40 of the Forest Ordinance"

At this juncture, I would like to express my views on the crux intention of the legislature to preserve the forest resource in Sri Lanka. This intention was emphasized by the judicial precedents in the long line of Judicial Authorities. For matter of clarity, I reproduce some of them below;

In the case of **Dewapurage Kamal Deshapriya vs. OIC, Pannala**[12], Justice Iddawala observed that;

"As such, the legislature has unequivocally cast a burden on a claimant of a vehicle inquiry under the Forest Ordinance to dispense the burden of proving to the satisfaction of the Court that he having ownership of the vehicle concerned had taken all precautions to prevent the use of such vehicle for the commission of the offence. It must be noted that the requirement of proving that all precautionary measures have been taken by such third party making a claim against a confiscation, ***is unique to the Forest Ordinance in comparison with other legislations with similar provisions****.…He must prove that he took all precautions*

10 CA (PHC) 108/2010 dated 26.08.2014
11 CA (PHC) 157/2012 dated 19.10.2015
12 CA (PHC) 139/2015 dated 20.09.2022

to prevent the use of such vehicle for the commission of the forest offence. The legislature intent of imposing such a stringent threshold in Section 40 of the Forest ordinance as amended in 2009, is to conserve the forest cover and preserve the green nature of Sri Lanka"

Also I am reminded by the wording of the following judicial precedents as to determine the burden cast on a claimant in a show cause inquiry under Forest Ordinance.

In the case of **S.D.N. Premasiri vs. OIC, Mawathagama**[13], it was held that;

"It is imperative to prove to the satisfaction of Court that the vehicle owner in question has not only given instructions but also has taken every possible step to implement them."

In the case of **Cader Bawa Jennathul Farida vs. Range Forest officer and others**[14], it was held that;

"It is trite law that mere giving instruction is not sufficient to discharge the burden cast on a vehicle owner under the Forest Ordinance."

I am also reminded of the recent judgments as to the confiscation of vehicle under the Forest ordinance which reiterates the burden on the owner to dispense the obligation on him. I reproduce the passages of the judicial guidance in this regard.

In the case of **Kukulage Upul Shantha Samarakoon vs. OIC, Weligepola**[15], it was held that:

*"The appellant as the documented registered owner averred that he neither had any knowledge of the diversion of the vehicle nor of the offence committed which does not suffice to dispense the burden cast on him by the Act to establish to the satisfaction of the court that he had taken……. Accordingly, the legislation on forest conservation has cast an indispensable burden on the third party to an offence coming within the purview of Section 40 of the Ordi*nance to dispense the burden of proving to the satisfaction of the court that he / she as the owner of the vehicle in dispute has taken necessary precautionary measures to preclude the vehicle from being employed in acts of crime."

As per the precedent set by the vast body of case law, the crux of the matter in such cases revolves upon whether or not the owner of a vehicle successfully satisfies the Court that he/she has taken all necessary precautions to prevent the misuse of their vehicle on a balance of probability favorable to them.

At this juncture I draw my judicial mind to the most recent judgment in the case of **Bolandahewa Disna Priyanthie vs. Attorney General** [16], Justice Neil Iddawela observed that:

13 CA (PHC) 46/2015 dated 27.11.2018
14 CA (PHC) 94/2017 dated 05.07.2019
15 CA (PHC) 231/2018 dated 11.10.2022
16 CA (PHC) 76/2018 dated 15.12.2022

"Therefore, it is evident through the above law that the most imperative burden cast upon a Vehicle Owner, who is a third party to a Forest Offence under the Act, is to show cause as to why the vehicle should not be confiscated by ensuring that s/he has taken all necessary precautions to the prevent the vehicle from being engaged in offences. Thus, the appellant's contention that she did not have knowledge of the offence being committed is immaterial as the said burden is properly dispensed, only when it is established that the necessary precautionary measures have been taken by the vehicle owner, regardless of the knowledge of the said offence."

This position is clearly analyzed in a recent case before the Court of Appeal, **Rajapakse Dewage Asanga Kumara Chandrasena vs. OIC,Police Station, Katugastota and others**[17], where it was held that;

"It is plainly clear in law that a claimant of a vehicle inquiry under the Forest ordinance has to prove to the satisfaction of the Court that s/he, having ownership of the vehicle concerned, had taken all precautions to prevent the use of such vehicle for the commission of the offence. By the amendment to the Forest ordinance in 2009 by Act No. 65 of 2009, the legislature has determined that having no knowledge of the offence being committed is a not good enough a reason anymore to claim a confiscated vehicle [….] The judiciary has to only discern whether the claimant being the owner of the vehicle, had taken all precautions to prevent the use of the vehicle for the commission of the offence. This entails positive actions on the part of the owner and not claiming mere ignorance. (Emphasis added)"

This case very clearly highlights that not possessing knowledge of the vehicle being used for illegal activities does not constitute a ground to disallow the confiscation of a vehicle. The burden cast upon a vehicle owner requires the owner to have taken necessary precautionary measures, to the satisfaction of the court, to prevent the employment of one's vehicle in acts of crime. Therefore, the contention of not possessing knowledge has no bearing in dispensing the said burden as positive actions on the part of the vehicle owner are necessitated (Vide 76/2017).

At this juncture I would like to draw my mind to a recent judgment in the case of **Kaludewa Padmini de Silva Vs OIC, Anti-Vice Unit, Head Quarters Police, Avissawella**[18], Justice Neil Iddawala held that:

"Accordingly, the Act has cast an indispensable burden on the third party to an offence coming within the purview of Section 40 of the Forest ordinance to dispense the burden of proving to the satisfaction of the court that ***he/she, as the owner of the vehicle in dispute, has taken all necessary precautionary measures to preclude the vehicle from being used in acts of crime. Therefore, this court will primarily look into the contention whether***

17 CA (PHC) 111/2018 dated 01.11.2022

18 CA (PHC) 144/2017 dated 28.03.2023

the learned magistrate has correctly applied the relevant legal provisions and evaluated the evidence presented before the court, in arriving at the final determination that the appellant has failed to dispense the said burden*"*

Further held that:

"It is apparent that in the present case even if the appellant had no knowledge of the use of her vehicle to commit the offence, she should be successful in establishing on a balance of probability that she had taken all possible precautions to prevent the act of crime. Yet it is clearly evident through the examined evidence that the appellant has not been able to successfully establish on a balance of probability that she took the necessary measures of precautions to prevent the said offence."

It timely needs to address the pure intention of the legislature with regard of purpose of an inquiry held under the provisions of the Forest ordinance as amended. As per the strict provisions of the Forest ordinance, every registered owner shall come up with the defense of acceptable and reasonable precautions purported be taken up by them for the vehicles not being used in any offence under said Act. The intention of the legislature will fail, if a registered owner is allowed to give evidence to the effect that they have instructed the Accused not to use the vehicle for the offences under Forest Ordinance as every registered Owner of a vehicle is guided by their counsel as to how they should give evidence in the inquiry as to why the alleged vehicle shall not be confiscated. And, it is very easy for them to come up with the defense of mere instructions which are alleged to be given to the perpetrators of the offences.

Animal Act as amended

At this juncture, it is imperative to draw attention to Legal Provisions and the judicial precedents as to the evaluation and analysis of the evidence adduced by a registered owner as to why his vehicle/ Animal shall not be confiscated at the inquiry conducted under section 3A and 3AA(3) (b) respectively as amended.

In the case of **Faris vs. OIC, Galenbindunuwewa and Another (1992)**[19], it was held that;

"*In terms of the proviso to section 3A of the Animal Act, an order to confiscate cannot be made if the owner establish one two matters. They are, (1) that he has taken all precautions to prevent the use of the vehicle for the commission of the offence. (2) That the vehicle had been used for the commission of the offence without his knowledge. If the owner of the lorry establishes any one of these matters on a balance of probability, an order for confiscation should not be made.*"

19 1 SLR 168

In the case of **Gamagedera Mudiyanselage Dickson Keerthisinghe vs. Forest Officer, Kebithigollewa[20],** Justice K.T.Chitrasiri held that:

"….Registered owners at all material times had been working abroad. Hence, it is clear that the owners of the vehicle had no physical control of the vehicle for them to take precautionary measures"

It is pertinent to note that the cattle owner though he was testified had failed to establish his ownership to the alleged cattle. At this juncture I would like to reproduce the legal provisions as to how an owner of cattle should establish his/her ownership to alleged cattle in question.

Section 06 of the Animal Act as amended reads as follows:

Every person who has any cattle belonging to him shall furnish, not later than the thirty-first day of January in each year, to the Government Veterinary Surgeon of the area in which such cattle are kept, a return, in such form as may be prescribed, of the description of , and the brand marks on, each head of such cattle.

Section 07 of the Animal Act as amended reads as follows:

Every Government Veterinary Surgeon shall-

(a). maintain, in such form as may be prescribed , a register of the description of, and the brand marks on, cattle within his area; and

(b). issue, or cause to be issued, to the owner of cattle branded in accordance with such regulations as may be in force under this Act relating to the branding of cattle **a voucher in the prescribed form in respect of each head of such cattle**.

Section 08 of the Animal Act as amended reads as follows:

(1). A voucher issued in respect of a head of cattle under the regulations in force under Cattle Ordinance shall, unless the brand marks specified in that voucher as those on that head of cattle have become indistinct, be deemed to be in force as if it were a voucher issued under section 7.

(2). Where in any legal proceedings any question arises as to the ownership of any animal, the voucher issued or deemed to be issued under section 7 shall be admissible in evidence and shall be sufficient prima facie evidence of any fact stated therein as to the ownership of that animal.

The plain reading of the section 06 of the Animal Act as amended is crystal clear that every person who has any cattle belonging to him shall furnish not later than the thirty-first day of January in each year, to the Government Veterinary Surgeon of the

20 50/2013 – 29.01.2015

area in which such cattle are kept, a return, in such form as may be prescribed, of the description of, and the brand marks on, each head of such cattle.

Then Section 07(b) stipulates that Every Government Veterinary Surgeon shall issue, or cause to be issued, to the owner of cattle branded in accordance with such regulations as may be in force under this Act relating to the branding of cattle **a voucher in the prescribed form in respect of each head of such cattle**.

Thus, the intention of the legislature is very clear that if someone has cattle, the person belongs such cattle shall furnish the details of each cattle and shall get registered such cattle and shall get a specific voucher from the Veterinary Surgeon of the area. It is the legal duty of each cattle owner and the legal mode of establishing the ownership of the cattle belong by him/her.

I am also reminded by the judicial precedent in this regard by the recent judgment in the case of **Arabage Chandrani vs. OIC; Lunugamwehera**[21]**,** Justice. Menaka Wijesundara held that:

"*The law relating to the instance matter falls within the Animal Act No 29 of 1958 and it has specifically stated as to how a cattle owner should prepare the cattle voucher in terms of the Animal Act to be read with the Gazette Notification dated 26.11.2009 which has said that* ***'any cattle sold, the buyer and the owner of the cattle shall sign the cattle voucher before the Government Veterinary Surgeon of the area in which the cattle is kept and the Government Veterinary Surgeon shall handover the perfected cattle voucher to the buyer or the new owner of the cattle'****. But the document marked as E1 submitted by the petitioner at the inquiry is not in compliance of the said regulation. Therefore the magistrate had disregarded her evidence and has confiscated the cattle.*"

Further held that

"This matter has been discussed in the case of CA (PHC) APN 22/2018 dated 08.03.2022 by this bench where it had discussed that the cattle Voucher which should be in the possession of a person who claims ownership to cattle under the provisions of the Animals Act, Section 3(d),6,6,8(2)….. Therefore as the petitioner has failed to produce the relevant documents in compliance of the act, learned High Court Judge has observed that there is no exceptional illegality in the order of the Magistrate."

It warrants mentioning that Her Ladyship Justice Menaka Wijesundara has pointed out the legal provision as to how a person shall establish his/her ownership of the cattle and if someone fails to do so, will lead the confiscation of such cattle on the footing of the absence of proving the ownership of cattle.

21 168/2018 – 01.11.2022

Fauna and Flora Protection Ordinance as amended

At this juncture, it is imperative to draw attention to Legal Provisions and the judicial precedents as to the evaluation and analysis of the evidence adduced by a registered owner as to why his vehicle shall not be confiscated at the inquiry conducted under section 64(1) of the Fauna and Flora Protection ordinance as amended.

Section 64(1) of the Fauna and Flora Protection ordinance as amended stipulates confiscation of vehicles connected with forest offence as follows:

"Except as hereinafter expressly provided in regard to the disposal of any elephant or the carcass of any elephant or the tusks or tushes of any elephant, o for an offence under this ordinance, any animal, plant or part of such animal or plant which is the property of the State under this ordinance and any gun, vehicle, boat, artificial light, snare, net, trap or any other instrument. contrivance, appliance or thing used in or for the commission of any offence, shall by reason of that conviction, in addition to any punishment specified for such offence, be forfeited to the State:

Provided however, where the owner of such gun, vehicle, boat, artificial light, snare, net, trap or other instrument, contrivance, appliance or thing used in or for the commission of any offence is a third party, ***no forfeiture shall be made if such owner proves to the satisfaction of the court that he had used all due diligence to prevent the use*** *of such gun, vehicle, boat, artificial light, snare, net, trap or other instrument, contrivance, appliance or thing used in or for the commission of any offence."*

Accordingly the above provision casts the burden upon the owner of a vehicle to prove to the satisfaction of the court, on a balance of probability, that he has exercised 'due diligence' in order to ensure that the said vehicle would not be employed for any activities contravening the law. There is no objectively- determined threshold to reach in exercising due diligence as it would be decided through judicial discretion according to the circumstances of each individual case.

The legal term ***"due diligence"*** has not been predefined in the Ordinance itself, however by looking into the objectives of the legislation specially the preamble, it is evident that the caters towards the conservation of the biodiversity of Sri Lanka by imposing laws to prevent any hindrance caused to the Fauna and Flora of Sri Lanka, while protecting the rights of the people connected to incidents therein. Thus, as per section 64(1) of the Act, the law delivers the opportunity to an owner of a vehicle which was employed in committing such offences to prove to the satisfaction of the court, that due diligence has been exercised by him/her to prevent the commission of such offences. This law is aligned with the principle of natural justice where every person has a natural right to his property and thus must be heard before having their property forfeited.

The House of Lords in **re Hamilton on 1981 AC 1038** has stressed that:

"one of the principle of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he or someone acting on behalf may make such representations if any, as he seems fit. This is the rule of ***audi alteram partem*** *which applies to all judicial proceedings…"*

Thus, it is evident that above ordinance while preserving the Fauna and Flora of Sri Lanka, has also delivered importance to an individual's rights over his/ her property. As such, Section 64(1) allows an owner of a vehicle to make his/her case and show cause as to why such vehicle should not be forfeited.

In the case of **Chandrani Wijerama vs. RFO, Bellenwila[22],** Justice Iddawela observed thus:

"Accordingly the appellant has submitted evidence to court during the inquiry. However, she has merely narrated the events preceding the commission of the said offence, without attempting to convincingly establish the measures she had taken as a responsible owner. The appellant has averred that she asked the accused not to engage the vehicle in illegal activities as it provides for her only source of income… The discrepancies and inconsistencies in the evidence of the appellant and her failure to prevent the commission of such an offence for a second time, prove that she has not acted with due diligence to prevent the use of the vehicle to commit an offence."

The Black's Law Dictionary expounds due diligence as "The diligence reasonably expected from, and ordinary exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation". As such, the requisite of due diligence on the part of an owner of a vehicle, necessitates the owner to take measures an ordinary, reasonable person to discharge the obligation of ensuring that her vehicle is not employed in any illegal activities, which she has failed to do for the second time….. All such similar legal provisions have cast the burden upon the owner of a vehicle to prove on a balance of probability that precautionary measures were taken to prevent the commission of offences. However, the Fauna and Flora Protection Act goes beyond and cast a burden on the owner to establish on a balance of probability that diligence has been duly exercised in order to prevent such offences… Hence, merely instructing the accused does not satisfy this court that due diligence on the part of the appellant as a responsible owner of a vehicle has been met".

Mines and Minerals Act as amended.

At this juncture, it is imperative to draw attention to Legal Provisions and the judicial precedents as to the evaluation and analysis of the evidence adduced by a registered

22 111/2022 dated 15.11.2012

owner as to why his vehicle shall not be confiscated at the inquiry conducted under section 63B (1) of the Mines and Minerals Act as amended.

It warrants referring the passage by His Lordship Justice Priyantha Jayawardena PC in the case of **Hetti Achchige Anton Sujeewa Perera vs. Attorney General [23],** which reads as follows;

"In interpreting a provision of law it is necessary not only look at the words of the section on the face of the provision but also to consider the real meaning of it. Further, the legal meaning shall prevail over a mere literal meaning on the face of a word or a phrase in an Act. Particularly the real meaning of a word should be considered when the meaning on the face of a word does not lead to achieving the object of the Act or leads to absurdity over the real intended meaning by enacting the legislation.

Furthermore as stated above, section 63B (1) has conferred power on the Learned Magistrate to forfeit to the State any mineral, machinery equipment or material used in or connection with the commission of an offence under the Act. Moreover, as the transportation of minerals without a valid license issued under the Act is an offence under said Act, the equipment used to transport minerals falls within the scope of section 63B (1). In this regard, it is pertinent to note that any mineral, machinery equipment or material used not only directly for exploration of mining but also anything that would be facilitate mining and transportation are subject to the scope of the said section.

Thus having considered the aforesaid dictionary meaning and the context where the word ***equipment*** *is used in the Mines and Minerals Act, I am of the opinion that the word* equipment *used in the Act should be taken to include a* ***Vehicle*** *(Lorry, Tipper or even a bullock cart) used to transport minerals without a valid license issued under the said Act Further, the judgment delivered in* ***Nishantha and 03 others Vs State (supra)*** *has not considered section 63B (1) of the said Act as amended in the above context. Furthermore, in the said judgment the aforementioned amendments to the principle Act were not considered in the context of section 26, 28(10,63(1),63A and 63B of the Act and in the light of the object of enacting the Principle Act. as a result, the said interpretation defeats the object of the said amendments made to the principle Act. Moreover, I am of the opinion that the interpretation given to the word* ***equipment*** *in the said judgment is repugnant to Article 27(14) of the Constitution. Thus, I am of the view that the said judgment is per in curium though it was cited by the appellants."*

As such, the legislature has unequivocally cast a burden on a claimant of a vehicle inquiry under the Mines and Minerals Act as amended to dispense the burden of proving to the satisfaction of the Court that he, having ownership of the vehicle concerned, had taken all precautions to prevent the use of such vehicle for the commission of the offence.

23 SC Appeal 101/2012 05.07.2022

Recent Development of the Law

It shall be noted that the apex courts very recently have determined as to the legal obligation of a third party owner where his vehicle which being used in the commission of an offence is subjected to the inquiry under respective statutes. It is appropriate to refer to the sentiments and observations made by His Lordship Justice. Sampath B. Abayakoon in the case of **Santhan Silvester Vs Range Forest Officer (RFO), Mannar[24].**

"It is the view of this court that once an accused person is found guilty for a forest offence, it was up to the person who claims ownership of a vehicle used in the commission of the offence to come before the court and establish that he has taken necessary precautions to prevent the offence being committed which includes establishing that he had no knowledge of the offence being committed.

…. Once such vehicle being produced before a Magistrate's Court on the basis that such vehicle or vehicles were used in the commissioning of the offence, and once the accused is convicted, it should not be the prerogative of the Learned Magistrate to go after the owner seeking him to establish his claim as had happened in this case.

I find that there was no necessity for ***the learned Magistrate of Mannar to issue notice to the petitioner when he failed to appear before the Court without a valid reason or even to issue a warrant against him. If the petitioner fails to appear before the Court and establish his claim. It means that he has failed to establish the requirements of the proviso of section 40(1) of the Forest Ordinance."***

And also, it is imperative to note that the Supreme Court has very recently interpreted the Poison, Opium and Dangerous Drugs Ordinance as amended to the extent that like other statutes such as Forest ordinance and Animal Act which contains requirements to be fulfilled by the third party owner at an inquiry to show cause why his vehicle shall not be confiscated to the state, the owner of the vehicle should come up with the same defence at the inquiry held under Poison, Opium and Dangerous Drugs Ordinance as amended. It is a good approach and development of the laws pertaining to the confiscation. It is appropriate to refer to the dictums observed by His Lordship Justice K. Priyantha Fernando in the case of **W.M. Piyal Senadheera Vs Attorney General.[25]**

"Therefore, it is my position that, it is appropriate to interpret the Poisons, Opium and Dangerous Drugs Act in a similar light so as to include the proviso set out in section 40 of the Forest Ordinance and section 3A of the Animal Act.

Further, where one relies on the position that A third party owner of vehicle must be treated differently and that there should be no automatic confiscation and that a hearing should

24 CA 116/2023 – 20.02.2024

25 SC 249/2017 – 20.02.2024

be accorded to such a person as set out under the Forest Ordinance and the Animal Act, the proviso in its entirety should be considered. One cannot simply request that the proviso should be applied to the extent where it is beneficial to them. The proviso is conditional on the word "if". The benefit of the proviso could only be attained if the owner of 5the vehicle proves to the satisfaction of the Court that He has taken all precautions to prevent the use of the vehicle in question or that the vehicle has been used without his knowledge."

Conclusion

It is practically uneasy to discuss all the provisions under each and every enactment which spells out specific provisions relating to the confiscation of vehicles and others. However, I was able to address some of the key enactments which are often entertained by the court of first instance. In assessing the confiscatory provisions embedded in the aforementioned enactments, the pure intention of the legislature to maintain some standards of defense in specific enactments such as Forest ordinance as amended. Hence, where the inquiry is held in this regard, the courts shall give effective meanings to the intention of the legislature. If the courts fail in achieving the expected standard of inquiry, the intention of the legislature which exercises the sovereignty of the people of this country will defeat.

PROTECTION OF RIGHTS OF A REGISTERED TRADE MARKS OWNER BY CRIMINAL PROSECUTIONS; AN OVERVIEW OF EXISTING LEGAL FRAMEWORK OF SRI LANKA

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INTRODUCTION

The creativity and the innovativeness of the human mind has helped the man to conquer the challenges paused by the nature and other circumstances. With the Industrial Revolution and mass scale productions the necessity arose to educate the consumer as to who was manufacturing what and to protect the actual thinkers or creators from being deprived by third parties. This resulted in introducing the Law relating to Intellectual Property. Intellectual property (IP), including creative works protected by copyright, brand identification protected by trademark, and novel inventions protected by patents and trade secret law, encompasses a vital component of the economy of a country. As one court observed, "The future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property." [1]

Sri Lanka became a member of WTO[2] on 1st January 1995 and a member of GATT on 29thJuly 1948. Consequently the need arose to amend Sri Lankan Intellectual Property Law to tally with the international instruments and especially to include provision in the TRIPS Agreement[3]. Accordingly, the Intellectual Property Act. No. 36 of 2003 was brought into force. Provisions for both civil and criminal enforcement of Trade Mark Rights were introduced by the Act. Nevertheless the number of cases resorted to criminal prosecutions is considerably low as oppose to civil litigation. This study focuses on the necessity and importance of prevailing legal provisions regarding criminal prosecutions under the Intellectual Property Law with regard to the protections of rights of Trade Mark owners and how it can be improved in order to make criminal prosecutions more desirable.

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1 Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 180 (7th Cir.1991)

2 World Trade Organisation

3 The Agreement on Trade Related Aspects of Intellectual Property (1883) and the Berne Convention for the protection of Literary and Artistic Works.

CRIMINAL ENFORCEMENT AGAINST TRADEMARK

Criminal Law in Sri Lanka is completely statutory which consists of Penal Code Offences and offences created through other statutes and Gazette Notifications. A crime is considered as an act or an omission committed in violation of law forbidding or commanding it. Upon conviction of such crime the offender is punished with either, death, imprisonment or fine or a combination of it. Further, Sri Lankan Criminal justice system recognizes the Latin maxim *"Actus non facit rium nisi mens sit rea"*. The meaning of this maxim is that nothing is an offence which is done without a criminal intent. Hence, generally an offence would consist of two elements, namely the physical element and the mental element which are commonly referred to as *actus reus* and *mens rea* respectively.

Offences committed under the Intellectual Property Act falls under the category of statutory offences. According to the Act, offences related to trademarks and trade descriptions can be categorized in to two categories as follows.

1. General Offences.
2. Offences Related to Trade Marks and Trade Descriptions.

The forum identified by the Act for criminal sanctions is the magistrate's court and the provisions of Code of Criminal Procedure and Evidence Ordinance are also applicable herewith. The Act identifies separate offences for each and every field of Intellectual Property. The offences relating to Trademarks, recognized under the Intellectual Property Act can be listed as follows.

1. Willful infringement of a mark.
2. False Representations regarding marks.
3. Other offences as to marks and trade descriptions.

Section 184 creates the offence of willful infringement of a trademark. The elements of this offence can be stated as follows.

1. An infringement must have been taken place with regard to the rights of any registered owner, assignee or licensee.
2. Such infringement should have been committed by the infringer willfully.

Section 150 of the Code of Intellectual Property[4] is identical to section 121 of the Intellectual Property Act and the elements of the offense of willful infringement of trademarks mentioned in section 150 are the two elements mentioned above. The above two elements have been recognized in the case of *Leelananda Vs Earnest De Silva*[5] and were recognized as the elements to constitute the offence under section 150 and held that

4 The code of Intellectual Property Act, No. 52 of 1977 was repealed by Intellectual Property Act No. 36 of 2003

5 1990 2 SLR 237

element no 1 above constitutes the *actus reus* while the second element constitutes the *mens rea* of the offence. These two elements were recognized again in the case of *James Fernando vs. OIC SCIB Negombo*[6] . In the recent case of *Sumanaratne vs. Rupatunga*[7] it was held that all what the prosecution has to prove in trademark violation case is only the registration of the mark and the infringement of the rights and use of the mark does not have to be established.

The rights of a registered trademark owner are set out in section 121 of the Act. Once the registration of a Mark is assigned to a party by the owner of a mark under section 123 of the Act, such assignee can entertain all the rights granted to the registered owner of the mark under section 121. The rights of a Licensee of a Mark have been set out in section 126 of the Act. Accordingly, the physical element of this offence is to infringe any of the rights set out in sections 121 and 126 of the Intellectual Property Act.

The mental element of this offence is that the infringement should have been done willfully by the infringer. Even though, both Intellectual Property Act and the Penal Code do not define the word "willfully", with the aid of the definitions given in legal dictionaries[8] it can be stated if the infringement is done voluntarily, knowingly and deliberately, with the knowledge that the offender is infringing the rights of a registered owner and that he actually intended to encroach upon the rights of the rightful owner, such an act amounts to a willful infringement.

It is noted that the knowledge theory introduced by John Locke can be made use to understand what is meant by having a knowledge regarding the infringement. John Locke's argument is that when a child is born its mind is empty and black as a slate. Then it gradually fill its brain with ideas as it experience the world through the five senses. These ideas become knowledge of the person. Accordingly, when a person has perceived and has experienced that the trademark in question is being used by another person or an entity, it can be construed that he has the knowledge of the trademark owned by another. But if he still proceeds to use the mark without the consent or leave of the mark owner, it amounts to a willful breach of the rights of a trademark owner.

Section 185 of the Act identifies three occasions where offences committed by making false representations in respect of registration of marks. In the first instance an offence is committed once a person presents a mark as a registered mark when the mark is actually not registered. The second offence can be described by the following example. There is a person who has registered a certain mark for soft drinks only under the respective class. If he makes a representation to the effect that above registered mark

6 1994 3 SLR 35

7 2006 3 SLR 368

8 Black's Law Dictionary

has been registered for some other class too then he has committed an offence under Section 185 (1) (b) of the Act.

According to section 122 of the Act, there are certain limitations with regard to the rights of a registered owner of a mark. Thus the registration of a mark does not authorize the owner to preclude third parties from using their bona fide names, addresses, pseudonyms, a geographical name, or exact indications concerning the kind, quality, quantity, destination, value, place of origin or type of production or supply of their goods and services. Such use should be confined to the purposes of mere identification or information and cannot mislead the public as to the source of the goods or services[9]. Section 122 (b) is applicable for goods that are lawfully manufactured, imported, offered for sale, sold, used or stocked in Sri Lanka under a particular mark either by the owner of the mark or his licensee, provided that the goods have not undergone any change. Thus this section recognizes the principle of exhaustion of intellectual property rights in Sri Lanka. Accordingly, if a registered owner makes representations to the effect that he has obtained exclusive rights with regard to the mark and does not honor the limitations stipulated under section 122, then such registered owner commits an offence under section 185 (1) (c) of the Intellectual property Act.

According to the section this representation should have been made for industrial or commercial purposes and such purpose also has to be established by the prosecution. Accordingly, even where there is clear evidence that the violator had intentions of misusing a trade mark, the prosecutor still will have to establish the fact that the violator had made the representation for an industrial or a commercial purpose.

The mental element of these offences is not specifically recognized by the Act. Hence, the prosecutor only has to establish the commission of the physical act. But, as decided in the case *Perera Vs Munaweera*[10], the accused can come out with a defense based on *mens rea*. Section 185 (2) provides as to how the representation with regard to the registration of a mark can be made.

Section 186 (1) (a) creates the offence of forgery of a trademark. The meaning of the word forgery has not been defined in the Intellectual Property Act, No 36 of 2003. Thus consideration has to be made to the definition given in the Penal Code which reads as follows;

"Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to the Government, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud, or that fraud may be committed, commits forgery."

9 Section 122 (a)

10 56 NLR 433

Furthermore section 190 of the Act identifies two instances where the offence forgery of a mark is committed. Accordingly, any person who makes the same mark or a mark so resemble a mark which is likely to mislead, without the assent of the owner of the mark commits an offence. The second category is if a person falsifies any genuine mark by alteration, addition, effacement or otherwise commits the offence of forgery of a trademark. In order to establish the offences under sections 186 (1) (a) and 190 three main elements have to be proved by the prosecution. They are the existence of a valid mark, act of forgery of the above mark and that the act has been per se committed by the accused. The special feature of this offence is that when an accused is charged with this offense the accused can take up the defense of having ascent of the owner but it has to be proved by the accused.

According to section 186 (1) (b), false application of a mark has been recognized as an offense and three elements have to be proved under this offense, namely that the trademark has to be a registered mark, the accused should have applied a mark nearly resembling the existing mark in a manner that is likely to mislead the public and the act should have been committed by the accused falsely. According to the provisions of section 186 (1) (c) a person who makes any die, seal block, machine or other instrument for the purpose of forging, or to be used for forging commits an offense. Disposing or having in possession any die, seal block, machine or other instrument for the purpose of forging a trademark is an offense and this offence is created by section 186 (1) (e). Section 193 of the Act identifies a defense to an accused charged under section 186 (1)(c). According to section 186 (1) (f) of the Act, any person who causes to commit the offences mention above also commits an offence.

Section 192 (4) creates the offence of falsely applying marks. This offence is committed when a mark is falsely applied to goods or a mark which nearly resembles the registered mark so as to be likely to be misled is applied to goods. With regard to the offence falsely applying marks and trade descriptions, provisions set out in section 189 are also relevant.

According to the context of the section 189 it can be construed that act of mere possession of the instruments referred to above constitute an offence under this section. Once the prosecution establishes the basic facts the accused has to prove that he did not have the intention to defraud.

Offences related to false application of trademarks are set out in section 186 (2). In terms of section 186 (2) of the Act, any person who sells or exposes for sale or has in possession for sale or any purpose of trade or manufacture any goods or things to which any forged mark or false trade description is applied commits an offence. Further, an offence is committed where a mark so nearly resembling a registered Mark so as to

be likely to mislead the public is falsely applied. It is important to note here that counterfeiting prosecutions are conducted under this section.

Punishment for the offences mentioned above are a fine not exceeding Rupees Five Hundred Thousand or imprisonment for a term not exceeding two years or both such fine and imprisonment. The special feature of this Act is that it identifies punishment for repeating the offences. Accordingly, in the cause of second or subsequent conviction, the above fine or term of imprisonment or both may be doubled. This can be considered as a positive feature of the Act since it amounts to control or prevent repeating the same offence.

There are important rules laid down with regard to evidence as well. As per the provisions of section 195, an accused or his or her spouse can be called as witness and examined, cross examined and re-examined. Further, with regard to imported goods, the evidence of port of shipment shall be considered prima facie evidence of the place or country in which the goods were made or produced.

As per section 201 of the Act all the offences created by Intellectual Property Act are cognizable and bailable offences. But no specific provisions with regard to bail are found in the Act, accordingly the provisions of Bail Act of 1997 has to be made use of.

The Act imposes limitation on criminal prosecutions as well. Accordingly, as per the provisions of section 202, no prosecution for an offence under the Act can be commenced after three years from commission of the offence charged or two years after the discovery of the offence.

There are no specific provision laid down by the Act with regard to the investigation, arrest, search, trial, judgment, appeals and revision, thus the provisions of the Code of Criminal Procedure Act No. 15 of 1979 is applicable accordingly. Nevertheless, there are specific provisions laid down in the Act with regard to the search, seizure and disposal of counterfeit goods in section 197 of the Act.

PROCEDURE FOR CRIMINAL PROSECUTIONS

The Registered owner, the assignee or the power of Attorney holder of a trade mark could either take necessary steps to institute a criminal action. Section 136 of the Code of Criminal Procedure Act, No 15 of 1979 sets out the ways in which a criminal action can be instituted in the Magistrates Court. An initial complaint can be made to the police with regard to an infringement or an offender. This complaint will act as the first information under section 109 of the Code of Criminal Procedure. An offender can be prosecuted by way of a private plaint as well.

The violation may be committed by an individual, by a company or a partnership. In the case of an individual and a sole proprietor, it is sufficient to name the particular person or the proprietor as the suspect. All the Partners can be named as suspect with regard to a Partnership. But in the case of a Company, it is advisable to mention the names of those involved in the management of the affairs of the institution. Section 187 of the Intellectual Property Act can be made relevant hereto.

Having received the above information from police or by way of private plaint, the magistrate has the power to issue summons or a search warrant. It is important to note here that, most of the practitioners of Intellectual Property Law are of the view that the Search Warrant is the step which attracts the owners of Intellectual Property Rights to proceed to criminal action.

According to section 197(a), once an application is made by the owner of an Intellectual Property, the Magistrate has to first decide as to whether he should issue summons or a search warrant. Here the Provisions contained in Sections 137 to 140 of the Code of Criminal Procedure Act can be made use by the Magistrate.

According to section 197(b) once the Magistrate decides to issue a search warrant, he must obtain information under an oath. This information can be obtained either by way of leading evidence or by way of an Affidavit. The purpose of such evidence is to satisfy that an offence is being committed in respect of which Court has jurisdiction to try.

Once such evidence is lead the Court would issue summons and a search warrant to raid the premises in question. Then the Police will conduct the raid and seize the goods found in such premises in violation of the Intellectual Property rights of the owner and any equipment or machinery used for the manufacture of such goods. Once the raid is conducted and the goods are seized the Police Officers conducting the raid should prepare a report along with an inventory of goods seized and should produce the same with the seized goods to the Magistrate. The goods seized during a raid should be kept under the custody of the court until the trial. It is important to note here that, the evidence constituted by the raid are strong enough to subsequently use against the violators in an application for injunctive relief.

The violator is supposed to enter an appearance on the summons returnable day. If not the prosecutor could move for a warrant. Once the charges are read out to him the suspect has the option of pleading guilty or not to them. If the suspect pleads guilty he may be punished according to the law. If the suspect pleads not guilty the court would fix the case for trial. Without offering a plea, the suspect has the opportunity of raising a preliminary objection based on a defect in the Private Plaint or on the jurisdiction.

In a case where a suspect has pleaded not guilty the matter will be fixed for trial. At the event of the trial, the provisions of sections 182-191 of the Code of Criminal Procedure Act, No 15 of 1979 has to be complied with. And also the provisions of the Evidence Ordinance should also be complied with.

Sections 186 and 193 recognize certain defenses available for an accused. Accordingly, if an accused can prove the three facts set out in section 286 (1) (a) to (c) the accused may not be convicted for the alleged infringements. The second defense is that the accused can establish the fact that he falls under any one of the categories set out in Section 193 of the Act.

The Act lays down the provisions as to what measures should be taken to the goods seized. The procedure to be followed with regard to goods is set out in sections 197(2) and 197 (3). Accordingly, if the accused was found guilty, the procedures laid down in section 197 (2) and 197 (3) have to be followed and the goods will be forfeited. The goods so forfeited should be destroyed or otherwise disposed of in the way the magistrate who ordered the forfeiture may direct. The magistrate is further empowered to make an award to an innocent party for any loss sustained in dealing with the goods so forfeited.

By considering the provisions laid down in the Intellectual Property Act with regard to criminal prosecutions against trademark violations it can be construed that Sri Lanka has a very comprehensive system with regard to criminal prosecutions against trademark violations.

EFFECTIVENESS OF CRIMINAL PROSECUSIONS WITH REGARD TO CONTROLLING THE RISING TIDES OF TRADE MARK VIOLATIONS.

Even though the legislative provisions are there in par with International legal principles, still the number of intellectual property violations is at rise. As stated by a survey conducted by KPMG Sri Lanka titled 'Awakening Sri Lanka Fraud Survey Analysis 2011/12' has indicated that 27 percent of its respondents, which was the highest figure, had stated that weak enforcement of laws was the main reason for the existence of intellectual property fraud[11]. Dr. H.W. Tambaiah submits that the public perception on intellectual property is also reason for the gap between the legislation and enforcement of intellectual property rights in Sri Lanka because, even the private ownership of tangibles is a relatively new phenomenon in Sri Lanka and communal ownership precedes individual ownership[12].

11 K. Perera, "Weak enforcement main cause for IP Frauds KPMG Fraud Survey", *Daily Mirror*, 25 May 2012, viewed 29 July 2012, http://epaper.dailymirror.lk/epaper/viewer.aspx, and at Talagala, Chamila, Enforcement of Intellectual Property Rights in Sri Lanka: Some Issues (August 23, 2012). Available at SSRN: https://ssrn.com/abstract=2136251 or http://dx.doi.org/10.2139/ssrn.2136251 viewed on 17/7/2020

12 H. W. Tambiah, Sinhala Laws and Customs, Colombo: Lake House Investments Ltd., 1968 at p.158 and Talagala, Chamila, Enforcement of Intellectual Property Rights in Sri Lanka: Some Issues (August 23, 2012). Available at SSRN: https://ssrn.com/abstract=2136251 or http://dx.doi.org/10.2139/ssrn.2136251 viewed on 17/7/2020

Further, Dr. C. Talagala submits that private proprietary rights did not exist in ideas, information and knowledge in Sri Lanka in the true legal sense as found today and as a culture predominantly influenced and guided by the Buddhist principles, the concept of proprietary rights with regard to intellectual property was never familiar to Sri Lankans and it is still considered as a Western notion which was forced in to the country by the British[13]. Thus even now the knowledge and experience with regard to intellectual property rights and enforcement of the same are still not known to many Sri Lankans and this ignorance is a great impediment for the enforcement of intellectual property in Sri Lanka.

Dr. C. Talagala submits that the publicity that a criminal trial can attract and the deterrence effect of criminal prosecutions can make the criminal enforcement of intellectual property more attractive[14]. According to Thomas Dougherty, Scott Eltringham, Jason Gull, Eric Klumb, Brian Levine, Evan Williams and John Zacharia, the criminal enforcement of IP rights plays a vital role in safeguarding economic and national security interests as well as protecting the health and safety of consumers worldwide, because counterfeit products can harm the public at large. Inferior, unsafe counterfeits, not only defraud ordinary consumers, but also can pose significant risks to their health and safety.[15] The explanation of Dr. Karunarathna in this regard is that, the rights attached to a registered mark are not only a dispute between its owner and the infringer but such infringements adversely affect the entire society and the interests of the public. Hence, penal sanctions against IP infringers should be there as a measure of deterrent.[16] According to Irina De Manta, criminalizing IP infringement provides the proper balance of incentives for creators by giving them the safety of added protections for their works. Hence, she suggests that criminal prosecution is appropriate for the most egregious infringers.[17] As pointed out by Jeremy Asher, in his article published by Intellectual Property Magazine on 29 July 2014, the criminal courts have far reaching powers of enforcement. In particular, forfeiture can deprive the defendant of the major part of his assets with immediate effect.

13 Talagala, Chamila, Enforcement of Intellectual Property Rights in Sri Lanka: Some Issues (August 23, 2012). Available at SSRN: https://ssrn.com/abstract=2136251 or http://dx.doi.org/10.2139/ssrn.2136251 viewed on 17/7/2020

14 Talagala, Chamila, Enforcement of Intellectual Property Rights in Sri Lanka: Some Issues (August 23, 2012). Available at SSRN: https://ssrn.com/abstract=2136251 or http://dx.doi.org/10.2139/ssrn.2136251 viewed on 17/7/2020

15 file:///C:/Users/Dell/Desktop/IP%20criminal/prosecuting_ip_crimes_manual_2013.pdf viewed on 24/7/2020

16 DM Karunaratna, A Guide to the law of Trademarks and Service Marks in Sri Lanka (Second Edition, Sarvdaya Vishvalekha Publication, Ratmalana, Sri Lanka, 2007)233

17 Available at https:// scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article = 1194&context = faculty_ scholarship accessed on 08/08/2018

He further points out that, private prosecutions can:

- Be an extremely expedient means of stopping infringing behaviors;
- Generate considerable publicity to deter other infringers;
- Ensure that counterfeit items are forfeited and destroyed; and
- Demonstrate that the rights holder is serious about protecting its IP.

It is also his view that, confiscation and/or compensation proceedings under the criminal prosecutions sometimes lead to a greater financial recovery for an IP rights owner, compared with an account of profits under the civil system.

It is sad to see that no literature can be found discussing the lacunas in the present law and how the law should be amended and improved in order to make criminal prosecutions more desirable to general public. In my opinion the major lacuna in the Intellecutal Property Act No 36 of 2003 is that the law does not allow criminal prosecutions to grant a final and conclusive remedy. The main reason for this view is that criminal proceedings are not capable of compensating the aggrieved trademark proprietors, whereas compensation is an essential aspect of enforcement as it merely makes a person guilty of an offense rendering such person be liable to a fine and or imprisonment. It was opined that the importance of the protection of trademarks extends beyond punishing a person from wrongdoing. It implicates broader economic and social functions.

The provisions under section 17(4) of the Code of Criminal Procedure Act and the provisions under the Assistance to and Protection of Victims of Crime and Witnesses Act No 18 of 2023 can be made used to grant compensation. But the nature of Trade Mark infringement are such that the monetary loss as well as the damages to the goodwill of the trade mark should be taken in to consideration when granting compensation in a Trade Mark violation and such amount will naturally will be of very high value. Accordingly, having separate provisions for granting damages to the Trade Mark owner in criminal prosecutions can be considered as necessary amendment that can be brought in order to grant conclusive remedy concerning trademark infringements.

CONCLUSION

Criminal prosecutions have a positive impact on controlling trademark infringements due to its deterrent effect. Protection of intellectual property rights in Sri Lanka is well provided by Intellectual Property Act no 36 of 2003. But practical enforcement of intellectual property rights in Sri Lanka is not up to the expectation and there are various reasons which create this gap. As discussed above a major reason for this is that criminal proceedings are not capable of compensating the aggrieved trademark proprietors.

Thus, it is concluded in this work with reasons that it is inevitable and vital to make necessary improvements to the present law regarding criminal prosecutions, concerning enforcement of rights of trademark owners by introducing provisions to grant compensation to the aggrieved parties in order to provide better protection and enforcement.

Application of DNA for Identification of Perpetrators

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1. INTRODUCTION

1.1 HISTORY OF DNA

James Watson and Francis Crick first discovered DNA in 1953.They have continued Miescher's discovery after 100 years. There were others who have made many advancements to the field. They discovered that DNA is a double stranded helix with two strands connected by hydrogen bonds. Most of the DNAs are right-handed. The simple structure of DNA can be introduced as follows.(1)

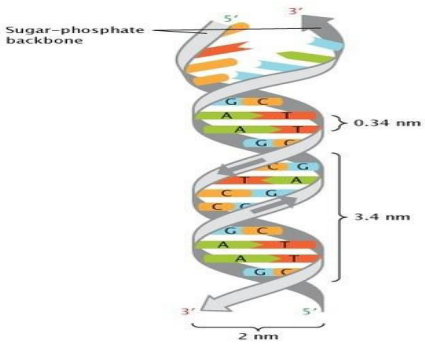

Figure 1

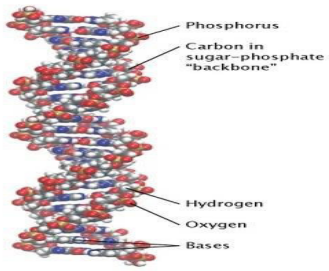

Figure 2

1.2 THEORY BEHIND DNA TECHNOLOGY(2)

DNA profiles are being used by Forensic scientists to identify criminals or determine parentage. That is more like a genetic fingerprint. DNA profile is unique to every person. That is very useful to identify people involved in a crime. However, there is one exception that is identical twins. They share the same DNA profile. A vital role is played by Deoxyribonucleic acid (DNA) in forensic science by identifying criminals excluding innocent people.

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In 1980s genetic fingerprinting for forensic and human identification had begun. The first scientific case that has used this scientific method is identifying the murder cases of Lynda Mann and Dawn Ashworth. However, at early stages blood types were used to prove paternity and other forensic problems in Europe and United States.

In the middle to late 1980s Forensic protein profiling was developed to separate questioned and known samples in laboratories. The variety of amino acid sequences in the proteins were used to differ individuals. Agarose gel, polyacrylamide gel, and starch gel electrophoresis were used to distinguish the alleles. The isoelectric focusing polyacrylamide gel electrophoresis and silver staining were more advanced methods. Buccal swabs, saliva, semen, blood, vaginal swabs are used to collect DNA. They can be collected in minute quantities on a surface without knowledge of the perpetrator. DNA samples should be collected from questioned and known samples. There, are three possible outcomes. They are inclusion, exclusion and inconclusive. The outcomes can be explained as follows.

- Inclusion (match)-between the two short tandems same genotypes can be observed on the peaks and the technical differences can be shown.
- Exclusion (non match)-genotypes within the profiles differ and they have been originated from two different sources.
- Inconclusive-difficult to come into a conclusion due to lack of information. Other than that, a match shows three possible outcomes. They are,
    i. The sample of the suspect is deposited.
    ii. False positive due to laboratory defects even when the suspect did not deposit the sample.
    iii. The suspect did not deposit the sample but the sample is available.

However, regardless of how many loci match, when one STR locus does not match when two genotypes of the samples are compared, the questioned and the known samples are reported as a nonmatch.

As the first step the DNA samples should be procured in DNA profiling. To build a unique DNA profile a small number of cells needed from hair, blood, salive, semen etc. DNA samples are discovered at crime scenes and investigation officers collect samples of DNA from crime scenes and further if there are any suspects police take DNA samples from them and sometimes the courts order to give DNA samples when it is needed. When the forensic scientists obtain samples, DNA is extracted from bodily fluids and tissues. Then they copy it. Then through the capillary electrophoresis, they separate the copied markers. This method will help to identify distinct markers and the number of

repeats for different markers in each allele. Then the scientists read this data using a chart. That is called an electropherogram. That shows the number of repeats. Then forensic scientists generate a DNA profiling definition. The legal professionals can read it.

2. ADVANTAGES OF DNA ANALYSIS ON IDENTIFYING PERPETRATORS.

There are many advantages of DNA analysis on identifying perpetrators.

- DNA sample will reveal whether that is a human or not.
- The sex of the sample can be easily identified, and the suspects can be short listed on that aspect.
- Minute quantity of sample is enough to obtain the DNA profile.
- Any sample from the body can be typed.
- Partially degraded DNA may be typed.
- Positive identification of individuals.
- Family relationships can be found.
- Link can be made between two or more crimes done by one person.

3. GLOBAL APPLICATION OF DNA TO IDENTIFY PERPETRATORS

Globally there is a vast development in identifying perpetrators in many countries. Not only developed countries but also the developing countries and other non-developed countries too use this DNA method for their laboratory tests to identify perpetrators.

However, developed countries use these methods in a massive manner to identify the perpetrators and that method is far more successful than other methods such as fingerprinting. DNA technology is used more effectively in England and Wales than any other region. That is used as a compulsory part of the investigation. That process has become very useful in identification of perpetrators and to exclude innocent. That is more rapid than any other investigation method. Many crimes are rapidly analyzed by using this technology. DNA profiles are successfully maintained and due to that the results are more rapid and effective. When there is a DNA data base, implementation cost, crime solving capacity, incapacitation effect, deterrence effect, privacy protection, legitimacy, implementation efficiency should be taken into consideration. Proper amounts of funding is done by the government to reach the expectations in criminal investigations. Money is allocated to law enforcement agencies and encourage police to do proper evidence collection and submission of evidence in a proper manner.

4. APPLICATION OF DNA FOR IDENTIFICATION OF PERPETRATORS IN SRI LANKA.

4.1 EXISTING LEGAL FRAMEWORK OF SRI LANKA

It is clear that there is no specific provision to govern DNA evidence other than section 45 of the Evidence ordinance and section 122 of the Criminal Procedure Code as amended by 14 of 2005.

Section 45 of the Evidence ordinance states as follows;

"When the court has to form an opinion as to foreign law, or of science, or art, or as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, the opinions upon that point of persons specially skilled in such foreign law, science, or art, or in questions as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, are relevant facts. Such persons are called experts."

Illustrations

(a) The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died are relevant.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind ,incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant."

Section 46 further discusses on the application of section 45. Section 46 of the Evidence ordinance is as follows.

"Facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant."

Illustrations

(a) The question is, whether A was poisoned by a certain poison. The fact that other persons who were poisoned by that poison exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall. The fact that other harbours are similarly situated in other respects but, where there were no such sea-walls ,began to be obstructed at about the same time, is relevant"

Section 122 of the Criminal Procedure Code states as follows.

"1) Where any officer in charge of a police station considers that the examination of any person by a medical practitioner is necessary for the conduct of an investigation he may, with the consent of such person, cause such person to be examined by a Government medical officer. The Government medical officer shall report to the police officer setting out the result of the examination.

(2) Where the person referred to in subsection (1) does not consent to being so examined, the police officer may apply to a Magistrate within whose jurisdiction the investigation is being made for an order authorizing a Government medical officer named therein to examine such person and report thereon. Where such an order is made such person shall submit to an examination by such Government medical officer who shall report to the Magistrate setting out the result of the examination."

However, there are difficulties when applying the existing procedure, evidentiary and substantive laws in dealing with DNA evidence. Due to that, there are limitations when the forensic scientists apply DNA evidence to investigate crimes.

4.2 EXPERT EVIDENCE

As discussed earlier DNA can be taken as expert evidence. There are many discrepancies in expert evidence and it is clearly proved when discussing different cases. Expert evidence is not always conclusive proof.

In the case of ***Chandrasena alias Rale V. Attorney General***(3) It was held that "A medical witnesses called in as an expert is not a witness of fact. His evidence is really of an advisory character given on the facts submitted to him. Whilst the opinion of expert being a guide to Court, it is the Court which must come to its own conclusion about the issues of the case. A Court is not justified in delegating its function to an expert and acting solely on latter's opinion."

It is to be noted that in a rape case the doctor can express his opinion whether a rape had been taken place. In a murder case, the Judicial Medical Officer could express his

opinion whether it is a natural death or a crime had been taken place. Whether it is a murder or culpable homicide not amounting to murder or a death caused by negligence has to be decided on the other evidence of the case. Therefore, it has to be proved by the evidence of other witnesses that the offence set out in the indictment/charge sheet has been committed by the accused and no one else.

In the case of ***A. Gratiaen Perera V. The Queen***(4) identical issue, hand-writing expert's evidence regarding a forgery has been discussed and held that "where a hand-writing expert testifies of forgery, his testimony should be accepted only if there is some other evidence, direct or circumstantial which tends to show that the conclusion reached by the expert is correct." A relevant portion of the decision of ***Mendis V. Jayasuriya***(5) has been cited in this case as follows: "Akbar J. took the view that the expert evidence should be used only in corroboration of a conclusion arrived at independently and not to convict a person on a charge of forgery if the other evidence is not conclusive. It would create some kind of suspicion but would not go beyond it."

In the case of ***H. A. Charles Perera and another V. M. L. Motha and another***(6) also it was held that "The evidence of a handwriting expert must be treated as only a relevant fact and not as conclusive of the fact of genuineness or otherwise of the hand-writing in question. The expert's opinion is relevant but only in order to enable the Judge himself to form his own opinion."

In ***Samarakoon V. The Public Trustee***(7) it was held that on an issue of forgery, the court may accept a hand-writing expert's testimony, provided that there is some other evidence, direct/circumstantial, which tends to show that the conclusion reached by the expert is correct.

In the case of ***Lily Perera V. Chandani Perera and others***(8) it was held that the evidence of the handwriting expert is a relevant fact but will to use only to assist the Judge himself to form his opinion. The following potion stated in this Judgment is also important to determine the issue before us. "The law of evidence" in summing up the effect of the authorities, E. R. S. R. Coomaraswamy states thus: The correct position as to the value of the evidence of the hand-writing expert seems to be that his evidence must be treated as a relevant fact and not as conclusive of the fact of genuineness or otherwise of the hand-writing: His opinion is relevant but only in order to enable the Judge himself to form his opinion.(9) The cases ***Charles Perera V. Motha***(6) and ***State of Gujarat V. Vinaya Lal Pathi***(10) can be discussed as landmark cases.

In ***Charles de Silva V. Ariyawathie de Silva and another*** (11) it was held that "Evidence of a handwriting expert is to be considered only as relevant fact and not conclusive of the genuineness or otherwise of the handwriting in dispute and that it is only relevant to enable the Judge to form his opinion".

It is apparent from the aforesaid Judicial Authorities that the expert's evidence is only relevant evidence of advisory character. Expert evidence should be used only in corroboration of a conclusion. But to arrive at a conclusion there must be some other evidence, direct or circumstantial.

4.3 CASE STUDIES

There are many cases where the scientists of have used DNA to identify the perpetrators. The origin of using DNA to identify perpetrators is Hokandara murder case.(***Sajeewa alias Ukkuwa and others v The Attorney-General)***(12)(Shirani Bandaranayake, J.) where the scientists used DNA to identify perpetrators. This is an introduction by late Dr. Maya Gunesekera. However, DNA technology is introduced by this matter it was not successfully applied to identify perpetrators. This was mainly based on the DNA evidence. No lawyer or the judges raised the issue related to DNA. The circumstantial evidence in Hokandara case comprised of fingerprints on a tin of biscuits, which was objected to by the defense. However, the Supreme Court rejected this objection because the supreme court was satisfied with the circumstantial evidence. There is an argument that if the court applies DNA evidence that would have been fair for both the parties. The same argument has been raised in ***Wahumpurage Wasantha v Attorney General***.(13)

Later this system is used in different cases such ***Sarath Ambepitiya case***.(14) In Sarath Ambepitiya case it was stated as follows.

" DNA evidence given by Dr. Maya Gunasekera of Genetech was conclusive in matching the DNA from the sample of vomit collected from near the Otters Sports Club with that of the 3rd accused, thereby placing him definitely in the Otters area, and further confirming the testimony of Susantha Pali.The record shows that the witness is highly specialized in her field and has vast experience in the area of DNA typing. Her expert evidence is accepted as credible evidence on account of her experience, expertise, the precautions taken to ensure the safety of the sample to prevent contamination and maintain the authenticity of the material and credibility of the findings. It is also relevant that the high standard of technology and procedure maintained by Genetech where the tests were conducted, also contributes to the acceptability of her evidence in this case."(14)

Following important points have been discussed in the above matter:

- Degree of familiarity with the technical process of DNA extraction and analysis.
- Gel Electrophoresis.
- How the samples were collected from suspects and the chain of custody, how they have maintained a proper chain of custody?
- How the STR alleles at 12 STR locations were determined ?

- How the scientists obtained the DNA profile of the suspect ?
- How the DNA profile was compared with the DNA profile obtained from the vomit sample ?
- How the clear opportunity to make the identification of the accused ?

The explanation shows the advance manner the scientists have used DNA technology to identify the perpetrator.

DNA evidence was successfully used in ***Don Shamantha Jude Anthony Jayamaha v Attorney General***(15) ***(Royal Park Murder Case)***. The trial court and the appellate court have applied the evidence related to DNA . The Court of Appeal has set aside the verdict of the High Court. Then convicted the accused of murder.

In ***Kotakethana murder case***(16) serial killings of 17 female victims were identified. There, DNA was utilized successfully. That was easy to identify the perpetrator among several suspects. Those found responsible were convicted.

In ***Seya Sadewmi murder case***(17) DNA evidence was used to identify the accused out of several suspects. And he was convicted by the High Court Colombo. Further, in the case of ***Sivaloganathan Vithiya gang rape and murder***(18) Magistrate in Kayts ordered the police to direct the suspects to undergo a DNA test. Nine persons were indicted and seven convicted. The case was before a trial at bar at Jaffna.

In ***Rita Joan murder case***(19) DNA evidence were not taken. There were sufficient other evidence to prove the case and to convict the accused.

The cases discussed above will show how the judges performed with the use of DNA evidence. They have used different ways to apply DNA evidence, and some have not used DNA evidence. That is strictly on their discretionary power. Further the application of DNA evidence will depend on different levels of knowledge and understanding of forensic science of the lawyers and judges.As per the Australian case ***The Queen v Farah Jama***(20) can lead to an inconsistency in the approaches by courts to scientific evidence. In ***Hokandara murder case***(12) application of DNA evidence had not been raised as an issue.

Similarly, in the case ***Wahampurage Wasantha v Attorney General***(13) the conviction was only based on circumstantial evidence and not on DNA evidence. This clearly shows the discretion power of the judges when applying DNA evidence to convict an accused.

A balanced judicial approach to DNA evidence can be seen in Judge ***Sarath Ambepitiya murder case***(14) and further in ***Royal Park murder case***(15). When observing the above explanation, in Sri Lanka ***Kotakethana case***(21), ***Seya Sadewmi murder case***(17) and further, in ***Sivaloganathan Vithiya murder case***(18) DNA evidence has been utilized efficiently and due to that the correct accused has been convicted.

4.4 IMPORTANCE AND CHALLENGES IN APPLICATION

DNA is unique to an individual. Only the identical twins have the same type of DNA. Therefore, it is very easy to trace the criminals. Others can be eliminated very easily. For an example during in a rape case DNA test can be done via collected from hair, skin cells, semen, or blood can be left on the victim's body or other parts of the crime scene. Collected DNA samples from the crime scene can be compared with the known samples to identify the suspect. In countries like United States, if there is no suspect DNA profile from crime scene evidence can be entered into the FBI's Combined DNA Index System (CODIS) and then identify the serial criminals. However, in Sri Lanka that system is not well developed as in developed countries. The importance of DNA can be taken as follows.

- DNA sample will reveal whether that is a human or not.
- The sex of the sample can be easily identified, and the suspects can be short listed on that aspect.
- Minute quantity of sample is enough to obtain the DNA profile.
- Any sample from the body can be typed.
- Partially degraded DNA may be typed.
- Positive identification of individuals
- Family relationships can be found.
- Link can be made between two or more crimes done by one person.

However, there are many challenges in Sri Lanka to use this method. There is a necessity to enact separate legislation to deal with DNA to identify criminals. Even though the courts can apply section 45,46 of Evidence ordinance and section 122 of criminal procedure code, that is not enough to easily apply this technology. The laws should be developed not only for the application but also for experiments, sample collections, governing DNA database etc. Further obtaining DNA samples with the consent for minor offences and obtaining DNA samples even without consent in grave crimes should be a practice and those provisions should be included to legislature.

The police should be well trained to apply new techniques and they should be advised how to investigate without contaminating DNA samples. Therefore, giving updated technical knowledge to police and the investigators is essential. The government too should enhance the facilities for DNA experiments and funds should be given to upgrade DNA related investigations. The results will be more accurate if the staff is more knowledgeable and if the chain of custody in DNA samples are done in a proper manner.

Further, National DNA database too will help to identify criminals and to prevent further crime.

5. CONCLUSION AND RECOMMENDATIONS

Forensic science sits at the nexus of science, law, policy and investigation. It should be viewed as a process that encompasses the crime scene through to court.

Magistrate has the discretion to order DNA profiling for selective cases. The reports produced by two molecular laboratories. There is an unparallel service to judiciary by both laboratories. However, DNA profiling produced by one molecular laboratory is not enough.

In United Kingdom there is a statutory guidance for lawyers and judges regarding expert witnesses set out in the Criminal Procedure Rules(22) and the Criminal Practice Direction(23) which must be read together; the reason for two documents is historical and technical; they have been drafted together and approved by the same body. They set out the following requirements if expert evidence is to be admitted in a trial:

- Expert evidence is admissible only if the court is satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted.
- Experts owe their duty to the court. This makes clear that experts do not owe a duty to their appointing party and must make proper disclosure. The duty has been strengthened from 1 April 2019.
- Expert reports must contain specific matters and must be exchanged well in advance of the trial.
- A pre-trial meeting between the experts must take place, unless the judge decides otherwise.

In some cases, the perpetrator might have planted evidence to mislead the investigators. The addition of a DNA profiling laboratory in the GAD is of the utmost importance.

In Sri Lanka there should be advanced laboratories and we are still in the process of reaching that standard. The conditions of the laboratories should be up to a standard condition to avoid contaminations and to give correct results. Special temperature and the stable electricity should be maintained.

With the development of the technology, DNA technology too has developed. There is a massive advantage when applying the DNA technology in identification of criminals. When there are several suspects other than applying other evidence it is easy to apply DNA technology because of its accuracy.

Recommendations are proposed to amend the laws related to DNA technology and to improve the facilities and resources to apply DNA technology in criminal investigations. Further, the knowledge should be enhanced related to DNA technology.

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ASSOCIATION BETWEEN JUDGES' EXPERIENCE (SENIORITY) AND TRIAL CASE DISPOSAL RATES OF DISTRICT AND MAGISTRATE'S COURTS IN SRI LANKA

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Abstract

This study investigates the association between judges' seniority and the disposal rates of contested trial cases in Sri Lanka's District and Magistrate's Courts, addressing the issue of prolonged case delays and backlogs. Conducted as part of a Master's dissertation in Criminal Justice Administration at the Open University of Sri Lanka, the research explores whether judges' years of experience impact case resolution efficiency.

A questionnaire survey was distributed to 229 judicial officers (District Judges hearing civil cases, Combined District Judges hearing both civil and criminal cases, Magistrates hearing criminal cases), with 85 out of 90 responses analyzed using "Minitab" software. The Chi-Square Tests revealed no significant association between seniority and disposal rates both for civil cases $\{\chi^2_{(1, N=45)} = 0.606, p=0.436\}$ *and criminal cases* $\{\chi^2_{(1, N=50)} = 0.053, p=0.817\}$*, indicating weak correlations. Despite these empirical findings, 77.6% of judges believe seniority affects how quickly they dispose of cases without postponements, and 83.5% think their experience gives them the sanity and confidence to reject unnecessary postponements. Moreover, 77.6% of judges report satisfaction with their disposal rates, potentially signaling a strong commitment to responsibly leveraging their judicial experience. However, these positive perceptions are called into question when contrasted with the harsh realities of severe delays and extensive case backlog. Even though 76.5% of judges acknowledge the need for an audit and 37.6% identify unprepared lawyers as the main cause of delays, 72.9% report not feeling harassed for rejecting postponements. However, given the severe backlog and systemic delays that judges also recognize, this 72.9% stance raises questions.*

Possibility of prioritizing judgment targets for career advancements over increasing disposal rates by experienced judges may have led to an insignificant association.

Recommendations include auditing the process, reassessing seniority's role, addressing postponements, controlling lawyer-induced delays, exploring legislative changes, increasing judges' authority and control, eradicating indirect harassments and influences on judges,

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setting standards/ rules of allegations in order of eradicating occupational distress of judges, safeguarding judges' freedom for fearless application of laws in cases where disposals are imminent, increasing resources, introducing technological advancements, maintaining efficient case-management mechanisms, and promoting research & development. The study emphasizes systemic reforms to enhance judicial efficiency.

Introduction

Background of the Study

Prolonged delays in resolving court cases are a major issue in Sri Lanka's justice system. District Courts, Magistrate's Courts, and the High Court all face significant backlogs. This excessive delay causes deep frustration among litigants, who often suffer in silence as their cases drag on.

Delays in the justice system, often due to frequent adjournments and postponements, can stretch cases for decades—over 20 years for criminal cases and up to 30 years for civil ones. This ongoing issue causes immense inconvenience and economic hardship, yet there has been little effective action or accountability from the authorities. The underlying causes of the delays are not fully understood or addressed, and there is a need for a comprehensive examination of these factors to improve the system. Galagoda[1] (2020) suggests that the frequency of adjournments and the experience of judges play crucial roles in the inefficiency of case disposal. Therefore, the study[2] based on which this article is written was conducted by me for the dissertation as a partial fulfillment of my Masters of Law in Criminal Justice Administration Programme of Open University of Sri Lanka. All collected data, including tables, graphs, charts, figures, and related information, have been utilized for the purposes of this article.

Statement of the problem

This study investigates whether judges' years of experience (seniority) influence the disposal rate of contested trial cases. Judges wield significant authority over case adjournments, a pivotal factor affecting case flow efficiency. Understanding the impact of judicial experience on postponements/ adjournments is crucial for deploying experienced judges effectively in busy courts and enhancing judicial training and procedural reforms.

1 Wasantha Galagoda, ' Expediting Judicial Process to Deliver Judgments within 1,000 Days and Enhancing Economic Growth: Part 1' (Daily FT 6 January 2020) < https://www.ft.lk/Opinion-and-Issues/Expediting-judicial-process-to-deliver-judgments-within-1-000-days-and-enhancing-economic-growth-Part-1/14-693026 > accessed 2022.03.27

2 R.B.M. Daminda R. Weligodapitiya, "Effect of Judges' Experience (Seniority) on Disposal Rate of Trial Cases in Sri Lanka" , Dissertation for Masters of Laws in Criminal Justice administration, The Open University of Sri Lanka(Not Published, submitted December 2022).

Research question

Is there an association between judges' years of experience in the judiciary (seniority) and the disposal rate of contested trial cases in Sri Lanka?

Hypotheses

- Null Hypothesis (H_0): There is no association between judges' years of experience/ seniority and the disposal rate of contested trial cases.
- Alternative Hypothesis (H_A): There is an association.

Research objective

To examine the association between judges' years of experience and the disposal rate of trial cases in District Courts and Magistrate's Courts in Sri Lanka.

Literature Review

Fonseka (2008) identifies two critical issues in Sri Lanka's judicial system, highlighting a general criminal case disposal rate of 21% in 2005, which is considered inadequate[3]. That researcher underscores two urgent concerns: (1) clearing the existing backlog of cases and (2) speeding up the resolution of ongoing ones. Fernando (2022) states that going through the circus of all kinds of problems and getting old in the process due to extraordinary delay, is tragicomic[4]. A study of Falt (1985) on case delays in Asia mentions that the Law Reform Commission in India has identified the failure of the trial judge to frame issues as a cause for delay[5].

In an article for the Daily Financial Times, Galagoda (2018) criticizes the lack of serious efforts to address why the judiciary is so slow, with some cases taking 10 to 30 years to resolve[6].

The article highlights two main issues with the judiciary:

1. Poor Time Management: Ineffective time management leads to significant delays, necessitating a major overhaul to boost efficiency.

3 A. T. Fonseka, 'Law's Delays and Management of the Judicial Process' (2008) <https://sljm.pim.sjp.ac.lk/admin/uploads/83.pdf > accessed 2024.08.17

4 Basil Fernando, Asian Human Rights Commission's Policy and Programmes Director, 'Judicial efficiency and judicial independence' (7 January 2022) The Morning < https://www.themorning.lk/articles/183017 > accessed 2024.08.14

5 Jeffrey Falt, ' CONGESTION AND DELAY IN ASIA\'SCOURTS' (UCLA PACIFIC BASIN LAW JOURNAL 1985) < https://escholarship.org/uc/item/14v2n6hw > accessed 2024.08.14

6 Wasantha Galagoda, 'Expediting judicial process to deliver judgments within 1,000 days and enhancing economic growth: Part 1' (ft.lk, 6 January 2020) < https://www.ft.lk/Opinion-and-Issues/Expediting-judicial-process-to-deliver-judgments-within-1-000-days-and-enhancing-economic-growth-Part-1/14-693026 > accessed 2024.08.17

2. Lack of Accountability: Delays are worsened by potential case postponements for personal gain and a widespread "don't care" attitude.

The article suggests that auditing by the Auditor General could address these problems.

In India, an NGO called "Lok Prahari" filed a case asking for the appointment of additional or ad-hoc judges to speed up case hearings[7]. The Chief Justice of India highlighted that judges with 15-20 years of experience tend to handle cases more swiftly, suggesting their greater effectiveness in expediting case resolution[8]. He emphasized that experienced judges could significantly reduce the backlog if managed effectively.

The Law Commission of India has proposed using the "Rate of Disposal Method" to address judicial case delays due to a lack of comprehensive data collection[9]. The Rate of Disposal Method estimates the additional judges needed to handle backlogs and new cases by:

1. Calculating how many cases a judge resolves annually.

2. Estimating judges required for:

- Existing backlog.

- New cases, to match disposal rates with new filings.

The study by the Supreme Court Observer (2019) in India found no significant correlation[10] between the number of judges and key metrics such as case disposal rate; judgments delivered, or case pendency. Correlation coefficients between working strength (number of judges) and,

- Disposal: 0.287
- Judgment delivered: -0.504
- Pendency: -0.161

7 Sakshi Shukla, ' \"Higher Disposal Rate Of Experienced Judges\": Supreme Court On Appointment Of Ad Hoc Judges For Pendency' (LAWBEAT FROM THE LEGAL CORRIDORS 2021) < https://lawbeat.in/top-stories/higher-disposal-rate-experienced-judges-supreme-court-appointment-ad-hoc-judges > accessed 2024.08.14

8 Preksha Goyal, 'Lok Prahari Through Its General Secretary S.N. Shukla IAS (Retd.) V. Union of India & Ors: Supreme Court Issues Guidelines For The Appointment Of Ad-Hoc Judges Read more at: https://www.lawyersclubindia.com/judiciary/lok-prahari-through-its-general-secretary-s-n-shukla-ias-retd-v-union-of-india-ors-supreme-court-issues-guidelines-for-the-appointment-of-ad-hoc-judges-5175.asp' (LAWYERSCLUBINDIA 2021) < https://www.lawyersclubindia.com/judiciary/lok-prahari-through-its-general-secretary-s-n-shukla-ias-retd-v-union-of-india-ors-supreme-court-issues-guidelines-for-the-appointment-of-ad-hoc-judges-5175.asp > accessed 2024.08.14

9 Report No. 245, 4. The Rate of Disposal Method (ADVOCATEKHOJ) < https://www.advocatekhoj.com/library/lawreports/arrearsandbacking/10.php?Title=Arrears%20and%20Backing%20-%20Creating%20Additional%20Judicial%20(wo)manpower&STitle=The%20Rate%20of%20Disposal%20Method > accessed 2024.08.15

10 No relation between number of judges and disposal rates' (SCO Supreme Court Observer 2019) < https://www.scobserver.in/journal/no-relation-between-number-of-judges-and-disposal-rates/ > accessed 2024.08.14

The coefficients show no significant correlation between the number of judges and case resolution variables.

The Hindu (2019) reports on Justice Ramasubramanian's 2017 remarks about the Indian judiciary. He noted that public trust in the judiciary remains strong. This view contrasts with the Supreme Court Observer's perspective, which suggests that while the low number of judges contributes to backlog, litigants' behavior plays a more significant role[11].

Research conducted by Smyth and Bhattacharya[12] (2003) indicates that judges' performance reflects both experience and age-related changes, suggesting that while experience is beneficial, age-related factors can also affect case disposal rates.

The Editorial Board of The Guardian (2021) notes that in Nigeria, a proposed amendment to extend judges' retirement age reflects the belief that increased wisdom and experience with age can improve judicial decision-making[13].

Reddick (2025), in her article "Mandatory Retirement Ages for Judges: How Old Is Too Old to Judge?"[14] argues that experience should be utilized rather than discarded.

Research Method

Selection of District Judges and Magistrates

The study examines the relationship between judges' years of experience and trial case disposal rates in Sri Lanka's District and Magistrate Courts. Data were gathered from District Judges and Magistrates, who handle both civil and criminal cases throughout their careers, regardless of court attachment. Judges remain in their roles, with promotions affecting only their grade, not their core duties.

Questionnaire distribution

A questionnaire, approved by the Judicial Service Commission, was mailed to 229 judicial officers, with 90 completed responses returned. After clarifications, data from 85 judges were analyzed. The participants were motivated to address delays in case resolutions, providing valuable insights for judicial reforms.

11 SPECIAL CORRESPONDENT, THE HINDU (2017) "Indian judiciary has impressive disposal rate' ' < https://www.thehindu.com/news/cities/Hyderabad/indian-judiciary-has-impressive-disposal-rate/article17935322.ece > accessed 2024.08.14

12 Russell Smyth & Mita Bhattacharya. How fast do old judges slow down?: A life cycle study of aging and productivity in the Federal Court of Australia. (2003) < https://www.sciencedirect.com/science/article/abs/pii/S0144818803000292 > accessed 2022.12.21

13 Editorial Board, ' Judges retirement age and effective justice system' (The Guardian 2021) < https://guardian.ng/opinion/judges-retirement-age-and-effective-justice-system/ > accessed 2024.08. 15

14 Malia Reddick, 'Mandatory Retirement Ages for Judges: How Old Is Too Old to Judge? ' (University of Denver IAALS 2015) < https://iaals.du.edu/blog/mandatory-retirement-ages-judges-how-old-too-old-judge > accessed 2024.08.15

Data analysis method

Quantitative data, such as years of experience and case disposal rates, were analyzed using Minitab statistical software. The analysis aimed to identify associations between judicial experience and trial case disposal rates, supplemented by qualitative insights for context. Descriptive analyses were also performed for comparison.

Approach to data analysis

The analysis focused on two sets of data:

1. Judges' years of experience and the number of civil judgments/orders produced in October 2022.
2. Judges' years of experience and the number of criminal judgments/orders produced in October 2022.

This structured approach combines quantitative and qualitative data to explore the relationship between judicial experience and case disposal rates.

Table 1: *Seniority of judges(X1) and respective disposal rates of civil cases (Y1) as at October, 2022*

Seniority in years (X1)	**Disposal Rate (Y1) (Number of civil judgments/ orders produced in October, 2022)**
7	3
6	5
7	8
3	3
6	2
20	4
1	5
13	4
14	5
14	5
13	4
6	6
13	2
13	5
6	8
11	6

8	5
3	6
15	19
15	2
12	6
16	22
13	10
13	12
15	6
12	4
8	9
12	11
14	4
12	4
3	5
6	10
13	15
12	6
11	31
5	9
14	2
16	5
12	2
12	5
15	6
5	15
13	6
12	5
8	9

And, seniority in years of judges(X2) and disposal rates of criminal cases (Y2) as at October, 2022 are tabulated in Table No. 2 as follows. (In respect of judges referred to in Set 2 above)

Table 2: *Seniority of judges(X2) and respective disposal rates of criminal cases (Y2) as at October, 2022*

Seniority in years (X2)	Disposal Rate (Y2) (Number of criminal judgments/ orders produced in October, 2022)
7	16
6	8
7	14
3	5
6	10
20	6
1	2
13	13
14	20
14	7
1	9
12	14
5	11
12	23
15	20
7	21
14	12
15	26
7	14
1	26
6	7
1	12
13	10
1	4
15	20
6	14
1	15
1	17
12	10
11	7
12	8

1	12
3	10
1	10
4	12
11	12
6	7
13	16
4	15
3	16
14	23
6	15
6	22
13	10
6	8
7	34
4	12
1	17
11	31
12	12

Testing normality of variables (seniority in years and disposal rates):

An initial statistical analysis was done to test the normality of the data (variables) presented in Table No. 1 and Table No. 2 using the Anderson-Darling Test for Normality[15]. The results of these tests are outlined below.

15 'The Anderson-Darling Statistic' (Minitab) <https://support.minitab.com/en-us/minitab/help-and-how-to/statistics/basic-statistics/supporting-topics/normality/the-anderson-darling-statistic/#what-is-the-anderson-darling-statistic> accessed 17 August 2024

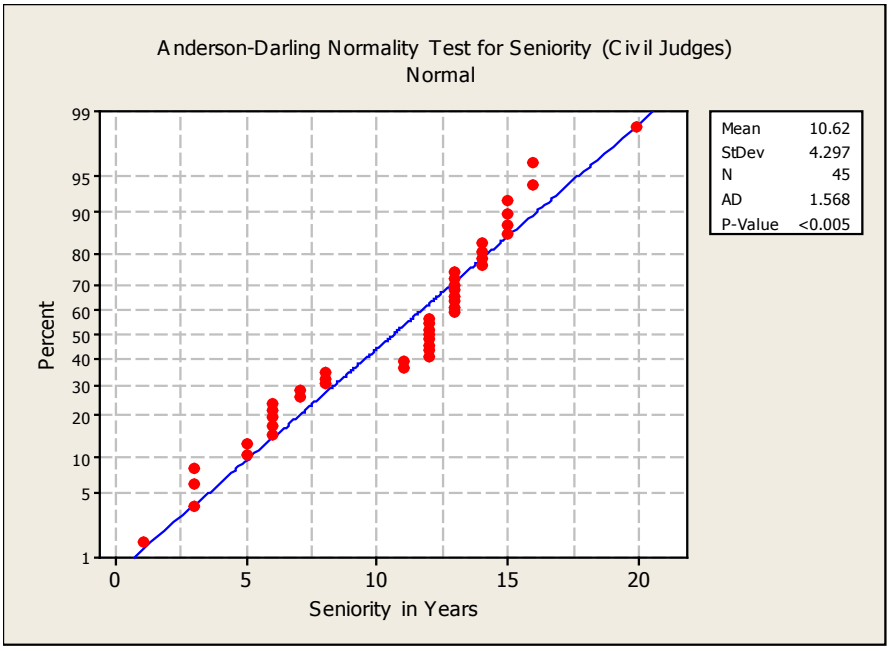

Figure 1: *Normality test results of overall seniority in years of judges-civil cases as at October, 2022*

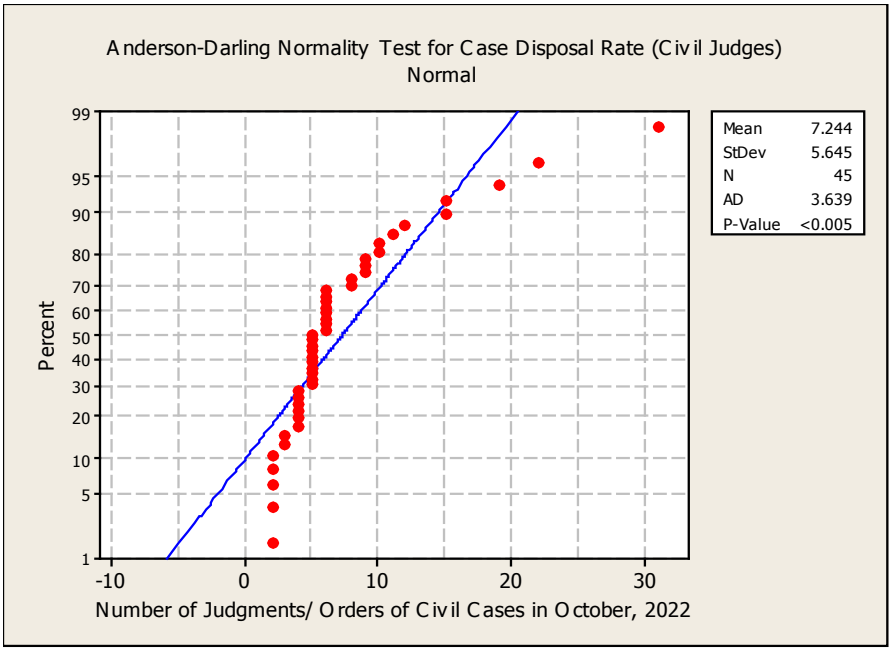

Figure 2: Normality test results of number of cases produced by judges- civil cases in October, 2022.

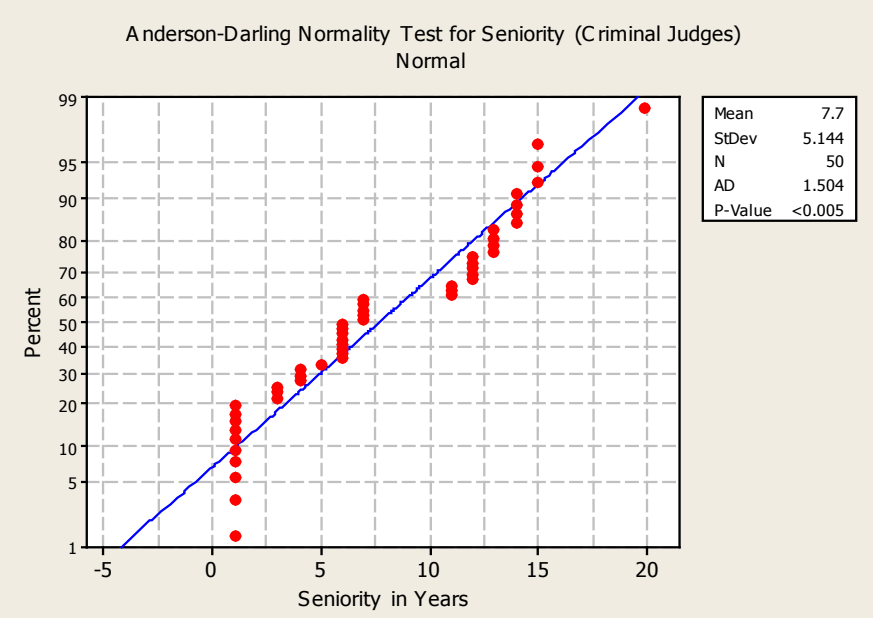

Figure 3: *Normality test results of overall seniority in years of judges- criminal cases as at October, 202*

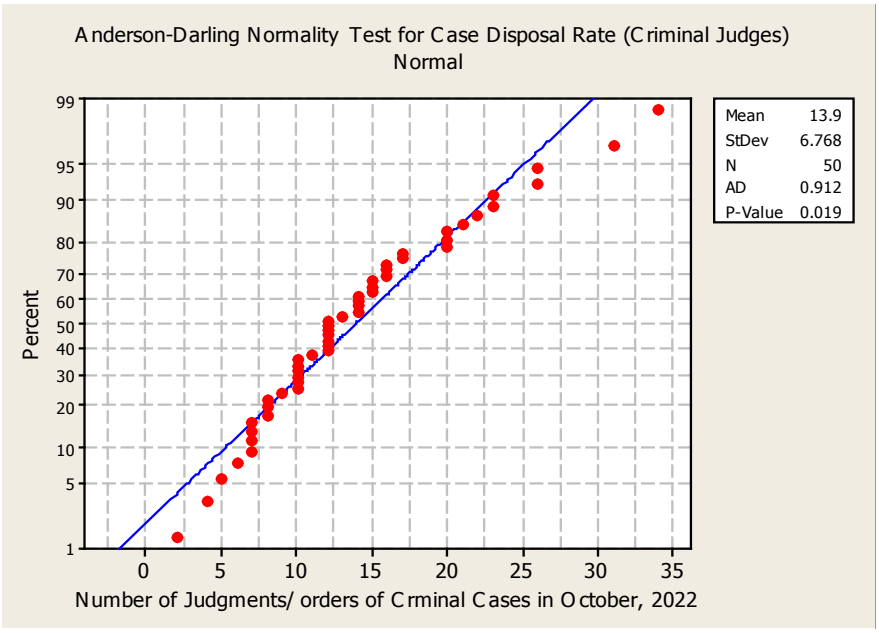

Figure 4: *Normality test results of number of cases produced by judges- criminal cases in October, 2022*

The P-Value analysis shows that none of the four variables follow a normal distribution, making them unsuitable for parametric tests. Therefore, the Chi-Square Independence Test, a non-parametric test, was used to analyze civil and criminal matters separately.

Originally, judges' experience levels were categorized into 0-7 years and 8-15 years. However, based on the survey data and median values (12 years for civil cases and around 7 years for criminal cases as of October 2022), the categories were adjusted accordingly.

Data categorization

Seniority in Years (October 2022):

- Civil Judges:
    - Category 1: ≤ 12 years (Low seniority)
    - Category 2: > 12 years (High seniority)
- Criminal Judges:
    - Category 1: ≤ 7 years (Low seniority)
    - Category 2: > 7 years (High seniority)

Based on the survey data and median values (for civil judges: 5, for criminal judges: 12 in October 2022), the categorization of disposal rates were as follows:

Disposal Rates (October 2022):

- Civil Judges:
    - Category 1: 2-5 judgments/orders (Low disposal rate)
    - Category 2: 6-31 judgments/orders (High disposal rate)
- Criminal Judges:
    - Category 1: 2-12 judgments/orders (Low disposal rate)
    - Category 2: 13-34 judgments/orders (High disposal rate)

Chi-Square Test analysis and results

For the data coding purposes,

LS stands for Low Seniority.

HS stands for High Seniority.

LDR stands for Low Disposal rate.

HDR stands for High Disposal rate.

LS-LDR refers the combination of Low Seniority with Low Disposal Rate.

LS-HDR refers the combination of Low Seniority with High Disposal Rate.

HS-LDR refers the combination of High Seniority with Low Disposal Rate.

HS-HDR refers the combination of High Seniority with High Disposal Rate.

Analysis-Civil cases:

Table 3 presents coded data combinations on judges' seniority and disposal rates for civil cases in October 2022, used for Chi-Square Test analysis.

Table 3: *Combinations of seniority and disposal rates (civil)*

Combination	**Number of Judges in the combination**
LS-LDR	12
LS-HDR	14
HS-LDR	11
HS-HDR	08

A contingency table (frequency table) can be derived from the coded data shown in Table 3. Table 4 is the contingency table.

Table 4: *Contingency table (frequency table) with categories for Chi-Square analysis in respect of judges who are hearing civil matters as at October, 2022*

Disposal (No. of judgments/ orders-civil) / **Experience(years)**	**Low disposal rate(LDR)**	**High disposal rate(HDR)**	**Total**
Low seniority(LS)	12	14	26
High seniority(HS)	11	8	19
Total	23	22	45

The data in Table 3 were analyzed to test the association between judges' experience (seniority as of October 2022) and the disposal rate of civil trials. The Chi-Square Test results are presented in Table 5 (Minitab result sheet).

Table 5: Tabulated statistics: Seniority Level-Civil Judges,Disposal Rate-Civil Judges

Rows: Seniority Level-Civil Judges Columns: Disposal Rate-Civil Judges

	High Disposal Rate	Low Disposal Rate	All
High Seniority	8	11	19
	42.11	57.89	100.00
	36.36	47.83	42.22
	17.78	24.44	42.22
	9.29	9.71	19.00
	0.1788	0.1711	
Low Seniority	14	12	26
	53.85	46.15	100.00
	63.64	52.17	57.78
	31.11	26.67	57.78
	12.71	13.29	26.00
	0.1307	0.1250	
All	22	23	45
	48.89	51.11	100.00
	100.00	100.00	100.00
	48.89	51.11	100.00
	22.00	23.00	45.00

Cell Contents: Count
% of Row
% of Column
% of Total
Expected count
Contribution to Chi-square

Pearson Chi-Square = 0.606, DF = 1, P-Value = 0.436
Likelihood Ratio Chi-Square = 0.607, DF = 1, P-Value = 0.436
Fisher's exact test: P-Value = 0.549897
Cramer's V-square 0.013458
Kappa 0.000000
Pearson's r -0.116008
Spearman's rho -0.116008

```
Goodman - Kruskal
Dependent variable                    Lambda              Tau
Seniority Level-Civil Judges       0.0000000        0.0134579
Disposal Rate-Civil Judges         0.0909091        0.0134579

Measures of Concordance for Ordinal Categories

Pairs     Number  Summary Measures
Concordant    96  Somers' D (Seniority Level-Civil Judges dependent)
Discordant   154  Somers' D (Disposal Rate-Civil Judges dependent)
Ties         740  Goodman and Kruskal's Gamma
Total        990  Kendall's Tau-b

Pairs
Concordant   -0.114625
Discordant   -0.117409
Ties         -0.232000
Total        -0.116008

Test of Concordance: P-Value = 0.781777
```

Analysis-Criminal cases:

Table 6 presents coded data combining judges' seniority levels and disposal rates for civil cases in October 2022, used for Chi-Square Test analysis.

Table 6: *Combination of seniority and disposal rates (criminal)*

Combination	Number of Judges in the Combination
LS-LDR	16
LS-HDR	14
HS-LDR	10
HS-HDR	10

A contingency table (frequency table) can be derived from the coded data shown in Table 6. Table 7 is the contingency table.

Table 7: *Contingency table with categories for Chi-Square analysis in respect of judges who are hearing criminal matters as at October, 2022*

Disposal (No. of judgments/ orders –criminal) / **Experience(years)**	**Low disposal rate(LDR)**	**High disposal rate(HDR)**	**Total**
Low seniority(LS)	16	14	30
High seniority(HS)	10	10	20
Total	26	24	50

The data in Table 6 were analyzed to test the association between judges' experience (seniority as of October 2022) and the disposal rate of criminal trials. The test results are presented in Table 8 (Minitab result sheet).

Table 8: Tabulated statistics: Seniority Level-Criminal Judges, Disposal Rate- Criminal Judges

Rows: Seniority Level-Criminal Judges Columns: Disposal Rate-Criminal Judges

	High Disposal Rate	Low Disposal Rate	All
High Seniority	10	10	20
	50.00	50.00	100.00
	41.67	38.46	40.00
	20	20	40
	9.60	10.40	20.00
	0.01667	0.01538	
Low Seniority	14	16	30
	46.67	53.33	100.00
	58.33	61.54	60.00
	28	32	60
	14.40	15.60	30.00
	0.01111	0.01026	

All	24	26	50
	48.00	52.00	100.00
	100.00	100.00	100.00
	48	52	100
	24.00	26.00	50.00

Cell Contents: Count

% of Row

% of Column

% of Total

Expected count

Contribution to Chi-square

Pearson Chi-Square = 0.053, DF = 1, P-Value = 0.817
Likelihood Ratio Chi-Square = 0.053, DF = 1, P-Value = 0.817

Fisher's exact test: P-Value = 1

Cramer's V-square	0.0010684
Kappa	0.0000000
Pearson's r	0.0326860
Spearman's rho	0.0326860

Goodman - Kruskal

Dependent variable	Lambda	Tau
Seniority Level-Criminal Judges	0	0.0010684
Disposal Rate-Criminal Judges	0	0.0010684

Measures of Concordance for Ordinal Categories

Pairs	Number	Summary Measures
Concordant	160	Somers' D (Seniority Level-Criminal Judges dependent)
Discordant	140	Somers' D (Disposal Rate-Criminal Judges dependent)
Ties	925	Goodman and Kruskal's Gamma
Total	1225	Kendall's Tau-b

```
Pairs
Concordant   0.0320513
Discordant   0.0333333
Ties         0.0666667
Total        0.0326860

Test of Concordance: P-Value = 0.408609
```

Interpretation of results of analyzed data

Civil Cases: The Pearson Chi-Squared test yielded a statistic of 0.606 and a p-value of 0.436, indicating no significant association between judges' seniority and the disposal rate of civil cases $\{\chi^2_{(1, N=45)} = 0.606, P = 0.436\}$. The Fisher Exact Test supported this with a p-value of 0.549897.

Criminal Cases: The Pearson Chi-Squared test produced a statistic of 0.053 with a p-value of 0.817, indicating no significant association between judges' seniority and the disposal rate of criminal cases $\{\chi^2_{(1, N=50)} = 0.053, P = 0.817\}$. The Fisher Exact Test confirmed this with a p-value of 1.0000.

Conclusion

Statistical conclusion: Failing to reject Null Hypothesis (H_0)

The statistical findings show no significant association between judges' experience/ seniority and the trial case disposal rate. Therefore, the research fails to reject the Null Hypothesis (H0) at the 0.05 significance level, indicating insufficient evidence to support the Alternative Hypothesis.

Descriptive analyses of qualitative data for comparison with these quantitative results are discussed in the following sections.

Discussions, recommendations, and Suggestions

Discussion of findings

Based on the statistical analysis of questionnaire data, it is evident that there is no significant association. Despite judges' subjective beliefs possibly differing, the quantitative data reveal the conflicting reality which is objective. This discrepancy highlights the importance of further empirical evidence over subjective perceptions in understanding judicial efficiency in trial case disposal.

The Figure 5 shows judges' understanding in respect of association.

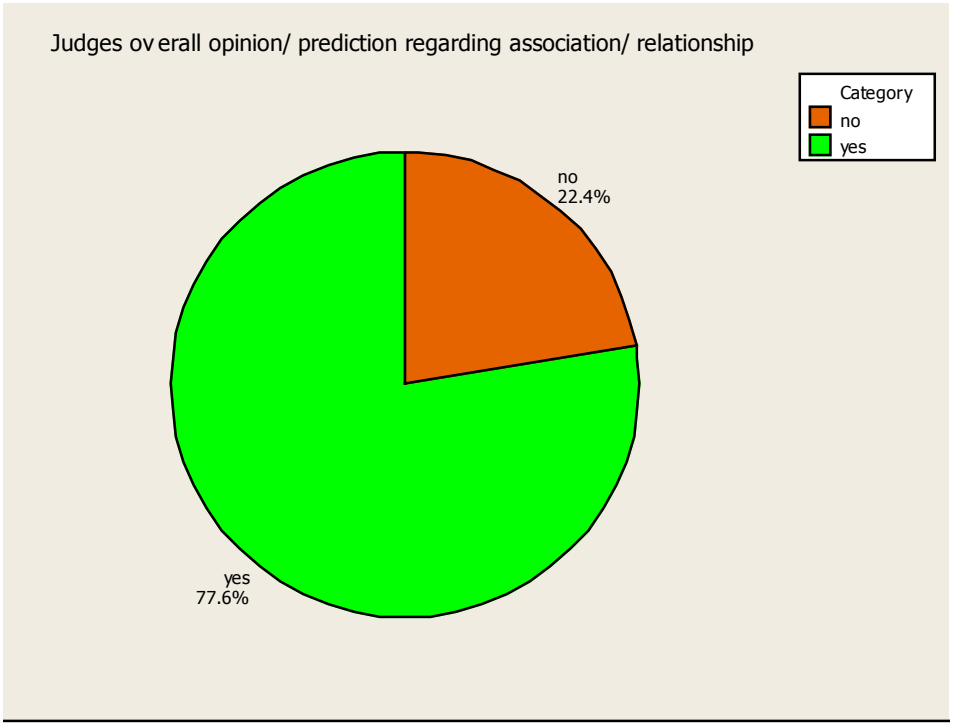

Figure 5: *Judges overall understanding in respect of association between seniority and disposal rate according to their belief.*

Interestingly, despite 77.6% of judges believing that seniority affects the disposal rate of judgments and orders, the results of the quantitative data analysis using Chi-Square Test revealed significant contradictions. For civil cases handled by judges in October 2022, the test resulted in $\chi^2_{(1,\ N=45)} = 0.606$, P=0.436, indicating no significant association. Similarly, for criminal cases, the test showed $\chi^2_{(1,\ N=50)} = 0.053$, P=0.817, also indicating no significant association.

Figures 5 and 6 together illustrate discrepancy between judges' perceived beliefs and empirical findings.

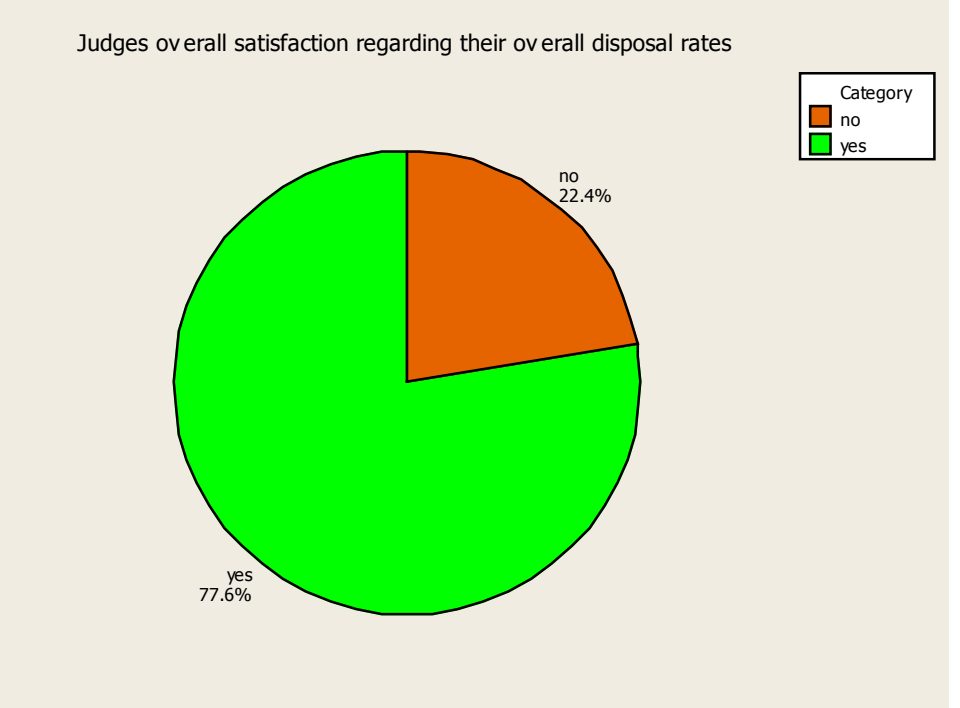

Figure 6: *Overall satisfaction of judges in respect of their disposal rates.*

Figure 6 reveals that 77.6% of judges reported satisfaction with their judgments/orders in October 2022. This reported satisfaction may not fully reflect their actual contentment, as the high case load, backlog, and the lack of a significant link between judges' experience and case disposal rates suggest that many judges might still be dissatisfied with case handling. This satisfaction may be influenced more by factors like meeting annual salary increment requirements rather than genuine approval of case disposal rates. Judges' responses underscore the need to minimize trial postponements and adjournments to improve case resolution and manage backlogs effectively. Figure 7 illustrates that 76.5% of judges support conducting an audit to investigate delays and inefficiencies, indicating that they admit persistent delay and poor disposal rate. Despite the reported satisfaction, research showing that seniority does not significantly affect case disposal rates further highlights the need for an audit to better understand and resolve underlying inefficiencies.

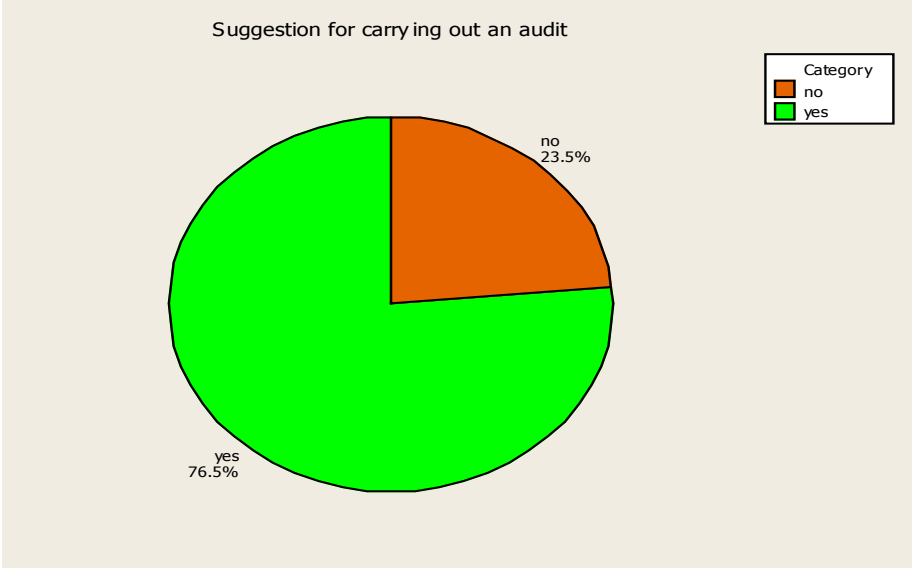

Figure 7: *Judges' suggestions to carry out an audit.*

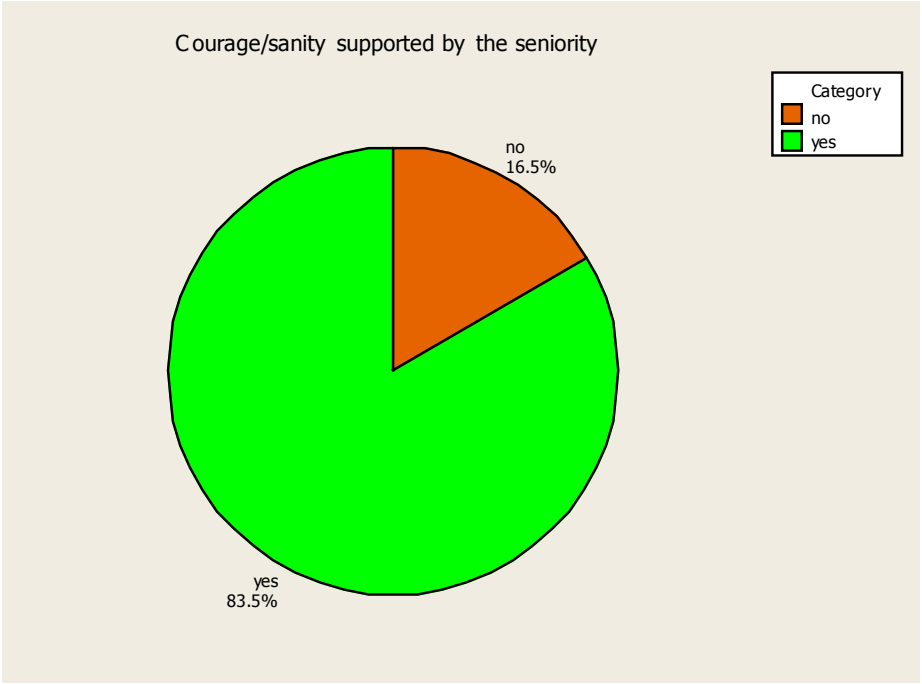

Figure 8: *Support for courage and sanity to refuse undue postponements of trials.*

Figure 8 shows that 83.5% of judges believe their seniority and experience equip them with the confidence and sanity needed to reject unnecessary trial postponements. However, this belief contrasts with Chi-Squared Test results, which indicate poor statistical significance and higher probabilities, suggesting that seniority does not significantly impact case disposal rates. Despite the judges' confidence in their experience aiding in reducing postponements, the data does not reveal a notable difference in disposal rates among judges with varying levels of seniority. This discrepancy points to a gap between the perceived value of experience and its practical impact, highlighting potential barriers or challenges in effectively leveraging judicial experience to enhance case resolution efficiency.

The chi-Square Test results also doubt the information received in connection with 72.9% of judges feeling of not being subjected to future harassments in indirect and distant means on account of refusing undue postponement. The information is shown in Figure No. 9.

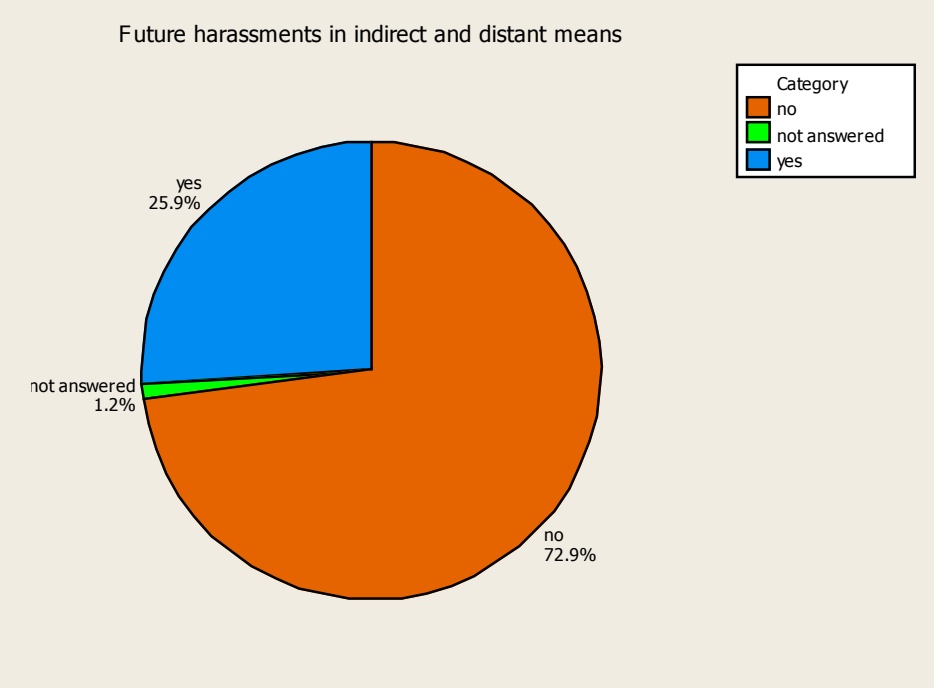

Figure 9: *Judges' feeling of being subjected to some kind of future harassments in indirect and distant means on account of refusal of undue postponements of trials.*

Supporting the belief of 83.5% of judges that experience improves their case management and 77.6% satisfaction with disposal rates, Figure 9 shows that 72.9% of judges feel

protected from distant or indirect harassment and undue inconveniences when denying unwarranted trial postponement requests. Despite these positive perceptions, Sri Lanka faces significant delays in justice delivery. Figure 10 shows that 37.6% of judges find that unprepared lawyers frequently request postponements. Additionally, 76.5% of judges support an audit to address these delays. The Chi-Squared Test results reveal that seniority has not significantly impacted case disposal rates. These circumstances collectively suggest that many judges may not be fully utilizing their experience to manage postponements effectively. This underutilization might be a strategy to avoid indirect risks associated with rejecting undue trial case postponements, contributing to ongoing inefficiencies in the judicial system.

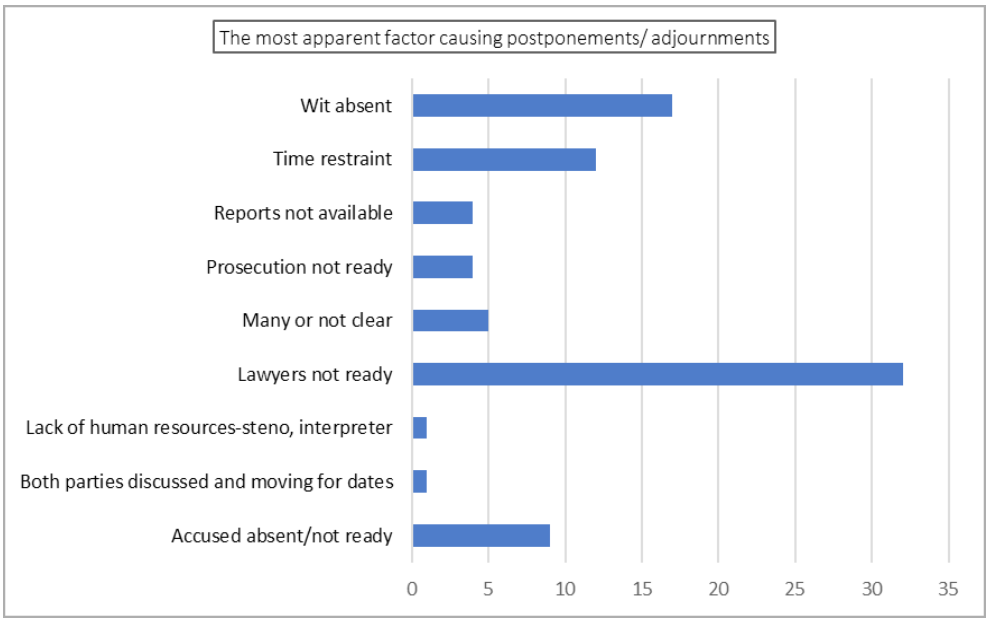

Figure 10: *The factors causing postponements/ adjournments of contested matters/ trials*

In accordance with the Figure No. 10, Table No. 10 shows the percentages of judges who stated apparent reasons.

Table 10: *Contributions to the postponements/ adjournments of trial cases*

Apparent factors causing postponements/ adjournments	**Contributions**
Lawyers are not prepared/not ready and accordingly moving for postponements/ adjournments	37.60%
Witnesses are not present/not called	20%
Time restraint	14.10%
Accused absent/ not ready	10.60%
Many reasons or not clear	5.90%
Medical reports & etc. are not available/ not called	4.70%
Prosecution party (Police & etc.) is not ready	4.70%
Lack of human resources (Stenographer, Interpreter)	1.20%
Both parties discuss and moving for dates	1.20%

Table 10 highlights that 37.6% of judges in courts of first instance identify lawyers' practices as the primary contributor to legal delays. Despite that, 72.9% of judges believe they won't face harassment for denying unwarranted trial postponements. This confidence may be unrealistic given the realities. Lawyers frequently request unwarranted trial delays, and although judges usually deny these requests to keep trials on track, such actions can sometimes lead to conflicts and tensions within the courtroom. Judges who regularly refuse to grant postponements may face subtle harassment or professional isolation. In fact, 25.9% of judges admit that they could experience such harassment because of these decisions. These concerns about future repercussions could explain the non-significant Chi-Square test results, potentially prompting judges to grant postponements more readily. Interestingly, while 77.6% of judges believe that seniority leads to better case disposal rates, and 83.5% recognize that experience provides the confidence and sanity to reject trial postponements, no significant difference in case disposal rates was found across different seniority levels. This suggests that concerns about future challenges may be influencing judicial behavior and efficiency. As a result, according to the responses, judges may feel compelled to advocate for greater control over lawyer conduct to improve case disposal rates and address backlogs.

Recommendations and further discussion

As said, the Chi-Square test results reveal no significant association between judges' seniority and case disposal rates, with $\chi^2_{(1, N=45)} = 0.606$, P=0.436 for civil cases and $\chi^2_{(1, N=50)} = 0.053$, P=0.817 for criminal cases. This indicates that assigning more senior judges to busy courts does not necessarily lead to faster case disposal. External factors may influence judges' performance more than their seniority. Although only 25.9% of judges reported concerns about potential indirect harassment for refusing undue postponements, this

issue could still affect case disposal rates. The study, based on responses from 85 of the 229 invited judges (37.28%), might have yielded different insights with full participation. Accordingly, a higher response rate from judges, ideally at least 50%, could have produced different Chi-Square test results. While the 85 responses are statistically sufficient, including all judges could provide a clearer picture.

The current data indicate that 77.6% of judges believe seniority is linked to higher disposal rates, 83.5% think seniority helps in resisting undue delays, 72.9% do not feel threatened by indirect harassment, and 77.6% are satisfied with their judgment output as of October 2022. Despite these positive perceptions, the significant case backlog persists, suggesting that other factors might be contributing to delays. And, Judges perceive that the primary cause of trial postponements is lawyers' unpreparedness, which accounts for 37.6% of delays (see Table 10 and Figure 10). However, if judges are determined with sanity to avoid unnecessary delays, compliance from lawyers and parties should follow, allowing judges to expedite trial cases.

Despite a majority of judges (72.9%) not fearing future harassment and 77.6% being satisfied with their performance, the ongoing backlog questions the effectiveness of current practices. On that view, some judges have suggested new legislation to grant presiding judges more power to oversee and manage lawyers. Additionally, the call for an audit by 76.5% of judges underscores the belief that an investigation into the causes of inefficiencies and backlogs is crucial. These discrepancies and inconsistencies highlight the need for further research to explore blended and additional factors contributing to delays.

The data collected in this research can be analyzed in various ways to explore additional associations related to legal delays and other concerns. However, this study focused on specific objectives and research problems. Future research could further analyze this data and investigate other factors affecting legal delays, such as judges' age or gender, in collaboration with these findings.

One of the study's limitations is using the disposals of October 2022 to represent the disposal rate. A more accurate approach would involve calculating monthly averages over at least a year. Additionally, the study acknowledges that working conditions vary widely across courts and judges. Although this study assumed uniformity for data collection, future research should account for these diverse factors. Despite these limitations, the findings from the lower judiciary provide valuable insights for higher authorities and reform planners in the judicial and legal sectors. Addressing judicial delays is crucial, as they directly affect litigants, who often refrain from challenging them out of fear of being seen as contemptuous. However, the growing pressure on litigants could eventually lead to a significant social backlash, potentially causing a public outcry against judges and law

enforcement.

Judges participating in the study have clearly highlighted public frustration and a loss of confidence in the system, including within the judiciary itself. Litigants struggle with delays due to inadequate supervision of their lawyers. This issue has led some judges to propose new legislation that would give the presiding judge greater authority to oversee and manage lawyers, aiming to enhance case management and reduce delays.

Apart from data used for analysis, judges from busy and heavily burdened first instance courts provided valuable insights crucial for immediate judicial reform in Sri Lanka, particularly for enhancing case handling and addressing backlogs. Key insights[16] include:

a. Detrimental effects of case postponements:

Justice and Legal Delays:

-Denies justice.
-Delayed and prolonged disposal.
-Time wasting and backlog.
-Heavy calling roll.
-Writing judgments not possible in specified time.
-Daily number of cases increases.
-Hearing trial cases per day is lower due to backlog.
-Loss of confidence in the system.
-Breakdown of rule of law.

Absence and Absconding:

-Absence of accused/witnesses.
-Accused absconding.

Litigant Difficulties:

-Difficulties and higher expenses for litigants.
-Accused compelled to plead guilty.
-Serving justice affected.
-Parties suffer mentally and financially.
-Economic loss to the country.
-Best interest of the child not implemented.
-Illegal acts for relief.

16 R.B.M. Daminda R. Weligodapitiya, "Effect of Judges' Experience (Seniority) on Disposal Rate of Trial Cases in Sri Lanka", Dissertation for Masters of Laws in Criminal Justice administration, The Open University of Sri Lanka(Not Published, submitted December 2022), Table 1, pages 31-43.

Judicial Workload and Efficiency:

-Heavy workload limits time for individual cases.

-Judges' salary increment affected.

-Decreased disposal rate.

-Poor public relations of judiciary.

-Lawyers' unnecessary applications.

-Issues in adjusting free dates of counsels.

b. Approaches for efficient case disposal in court:

Time Management and Trial Efficiency:

-More time for trials.

-Short trial dates.

-Day-by-day hearing.

-Deadlines for filing documents at the registry.

-Fixing trials on consecutive dates.

-Maintaining a lower number of calling cases.

-Fixing a comfortable number of trials.

-Calling all prosecution witnesses on the same day.

-Finishing at least one witness in a trial date without giving further dates.

-Concluding evidence of a witness on the same day.

-Dealing systematically.

-Case management and chronological order for trial.

Postponements and Adjournments:

-Refusing unnecessary postponements.

-Firmly refusing/ discouraging postponements/ adjournments.

-No postponements without reasonable/ substantial grounds.

-Refusing undue postponements/ imposing high costs.

-Implementing preventive mechanisms/ laws to reject adjournments on lawyers' - personal grounds on judges' discretion.

-Convincing that generally postponement moves are not entertained.

Legal Adherence and Efficiency:

-Strict adherence to laws/ regulations.

-Using legal provisions to limit lengthy cross-examination.

-Acceleration of trivial matters.

-Immediate bench orders for unwanted objections.

-Record admissions.

-Allowing application of laws/ sections at the best possible initial stage.

-Limiting unnecessary applications/ waste of time, using civil procedure code/ evidence ordinance.

-Giving high discretion to judges in certain occasions.

Witness Management:

-Calling all witnesses in a single matter on the same day.

-Calling essential witnesses as soon as possible.

-Avoiding unnecessary witnesses.

-Limiting time for examining witnesses.

-Controlling cross-examination to avoid irrelevant questions.

Settlements and Plea Bargaining:

-Encouraging settlements/ plea bargaining.

-Judge negotiating with parties for settlements.

-Promoting/ facilitating settlements.

Judicial Conduct and Support:

-Studying cases by judges.

-Due application of sections.

-Warning and actions.

-Indulging support of lawyers.

-Showing regard to lawyers' quality.

-Higher number of judges/ courts.

-Being an active judge.

-Adoption of a policy not to postpone, immediate termination proceedings according to law.

c. Suggestions for efficient and sufficient disposal rate/ suggestions for clearing back-logs:

- Promote Alternative Dispute Resolution: Encourage mediation, plea bargaining, and settlements to expedite case resolutions.
- Control Delays: Refuse unnecessary postponements, ensure adherence to statutory time limits, and address delays with actions against lawyers and strict procedural measures.
- Optimize Case Management: Maintain a lower number of calling cases, fix short trial dates, and prioritize old cases. Implement pre-trial procedures, and call all witnesses on the same day.
- Expand Resources: Increase the number of judges and court houses, establish new courts, recruit additional judges, and improve infrastructure.
- Enhance Efficiency: Extend court hours, improve digitalization, and use written submissions and precise time slots for cross-examination.
- Educate and Train: Provide intensive training for judges, lawyers, prosecution parties, and investigators on efficient practices and case management.
- Separate and Specialize: Separate judges for trials and case calling; establish special trial courts if needed.
- Improve Coordination: Reduce administrative burdens on judges, balance old and new cases, and enhance prosecution coordination.
- Streamline Processes: Implement strict deadlines, avoid unnecessary witnesses, and limit unwanted calling cases.

An approach informed by these key insights will ensure accountability and enable effective action to address current delays. Justice delays can deny rights and worsen litigants' grievances. Authorities and officers must shift away from a "not my problem" attitude and tackle these issues with urgency.

Judges can use the research findings to drive local reforms for improving case disposal and addressing backlogs. By focusing on specific delay causes detailed in the study, especially those in Tables 10, judges can tackle delays more effectively in collaboration with lawyers and stakeholders, rather than waiting for higher authorities.

Non-significant relationship between judges' seniority and trial case disposal rates {$\chi^2_{(1, N=45)} = 0.606$, P=0.436 for civil cases and $\chi^2_{(1, N=50)} = 0.053$, P=0.817 for criminal cases} suggests that judges in courts of first instance demonstrate similar levels of efficiency in disposing of trial cases. A reasonable argument could be made that this result might be influenced by the strict targets set for judges to produce a specific number of contested

judgments to qualify for annual salary increments. Under these conditions, judges may be tightly adhering to these targets, minimizing deviations that might otherwise arise from the natural application of experience in hearing cases, and writing judgments. If the result might not have been influenced in such a way, judges, regardless of their seniority, should equally contribute towards the common goal.

Finally, I would reiterate that there is a noticeable contrast between the empirical statistics (Chi-Square) and the descriptive statistics (graphical and percentages) which reflects judges' perceptions. Given this discrepancy, I strongly recommend extending this research to further explore these issues. Any reader of this article may take on the responsibility.

"Let it not be seeds on a barren land" A sociological approach on the Penal laws applicable for 'Statutory Rape'

Imesha Dharmadasa*
Magistrate, Madawachchiya

"The law will never make men free; it is men who have got to make the law free."
- Henry David Thoreau -

Introduction

The law, being a fundamental feature of society, has always been a fertile field of inquiry for sociologists. Sociology of law is that part of sociology that seeks to law, and moves toward sociology in search of ways to improve the capacity of law to serve the ends of society.[1] The sociological school of thought is one of the most popular approaches to jurisprudence in the contemporary world as well as in the legal fraternity.

The essence of the sociological analysis of law, is that law is a product of social forces and that its binding quality can be explained only in relation to the factors which mold a law in a given society. As society changes and evolves, the balance struck by the law between competing groups of interests will undoubtedly call for constant re-appraisal and modification. This is an ongoing process which can never cease to continue.

The sociological jurisprudence tends to the analyze the interconnection between the society and the law. The law, according to sociological analysts, should unavoidably be based upon the contemporary needs of the society. If laws that are not compatible with the attitude of the society are brought into play, such laws would eventually stand out in the legal system like a 'sore thumb'. Hence, the law makers of any country should be mindful of the aspirations of the society prior to enacting laws.

Research Purpose

Just as biology cannot explain an organ or a function without reference to the entire organism, similarly, sociology cannot explain social phenomena without reference to a social context as a whole[2]. In the same line of thought, one particular law or one branch of a country cannot succeed in explaining what the pulse of the society is. Hence, in writing this article, the author has identified its research purpose along the lines of the current

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1 Suri Ratnapala, "Jurisprudence" 2nd ed, Cambridge University Press 2013, at p 211

2 In the words of Comte, "there can be no scientific study of society either in its conditions or its movements If It is separated into portion and its divisions are studied apart." (n 3)

penal laws of Sri Lanka. For the purpose of ease, this author has limited the research into one crucial penal law of the country, which sheds light on a number of sociological concerns in its analysis.

In making the research purpose of this article a success, this article pays attention to the legislative expectation of imposing **a minimum mandatory sentence** of ten years imprisonment in terms of section 364 (2) (e) of the penal code as amended in 1995, with specific reference to offenders who are young-adults' who are accused of engaging in sexual intercourse with girls under 16 years of age and are convicted of "rape"[3].

According to Comte, the new science of human society must use the positive method.[4,5] following this method, the status-quo on the legal framework on **'statutory rape'** is scrutinized in this initial step.

In terms of section **363(e)** of the penal code as amended by way of Act no. 22 of 1995, **sexual intercourse with a woman under sixteen (16) years of age is rape whether committed with or without the consent of the woman.** This is referred to as *statutory rape* in the legal fraternity, and consent is irrelevant in such cases. even with the consent of a girl below 16 years of age, a person can be indicted in the High Court and convicted, as it has been clearly stated out in the statute, leading to the general usage of the word "statutory" rape. This provision is based on the principle that a girl below 16 years of age *inter alia* has no legal capacity to grant consent to sexual intercourse[6].

Section **364(2) (e)** provides for the imposition of a minimum sentence of ten years imprisonment for those convicted of rape where the woman is under eighteen (18) years of age. Nonetheless, the proviso to section 364(2) vests a discretion in court to impose a lesser sentence where the offence is committed in respect of a person under 16 years of age **if the offender is under eighteen years of age *and the intercourse is with the consent of the person.*** Here, the proviso makes reference to the *consent of a girl under 16 years of age,* when on the other hand, section 363(e) recognizes that a girl under 16 years has no capacity to grant consent to sexual intercourse[7].

In an instance where a young boy, for instance, a boy of 20 years of age, engages in sexual intercourse with a girl under 16 years of age and is convicted of statutory rape, the court has **no statutory leeway** to deviate from imposing a sentence which is less than the minimum mandatory sentence even if there are circumstances that may justify the imposition of a lesser sentence.

3 *"Punishment for rape of a girl under 16 years of age Amendment to section 364 (2) of the Penal Code*" Law Commission of Sri Lanka, 19th June 2009, at p 1

4 (n 3)

5 By this method, he meant the subordination of concepts to facts and the acceptance of the idea that all social phenomena are subject to general laws—social laws (n 3)

6 (n 5) at p 2

7 Ibid

The imposition of a minimum mandatory sentence on the young offender, in such circumstances, may not meet the ends of justice. Therefore, one may even raise questions as thus; *Should the trial judge have a discretion to impose a lesser sentence in cases of statutory rape, in certain circumstances, such as where the persons have engaged in sexual intercourse, they are young adults, and there is evidence of an intention to continue the relationship?*

The international obligations which Sri Lanka has made seemingly contradicts with the local legal framework which is rigid and unjustifiable in certain circumstances. In order to acquire a more reliable conclusion, a comparison between the status quo of the local Penal laws and the international obligations are taken into consideration in brief.

Sri Lanka has taken many initiatives to ratify and comply with international obligations[8] which inevitably shape the interpretation guidelines of laws enacted. A brief analysis done on international conventions such as the Convention on the Rights of the Child (CRC) and the Universal Declaration of Human Rights (UDHR) poses a much more moral and ethical question on this matter. The UDHR states that the inherent dignity and the equal and inalienable rights of men and women, promoting *social equality*[9] is important[10]. It also promotes non-discrimination and the equal protection of the law[11].

It is evident that on many rural areas, when adolescents reach puberty they tend to cohabitate and start a family life. It has become a normalized phenomenon in many social spheres within the rural areas. CRC as well as the Children's Ordinance[12] (as amended) identifies that any person under the age of 18 years as a "child". On another level of analysis, one may also argue that the right to marry and the right to institute a family[13] has been looted away from certain individuals in the society.

Thus, a normative question arises whether it is justifiable to convict a young boy above 18 years of age for a crime as grave as rape when such sexual intercourse has been solely an act done as a part of cohabitation, an action that is normalized within a certain sphere within the Sri Lankan society.

Penal Code Amendment No. 22 of 1995

The amendment to the Penal Code in 1995[14] was brought due to reason such as the absence of a minimum Sentence of punishment, the absence of compensation for the victim and the limited application of laws against some offences such as rape.

8 Savithri Goonesekara, *'Early marriage and statutory rape in Sri Lanka'* www.unicef.org at p 5
9 Emphasis added
10 UDHR, Preamble
11 Ibid, Article 7
12 No. 48 of 1939
13 Ibid, Article 16
14 Penal Code (Amendment) Act No 22 of 1995

The Penal Code reforms of 1995 which introduced major amendments therefore created an environment for changes in the law on minimum age of marriage. They were accompanied by important changes to the General Law, and the Kandyan Law. Amendments to these laws in 1995 therefore raised the ages of capacity to marry for men and women in General and Kandyan Law to 18 years (General Marriage Ordinance Amendment, 1995). Kandyan Marriage Act (Amended 1995). The original provision in the Penal Code, (s.364 A) on the offence of "carnal intercourse with girls" was repealed, and the Penal Code was also amended to create a new offence of statutory rape of a girl under 16 years, irrespective of any proof that she consented to sex (s.363 as amended 1995).

Incest up to that time was not criminalized in the Penal Code. The amendment of 1995 replaced the s.364 A offence of carnal intercourse with girls with a new broader offence of incest. These policy changes therefore set new normative standards.

But unfortunately, despite all these reforms being taken place, it is clear that in our social context that decades after these provisions are enacted, for many people, justice is not met with.

Adolescent sex in Sri Lanka sometimes combined with cohabitation and pregnancy is a *social reality*. The concept of a "customary marriage" is being developed to justify the recognition of underage cohabitation or marriage. For instance, the *Adhivasi* community of the country may have certain customary marriages where girls who attain puberty are given to young *adhivasi* boys who are identified within their community as "providers".

The laws of this country apply to every citizen equally and similarly. Hence, can one argue that the *adhivasi* tradition of marriages are also "crimes" in terms of the penal laws?

Thus, one may even argue that the legal prohibition on child marriage and statutory rape in the reforms of 1995 do not appear to be understood by the authorities concerned, or at certain times, but not in all circumstances, by the judiciary. Even after the changes to the law in 1995 use of force is not necessary as rape is defined as sex with a girl over 16 years, without her consent, and statutory rape a criminal offence, and abuse of a girl who is under 16 years. When she is below 16 years, she is considered lacking in capacity to consent to sex.

Exponents of the sociological philosophy believe that, while the content of a legal system is influenced by a variety of considerations including ethical values and historical circumstances, nevertheless the essential foundation of law is an understanding of the society in the setting of which the law has its application.[15]

15 According to the American Sociologist Roscoe Pound, the health and viability of the social fabric will be directly influenced by the perception characterizing the balancing of social forces which are operative within a particular community. This balancing exercise necessarily involves the respective significance of different groups of interests at a particular time in relation to general objectives which are vital to the life of the community at large. (Ibid)

Hence, it is safe to state that a clear disparity between the laws and the actual practice inevitably exists in this regard as the black text law does not go hand in hand with the practical realities. This cannot be justified on the norm that the people of the state should be met with justice through the laws enacted.

Impact of SC 03/2008 on the status-quo

The supreme court in the exquisite judgement of SC Reference 03/2008 (decided on 15.10.2008) has clearly laid down the benchmark on how the judiciary should be looking at cases where young adult boys above 18 years of age are indicted for committing statutory rape. The determination of the Supreme Court was that the discretion of court with regard to the imposition of punishments cannot be curtailed by stipulating a statutory minimum term for offences other than for offences which are serious in nature. This judgement cleared an 'ambiguity' in the legal fraternity and proved instructions as to how the court should be determining an issue of statutory rape where there is a love affair or cohabitation, and paved a much-needed pathway for courts to use its "judicial discretion" when sentencing an offender under Section 364(2)(e).

There still exists a minor debate that the rationale of 03/2008 judgement would only apply in statutory rape matters where a court can deviate from the minimum mandatory sentence based on the circumstances surrounding each and every case. But the tendency of using this rationale on other cases where the intention of the legislature has been to impose a minimum mandatory sentence (for example, the Poisons, Opium and Dangerous Drugs Ordinance, the Food Act etc.) is also seen in practicality. This article does not intend to tread on this matter in this instance extensively.

Has SC 03/2008 given a solid solution?

It is undoubtedly accepted that the Supreme Court determination paved a pathway to address issues where young adults who are convicted of statutory rape are brought before the law. Unfortunately, the solution provided by the Superior courts can only be granted once the Accused is indicted by the Hon. Attorney-General of the country and is brought before the territorial jurisdiction of the particular High court where the offence is alleged to have been committed.

But until the indictment reaches the High Court, the Accused has no other pathway of proving his lack of mens rea, as the police is duty bound to arrest him and produce him before the relevant magistrate of the area once a complaint of statutory rape is reported. This undoubtedly affects the Accused (who will be identified as a "Suspect" initially) where he could be pushed into unpredictable negative outcomes by virtue of being identified as a "criminal" suspected of committing the grave crime of "rape of a minor".

On the other hand, given many reasons which the author does not wish to discuss at this juncture, our criminal justice system has shown inordinate delays in forwarding cases to its proper judicial forum. The investigators take a considerable amount of time to conclude their investigations, and the process of forwarding an indictment to the High court also takes time, which shows the lack of efficiency in the criminal justice system as a whole.

Even in instances where it becomes apparent to the investigators and/or the indicting state officers that the suspect has not had the mental element or *mens rea* for him to be apprehended and/or indicted for a rape, the officials are bound by law to take necessary legal steps against such suspects as the law mandates to do so. Thus, it is evident that the golden opportunity granted by SC 03/2008 determination for young adults who are accused of statutory rape even when they lack the guilty mind, come into their aid a little too late in the criminal justice process, thus reiterating the importance of keeping the phrase "Justice delayed is justice denied" within the minds of the stakeholders of the criminal justice system.

Recommendations

This author is thus of the view that the current law should be reformed to better meet the ends of justice and to remove existing contradictions, despite the determination of the Superior courts which has provided for a proper guideline. At the same time, this author is of the opinion that bringing out a more precise stance of the legislature on the penal laws covering statutory rape matters, the legal system of Sri Lanka would also be able to refrain from utilizing the rationale of SC 03/2008 matter as a panacea on all instances where a minimum mandatory sentence is imposed.

Conclusion

There is no doubt that the sociological analysis is one of the most influential approaches to legal reforms in modern times. The sociological school underscores with recurring emphasis, that the truth that 'law is a means to an end rather than an end in itself'. The aim of the legal system, in the final analysis, is to identify the requirements which are crucial to the development of a society and to nurture the interests identified in such a manner as to ensure the improvement of social conditions across the full spectrum of the society.

On the other hand, the legislation should also be mindful of the fact that by paying attention to the societal pulse and making reforms based tailor made to the society that a community lives in, all three branches of the state are able to achieve the true aim of a legal system of the country, i.e., to establish rules for the society that are based on the

behavior of different groups of the society itself, as it is the "people" themselves who make up the "society".

The seeds planted in our criminal justice system through the 1995 amendment to the Penal Code should be praised as it has given opportunities for the stakeholders of our criminal justice system to ensure that certain vulnerable parties of our society are protected, while emphasizing the importance of the "deterrence" effect of the criminal justice system. But at the same time, if these amendments act as a hindrance to certain social practices leading in a "victimization of a suspect/accused" the true ambitions of a criminal justice system will not be achieved at the end of the day.

And for these reforms at hand to bloom, the land on which they are planted should not be a barren land. The land on which the seeds of law reform are planted are the society. And if the planters of the seeds do not evaluate the land prior to planting the seeds, the seeds will not bloom properly and give the expected harvest in return. The seed should be selected with extreme caution, and the efforts of the planters will not be defeated in vain, if the soil and the seed are acting in sync to result a blooming yard of harvest that will make the land more beautiful, and the crops maximum in yield.

An Unorthodox Public Law Approach for Remedying Dilemma in the Migration for Employment Context

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Significantly lengthy ques in the passport offices, intensive demand for grasping foreign employment at any cost as well as a series of frauds in connection with foreign employment demonstrate compellable push factors in the cycle of migration creating a dilemma in the migration law regime in Sri Lanka. This is because our people are pushed to leave the country with no-hope of retuning in search for economic relief. In the circumstances, real dilemma in Sri Lankan Migration context must duly be comprehended and a remedial legal approach is needed. A cautious scrutiny of the explicitly detailed legal regime based on Sri Lanka Bureau of Foreign Employment Act[1] to National Labour Migration Policy 2008, National Policy Action Plan on Migration for Employment 2023 etc. may reveal a both a legal gap and policy gap pursuant to unpredictable and inconsistent policy. This lacuna could be ascertained as the return migration and reintegration that are the most crucial elements in the nexus between migration and development. Reintegration could be defined as the multidimensional process enabling individuals to engage in economic and social relationships needed to maintain life, livelihood and dignity that they achieve inclusion in civil life after their return[2]. This conceptual aspect involves a broad scope that includes economic, social, psychological and physical wellbeing of returnee migrants. From a counteractive public law perspective, the function of court is not to encroach upon the province of the policy maker but to interpret law and give effect to the same. However, when the policy statements like National Labour Migration Policy 2008 (NLMP), National Action Plan on Return and Reintegration and National Policy and Action Plan on Migration for Employment 2023 are systematically declared demonstrating that the same could be relied upon, it would be a controversial moot point whether the same could give rise to a legitimate expectation and whether such declarative policy could be said to have been relied upon by prospective migrants. Although this unorthodox form of general legitimate expectation seems unknown to law at first sight and court may be alleged

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1 Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985 as amended Act No. 4 of 1994 & Striking elements introduced by the Act No. 56 of 2009

2 Institute of Policy Studies in Sri Lanka, Skills, Aspirations and Reintegration Challenges of Returned Migrant Workers: Evidence from Selected Districts July 2023, p 10

for usurping the functions of policy maker this paper strives to develop a desirable approach within the four corners of the law in order to remedy migration law dilemma. Simultaneously, persuasive effect of International Migration Law treaties and conventions like the Convention on the Protection of Rights of All Migrant Workers[3] are ascertained in order to solve the problematic issues of return migration and reintegration.

It is important to analyze the crucial contribution of migration to our economy in focusing on a solution to this burning social problem. Migrant workers' remittance is the second largest foreign exchange generating sector for Sri Lanka. Remittances perhaps outweigh export earnings as the value addition in certain export industries are relatively low[4]. The president of Sri Lanka highlighted in his throne speech 2023 that the migration remittances has reached USD four billion in addressing the vision of developing a globally competent workforce, ensuring equitable and gender sensitive service delivery[5].

Sri Lankan Economy could be defined a remittance dependent economy with huge trade deficits offset by remittances abroad[6] and 71 percent significant contribution of migration remittances surpassing tea, rubber and garments exports as well as the same forming 8 percent of Gross Domestic Product (GDP) in 2020[7]. Therefore, strengthening foreign employment process and rectifying flaws in the legal regime governing migration is a vital factor in confronting the current economic crisis. Multiple facets in migration and foreign employment are regulated by explicit laws ranging from the Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985, Act No. 4 of 1994, SLBFE Amendment Act No. 56 of 2009 (SLBFE Act), International Law Conventions such as the Convention on the Protection of Rights of All Migrant Workers, National Labour Migration Policy (NLMP, 2008), Strategic Plan SLBFE 2022-2026 to sub-policy National Action Plan on Return and Reintegration 2015, National Policy and Action Plan on Migration 2023-2027 to Operational Manuals etc. Despite some progressive steps like sub-policy and the National Action Plan on Return and Re-integration of Migrant Workers, return migration and re-integration are crucial aspects lacking focus. However, return migration is one of the key pillars of migration and development nexus, along with diaspora engagement. Return and re-integration are inevitably linked with brain drain scenario. According to Lovell skilled emigration triggers multiple impacts inclusive of skilled migration reducing the number

3 International Convention for the Protection of Rights of All Migrant Workers and Their Families (1990) ratified by Sri Lanka in 1996

4 Prof. Manori Weeratunga, Head, Department of Demography at University of Colombo & Eranda Roshan Fernando is a Researcher, *Recent trends of Labour Migration in Sri Lanka, DailyFT dated 23rd March 2023*

5 National Policy and Action Plan on Migration for Employment -Sri Lanka 2023-2027, p (x)

6 Sadaratne Nimal, *Economic Benefits and social costs of migration, The Sunday Times Economic Analysis* dated 21st August 2011

7 Sri Lanka Bureau of Foreign Employment, Corporate Strategic Plan 2022-2026. (2021). Retrieved from Central Bank Report, http://slbfe.lk/file.php?FID=672

of educated workers critical to a developing country's productivity, returnee migrants bringing back their skills and work experience, expatriates abroad contributing to foreign remittances, returnee migrant employees transferring their knowledge or technology to developing countries in increasing productivity and economic development[8]. The indirect effects of migration reflect the increase of workforce skill stimulating economic growth to the optimum level and brain exchange between the countries[9]. Although migration or foreign employment legal regime is covered by explicitly detailed legal provisions Sri Lanka seemed to have been deprived of benefits of migration on account of the failure to attribute due recognition to return migration and reintegration that are decisive elements in the migration cycle. Inconsistent and unpredictable policies that fail to comprehend the importance of balancing conflicting interests concerning brain drain are criticized as lopsided, shortsighted and unsuitable[10].

The remedy for said complications could be ascertained from the eyes of Sri Lankan migrants (skilled, semi-skilled or unskilled) who are deprived of prospects of return owing to the absence of effective implementation of return and reintegration. Considerably wide-range and scope of the operation of legitimate expectation analyzed in recent fundamental rights application *Vavniya Solar Power Limited vs. Ceylon Electricity Board et al SCFR 172/2017*[11] concerning renewable energy laws demonstrate the capacity of the judiciary to act as dynamic guardian of peoples' rights based on substantive legitimate expectation. Furthermore, a broad form of legitimate expectation in the sphere of administrative law and fundamental rights law in the view of the SLBFE Act, National Labour Migration Policy 2008, Strategic Plan 2022-2026, sub-policies on the National Action Plan on Return and Reintegration 2015 to National Policy and Action Plan on Migration for Employment 2023-2027 etc., in pursuance of innovative interpretations on constitutional articles focusing on public trust doctrine, imputing pragmatic effect to Directive Principles of State policy etc., collectively operate as an effective remedy. Thus, the approach of the superior courts in the sphere of public law demonstrable in a series of cases extending from landmark judgments *Bulankulama vs. Minister of Industrial Development case*[12], *Ravindra Gunewardena vs. Central Environmental Authority et. al*[13], *recent Writ application concerning deforestation of Wilpattu Forest*

8 Gunewardena, C & Nawaratne, R (2017) *Brain Drain from Sri Lankan Universities quoting Lovell, Sri Lanka Journal of Social Science 2017/40(2)* , p 103-118, p. 105

9 Ibid p105

10 Samath, Faizal, *Migration and Retaining Talent, The Sunday Times, Business Times* dated 4th December 2022

11 *Vavniya Solar Power (Private) Limited vs. Ceylon Electricity Board, Sri Lanka Sustainable Energy Authority et al* SC Minutes dated 20th September 2023

12 *Bulankulama vs. Ministry of Industrial Development 2000 (3) SLR 243*

13 *Ravindra Kariyawasam, Chairman Centre for Environment and Nature studies vs. Central Environmental Authority, Sri Lanka Electricity Board, Board of Investment et al.*, SC FR 141/2015 dated 4th April 2019

Reservation[14] etc. based on republican features of our Constitution focusing on judicial incorporation of international conventions and public trust doctrine demonstrate the capacity of the judiciary to function as dynamic guardians of peoples' rights even in the migration law regime especially in the context of pressing social need. Thus, the objectives of this paper is focused on (a) comprehending the socio-economic significance of return migration and reintegration (b) analyzing the existing legal framework in relation to return migration and reintegration (c) identifying the dilemma in the migration law regime, ascertaining remedial measures for said dilemma (d) ascertaining influential developments in the public law regime in order to develop a remedy (e) considering the possibility of unorthodox form of general legitimate expectation over inconsistent and unpredictable policy especially in the light of recent dynamic developments in public law such as public trust doctrine, impact of directive principles of state policy, effect of republican features of the Constitution like inalienable peoples' sovereignty etc., and (f) ascertaining the possibility of resorting to International Law Conventions in the Migration context in the said remedial process.

Existing Law on Return Migration and Re-integration

In terms of Section 15(s) of the Sri Lanka Bureau of Foreign Employment Act (SLBFE Act), the bureau is bound by the object of undertaking programs for the rehabilitation of Sri Lankans who return after employment outside Sri Lanka and the SLBFE is empowered to do anything necessary or incidental to the objects under Section 16 of the SLBFE Act. National Labour Migration Policy 2008 declares that return migration and circulation are key opportunities for skills transfer, productive employment and conflict-free social integration[15]. Moreover, National Policy and Action Plan on Migration for Employment from Sri Lanka 2023 reiterate the same with policy empathy that the State shall duly recognize the contribution made by migrant worker and facilitate their return and reintegration[16]. Commencing at the point of departure the Sri Lanka Bureau of Foreign Employment ('SLBFE') will design and implement a mechanism for returnee migrant workers to promote local employment and tap into their potential for national and personal development. However, National Labour Migration Policy itself recognized that there were no specific programs that target returnee migrant workers to ensure their successful integration into societies that they left behind[17]. In pursuance of the directions of NLMP 2008, sub-policy and National Action Plan on Return and Re-integration of migrant workers was adopted by the Ministry of Foreign Employment in December

14 *Ravindra Gunewardena vs. Central Environmental Authority, Ceylon Electricity Board et. al.), recent Writ application concerning deforestation of Wilpattu Forest Reservation* CA (Writ) 291/2015 CA Minutes dated 16th November 2020

15 National Labour Migration Policy 2008, Ministry of Foreign Employment Promotion & Welfare, p32 & p vi,

16 National Policy & Action Plan on Migration for Employment 2023, p 6,

17 National Labour Migration Policy 2008, Ministry of Foreign Employment Promotion & Welfare, p32

2015 covering social reintegration of returnees, physical and psychological wellbeing of returnees and their family members, civil and political empowerment of migrant returnees and effective management of return and reintegration process[18]. The policy declarations conveying legal effect seemed to have culminated under National Policy and Action Plan on Migration for Employment 2023 especially with a proposed monitoring mechanism for the policy and National Action Plan on Migration for Employment.

Simultaneously, Sri Lanka participates in multilateral bodies such as ILO and UN and has ratified all core ILO Conventions except Convention 97 Migration for Employment Convention (Revised) 1949[19]. While SLBFE is the primary body overseeing migrant workers, the SLBFE Act includes lack of protectiveness provisions for the workers, lack of gender sensitivity provisions and inconsistency with the ratified 1996 International Convention on the Protection of All Migrant Workers and their Families[20]. Said International migration law conventions provide a conducive legal platform for remedying the complications in terms of return migration and re-integration

Inconsistent and Unpredictable Return Migration and Reintegration Policy with no positive steps

Although SLBFE has established a separate reintegration unit as indicated in the sub-policy National Action Plan on Return and Reintegration 2015 consequent to lack of co-ordination among ministries and agencies responsible and between divisional level actors gap analysis in 2018 recommended that SLBFE reintegration unit must be strengthened to co-ordinate with sectorial ministries and departments and enter into agreements with other relevant institutions. The lack of coherence and co-ordination in migration issues is another concern with different ministries handling different responsibilities[21]. This lack of coordination ultimately reduces the effect of policy to a nullity in a manner defeating the very purpose of the same. Furthermore, the strategic recommendations of the National Action Plan 2023 recommended the policy coherence, institutional coherence and sectorial collaboration[22]. The current situation concerning return migration and reintegration could be observed in a recent Sunday Times Business news article, which analyzes public perception on brain drain and migration scenario. A bigger problem that has not been addressed so far by policy makers and

18 Wicramasekera, Piyasiri (2019). *Effective Return and Re-integration of Migrant Workers with special focus on ASEAN members,* p9, p22, p 30

19 Gunewardena, Samanthi J (2014) *Labor Movement Responses to International Migration in Sri Lanka; Governance Mechanisms*)

20 Ibid after table 1

21 Wicramasekera, Piyasiri , *International Migration and Employment I n the Post Reforms Economy of Sri Lanka, International Migration Program,* p 30

22 P xvi, National Policy & Action Plan on Migration for Employment in Sri Lanka

even the think tankers connected with Institute of Policy Studies and other likeminded organizations in Colombo is the need for consistent policy on migration *vis-a-vis* the brain drain and what happens to the country's labour force if professionals and unskilled persons are going abroad. There is no clear policy: on one side Sri Lanka is encouraging outbound migration for work and training personal like in the case of Korea, which is offering fantastic salaries and other categories like engineers, doctors etc. but what happens when economic crisis ceases and Sri Lanka is on an upward growth path[23] .

This is the drastic policy dilemma in pragmatic operation, where policy is inconsistent, unpredictable and contrary to the declared purpose of the same. In other words, said policy declarations that changes from time to time with no-positive action and failing to take into account migration and development nexus and/or the return and reintegration aspects have been criticized as lop sighted, short sighted and unsuitable[24].

Thus, there is an urgent social need for consistent and predictable policy on return migration and reintegration with positive actions on the same, which comprehend the importance of balancing the conflicting interest of brain drain scenario. The recommendations land mark research in 2023 of Institute of Policy Studies titled *"Skills, Aspirations & Reintegration Challenges of Return Migrant Workers: Evidence from Selected Districts in Sri Lanka"* such as improving returned migrant workers' interest to seek skills for business activities, develop evidence-based, gender responsive and timely programs and awareness campaigns to support returned migrant workers to identify and fulfill their reintegration aspirations, including skills, employment and business-related aspirations, enhancing social wellbeing of returned migrants in connection with their families and improving female returned migrant workers' access to economic opportunities by establishing day care and long-term care facilities for elderly and day care and after school care for children in areas with a high density of returned migrant workers reflect to some extent what is required as consistent and predictable policy being followed by positive steps to implement the same[25].

Legitimate Expectation as a Remedial Approach in the Migration Context

Definition of Legitimate Expectation

The development of legitimate expectation under multiple facets seems a potent tool to be utilized in confronting drastic gaps in migration law regime like return and reintegration. As the American realist Oliver Wendell Holmes defines the history of common law and states that the law embodies the story of a nation's development

23 Samath, Faizal, *Migration and Retaining Talent, The Sunday Times, Business Times dated* 4th December 2022

24 Ibid

25 You Lead, Skilled & Resilient Migrant Workers Project, Skills, Aspirations & Challenges of the Returned Migrant Workers: Evidence from Selected Districts in Sri Lanka July 2023 www.youlead.lk

that reflects the felt necessities of the time, the prevalent moral and political theories, and institutions of public policy[26]. Although in Sri Lanka, influential developments of the notion of legitimate expectation in the environmental law seem a judicial endeavour to upgrade with social necessity in relation to complications in the migration law context, the same have so far been hardly utilized. Thus, it is the duty of courts to utilize the developments dynamically and innovatively in the concept of legitimate expectation based on policy declarations like National Policy and Action Plan on Migration for Employment in order to remedy drastic gaps in migration law concerning return migration and reintegration.

The influential contribution of the lawyers to development of legal concepts like the Legitimate Expectation could be observed in relation to sociological jurisprudence of Rosco Pound. The sociologist of law approaches law from the viewpoint of society and its diverse forms of social control. These inquiries lead to the discovery of the specialized and organized form of social control which is the lawyer's law. The sociological jurist starts from the opposite end, the organized form of control that is the lawyer' law, and moves towards sociology in search of ways to improve the capacity of the law to serve the ends of society. The meeting point according to the sociologist is the sociology of law, but according to Pound it is sociological jurisprudence[27]. Therefore, especially in the context of the urgent social need for solving the problem concerning return and reintegration from a migration law scenario both the judges and lawyers are well positioned to justify unorthodox form legitimate expectation against inconsistent, unpredictable and uncertain policy.

The doctrine of legitimate expectation is founded upon the principle that an expectation generated due to representations made by regular practices and it should conduct itself in accordance with its own representations and practices. This is basically two-fold that the same could be identified as Procedural Legitimate Expectation and Substantive Legitimate Expectation. His Lordship Yasantha Kodagoda while engaging in a lengthy discussion on multiple aspects of said doctrine of legitimate expectation analyzed that the recognition of substantive legitimate expectation offers not mere procedural protection. It provides a degree of legal certainty about the nature and merits of the decision of the public authority, which results in a particular outcome. Thus, legal certainty is the essence of said doctrine.

"The concept of legal certainty provides a major justification of the doctrine of substantive legitimate expectation. ...Legal Certainty is a component of rule of law. The legal protection of expectation of through the application of the principles of administrative law such as

26 *Wendell Holms, Oliver (1881), The Common Law Vol. I. Boston: Little, Brown and Company, https://www.google.lk/books/edition/The_Common_Law/3lllNNjlznkC?hl=en&gbpv=1&pg=PR1&printsec=frontcover*

27 Prof Suri Ratnapala, Jurisprudence p 188 & 189

the doctrine of legitimate expectation is way of giving requirements of ***a) predictability b) certainty c) formal equality and d) fairness and e) consistency, which all the facets inherent in the rule of law****. However, legal certainty should be balanced with wider public interest. What will ultimately be sanctioned by court is what is in public interest*[28]*"*

Thus, the doctrine of Legitimate Expectation is grounded on the basic facet of the rule of law, which is the legal certainty. The very essence of rule of law is embossed on principles of legal certainty, consistency, predictability, formal equality and fairness.

An Unorthodox Substantive Form of Legitimate Expectation for Consistent and Predictable Policy

When migration for employment becomes a decisive factor in Sri Lankan economy while return and reintegration is drastic gap in the legal regime governing migration for employment there is an urgent social necessity to remedy said gap. Even though the conduct of authorities like the Ministry of Labour and Foreign Affairs reflect systematically declared policy statements such as National Labour Migration Policy 2008 to National Policy & Action Plan 2023 the same results in frustration on account of being inconsistent, unpredictable and uncertain in their pragmatic operation. This because on account of return and re-integration policy resulting in disappointment in their pragmatic operation our prospective migrants for foreign employment are pushed out of the country with no-hope of returning. Therefore, in the absence of public law intervention to solve this policy dilemma in the migration law regime, people will be deprived of redress and it is important to note that judiciary is the last resort or the ultimate check and balance available to people especially when other arms like legislature and executive acts in an arbitrary manner.

Individuals may not have strictly enforceable rights but have legitimate expectations and decisions subjected legitimate expectations are subjected to judicial review[29]. A promise, regular procedure or undertaking could give rise to a legitimate expectation as upheld in *Perera vs. National Police Commission*[30]. There are two types of legitimate expectation called substantive legitimate expectation and procedural legitimate expectation. The doctrine of substantive legitimate expectation is based on the principle of 'legal certainty', which requires that a person should be able to plan an action based on representations made to him by public authority and which he has reasonably relied on. This concept of legal certainty in connection with legitimate expectation was ascertained in explicit detail by His Lordship Late Prasanna Jayawardene in the

28 SC FR 172/2007 SC Minutes dated 20th September *20203 Vavniya Solar Power (Private) Limited vs. Ceylon Electricity Board, Sri Lanka Sustainable Energy Authority et al* P 42 & 43

29 Multinational Property Development vs. UDA 1996(2) SLR 51

30 *Perera vs. National Police Commission* 2007 Bar Association Law Journal Vol. XIII 14 @ 17 Her Ladyship Shiranee Bandaranayake quoting *David Foulks Administrative Law*

fundamental rights application Ariyaratne *& 93 others vs. Illangakoon*[31]. A recent series of administrative law and fundamental rights judgments based on republican features of the 1978 Constitution such as inalienable peoples' sovereignty, public trust doctrine, extensive scope of *mandamus*, the distinction between *prerogative writs* and orders in the nature of writs under article 140 etc. demonstrate the capacity to ascertain a novel but unorthodox form of legitimate expectation, which could more likely to be decerned as substantive legitimate expectation for consistency and predictability of policy being followed by positive action. This form of legitimate expectation involves consistent and predictable and policy and positive action on declared policy. However controversial or unorthodox this notion may be, especially on account of the problematic policy scenario concerning return migration and reintegration, it would be a worthwhile endeavour to ascertain all possible remedial legal interpretations within desirable legal limits.

In *Zamrath vs. Sri Lanka Medical Council*[32] His Lordship Dehideniya referring *Kathuriarchchi vs. Sri Lanka Medical Council* elaborating the purview of powers granted to SLMC under the law and the notion of administrative authorities being bound to meet the challenging needs of the society, examined the rationale underlying legitimate expectation as follows:

"This doctrine ensures legal certainty which is imperative as people ought to plan their lives, secure in knowledge of the consequences of their action. The perception of legal certainty deserves protection as a basic tenant of rule of law, which court attempt to uphold as the apex court of the country. The perception of legal certainty becomes negative when authorities by their own undertakings and assurances have generated legitimate expectations of the people and subsequently by their own conduct infringe so generated legitimate expectations."

The doctrine of legal certainty reflects fertile basis for legitimate expectation in the migration context.

In *Perera W.K.C vs. Prof. Daya Edirisinghe*[33] His Lordship Mark Fernando analyzing legitimate expectation concerning Constitutional provisions of equality, inalienable sovereignty and duty cast on all organs of state under Article 4(d) discerned that Article 12(1) of the Constitution ensures equality and equal treatment even where a right is not granted by common law statute or regulation and confirmed by the provisions of Article 3 and 4(d). Thus, whether rules of examination criteria have statutory force or not, the rules and examination criteria read with Article 12 confer a right on duly qualified candidates to the award of degree without discrimination.

31 *Ariyaratne & 92 Petitioners vs. Illangakoon, Inspector General of Police, AG & 85 Respondents SC FR 444/2012 SC Minute* dated 30th July 2019 His Lordship Prassanna Jayawardene quoting Craig, p24

32 *Zamrath vs. Sri Lanka Medical Council* His Lordship Dehideniya in *Kathuriarchchi vs. Sri Lanka Medicial Council* 2020 (1) Sri LR @ 27

33 *Perera W.K.C Perera vs. Prof. Daya Edirisinghe* 1995(1) Sri LR 148

His Lordship Priyantha Jayawardene PCJ in *Ratnakumara vs. PGIM*[34], observed that legitimate expectation may arise from subordinate legislation. On the question of legality of legitimate expectation for consistent and predictable policy, in *Dayaratne vs. Minister of Health and Indigenous Medicine*[35] it was held that while policy is for the policy maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course does the lawfulness of policy). Thus, legitimate expectation in migration context does not mean stepping into the shoes of the policy maker but simply interfering with unfairness of inconsistent and unpredictable policy in pursuance of the principle of legal certainty. The Lord Carnwath in *United Policy Holders Group vs. AG of Trinidad* & *Tobacco* quoting Wade stated the proportionality court will take into account in resiling from legitimate expectation are any conflict with wider policy issues, particularly those of macro-economic or macro-political kind this was observed with reference to Privy Council decision quoted United Policy Holders Group vs. AG of Trinidad & Tobacco, in *Ariyaratne & 92 others vs. Illangakoon IGP* by His Lordship Late Prasanna Jayawardene.

His Lordship Yasantha Kodagoda in conclusive remarks in the afore-quoted case of *Vavniya Solar Power Private Limited vs. Ceylon Electricity Board* distinguished court granting substantive relief in relation to Legitimate Expectation as opposed to court declaring what policy ought to be. In other words, how the courts are expected to maintain a lawful balance in the interpretation of the notion of legitimate expectation rather than encroaching upon the province of policy maker:

"In conclusion, it would be pertinent to note that, the essence of jurisprudence in Vavniya Solar Power Case supports the view that, in a case of substantive legitimate expectation, the test for reviewing a decision of public authority is no-longer limited to the criteria of ***Wednesbury unreasonableness****. The court's task is to weigh genuine public interest that would be protected by accommodating personal interest of the claimant in comparison with reasons given by public authority for change of policy on its part it would invariably claim to be in the public interest. That is not a means of directing a public institution what their policy ought to be. The approach of court is a means of preventing abuse of power by public authorities and thereby protecting public interests, which is the bounded duty of courts*[36]*"*

In the circumstances, court intervention in declaring that inconsistent, unpredictable and uncertain time to time declared policy, that blatantly disregards brain drain or migration development nexus could be apprehended a violation of Legitimate

34 *Ratnakumara vs. PGIM,* His Lordship Priyantha Jaywardene PCJ (*SC Appeal 16/2014* SC Minutes dated 30th March 2016

35 *Dayaratne vs. Minister of Health and Indigenous Medicine* 1999 (1) Sri LR 393 at p. 403-404

36 P 47, Hid Lordship Yasantha Kodagoda in *Vavniya Solar Power Limited vs. Ceylon Electricity Board, Sri Lanaka Sustainable Energy Authority et al* SC FR 172/2017 SC minutes dated 20th September 2023

expectation. Although National Labour Migration Policy 2008, National Policy Annual Action Plan on Migration for Employment 2023-2027 and National Action Plan on Return and Reintegration 2015 depicting a holistic approach for return and reintegration of migrant employees convey demonstrable intention of state organs to take positive action upon the said expressly declared policy the very purpose of effective return and reintegration is ultimately defeated pursuant to inconsistency, unpredictability and uncertainty and lack of positive measures. The state functionaries including those exercising ministerial functionaries cannot omit positive action in violation of the legitimate expectations created by the systematically declared policy statements however drastically they may change over time. Thus, such approach cannot be interpreted as court usurping the function of policy maker.

Fundamental Rights, Constitutional Features, Sri Lanka Bureau of Employment Act and Migration Policy Declarations Creating basis for such Unorthodox Legitimate Expectation

A series of fundamental rights judgments ranging from *Janogosha* Case[37], *Waruna Karunathilake Vs. Dayananda Dissanayake, the Commissioner General of Elections*[38] etc. reflect that the fundamental rights declared and recognized under Article 14 of the Constitution such as freedom of expression and movement comprise an extensively broad scope for interpretation.

The fundamental right of freedom to return to Sri Lanka under the Constitution is a broad notion of which returning and reintegration prospects of migrant workers is an integral element and state organizational structure including the SLBFE is bound by the duty to respect, advance and secure fundamental rights[39].

Article 4(d) of the Constitution, which declares that fundamental rights declared by the constitution shall be advanced secured and protected by all organs of state and shall not be abridged, denied nor restricted imposes a duty on organs of state like ministries to advance and secure fundamental rights. Therefore, the freedom to return to Sri Lanka must be interpreted in a broad sense that effective return and reintegration are inseparable, indispensable and integral elements of the fundamental right of freedom to return to Sri Lanka.

In the migration context, National Labour Migration Policy 2008, National Action Plan on Return and Reintegration 2015, National Policy & Action Plan on Migration for Employment 2023-2027, Strategic Plan 2022-2026 declaring the empathy on return migration and reintegration even from the point of departure and Section 15(f) of

37 *Amarathunga vs. Srimal & others* 1993(1) Sri LR 264

38 1999(1) Sri LR 157

39 Article*, 14(1) (i) and 4(d) of the Constitution of the Democratic, Socialist Republic of Sri Lanka*

SLBFE Act read with equal protection provisions of Article 12 of the Constitution, inalienable people's sovereignty under Article 3, Article 4(d) duty cast on all organs of the state as well Article 14(1)(h) and 14(1)(i) freedom of movement and freedom to return ensured legitimate expectation to effective return of migrant workers.

Directive Principles of State Policy and Fundamental Duties Strengthening Legitimate Expectation

As declared in terms of Article 27(1) of the Constitution Directive Principles of state policy shall guide parliament, president, and the cabinet of ministers in the enactment of laws and in governance. State is pledged under Article 27(1) (d) to directing and coordinating public and private economic activity towards social objectives and public welfare and in Article 27(7) the state is bound to ensure that operation of the economic system does not result in concentration of wealth and means of production to the common detriment. Especially in the context where these constitute guidelines for policy from a, migration point of view, said principles are vital in developing legitimate expectations for progressive action on declared policy and positive action on the same.

The Facet of Public Trust Doctrine Effecting Directive Principles as a Strong Basis for Legitimate Expectation

Despite the non-justiciable nature of directive principles in terms of Article 29 of the Constitution, our Courts have frequently given life to these in the interests of people. His Lordship Shravananda *In re the 13th Amendment to the Constitution* held as follows:

"True the principles of state policy are not enforceable in a court of law but that short coming does not detract them from their value as projecting as aims and aspirations of a democratic government[40].

The significance of directive principles developed so heavily when the same was given effect in conjunction with public trust doctrine. In Writ application in relation to controversial deforestation of *Wilpattu* Reservation His Lordship Janak de Siva quoting *Heather Mundy* case defined public trust doctrine as follows:

"…… this court recognized itself has long recognized and applied public trust doctrine: that powers vested in public authorities is neither absolute nor unfettered but held in trust for public, to be exercised for the purposes for which they have been conferred and their exercise is subjected to judicial review by reference to those purposes."[41]

40 *In re the 13th Amendment to the Constitution* (1987) 2 Sri. LR 312

41 *Centre for Environmental Justice (Guarantee) Limited vs. Anura satharasinghe, Conservator General of Forestry, Rihad Badiuddeen, Ministry of Industry & Commerce et al*, CA (Writ) 291/2015 dated 16th November 2020

The public trust doctrine is a strong rationale as to why the authorities who develop NLMP 2008, Corporate Strategic Plan and Sub-policy on Return and Reintegration are bound by legitimate expectation for consistent and predictable policy with positive action. Therefore, the authorities like Ministry of Foreign Affairs or Sri Lanka Bureau of Foreign Employment, officers etc. who hold powers in trust people cannot simply declare statements of said nature without creating legitimate expectations in favour of prospective returnee migrants.

In *Environmental Foundation Limited vs. Mahaweli Authority*[42] *His* Lordship Ratnayake observed that although it is expressly declared in the constitution that directive principles do not confer any legal obligations and are not enforceable in any court or tribunal courts have linked directive principles to public trust doctrine and have stated that these principles should guide state functionaries in the exercise of their powers.

His Lordship Prasanna Jayawardena PCJ in fundamental rights application against *ground water pollution consequent to Chunnakam Power Station*[43] stated "CEA and BOI, which are state agencies, are to be guided by directive principles and fundamental duties when carrying statutory and regulatory duties. The Directive Principles of State Policy are not wasted ink on the pages of the Constitution. They are living guidelines which state and state agencies should give effect to."

These cases, where directive principles are made effective combined with the public trust doctrine, enlarge the scope of legitimate expectation and the said approach could be used to resort to directive principles in the migration context.

The directive principles preventing operation of economic system resulting in concentration of wealth and means of production to common detriment, as well as state being pledged to economic activity planning towards social objectives, reflect fertile basis for strengthening legitimate expectation in view of National Labour Migration Policy 2008, National Policy & Action Plan on Migration for Employment 2023-2027, Strategic Plan and objectives of the SLBFE Act to effective return and reintegration ensured by the SLBFE. Thus, the public trust doctrine in pursuance of peoples' inalienable sovereignty under Article 3 of the Constitution along with the effect of directive principles will undoubtedly facilitate legitimate expectation for effective return in favour of the prospective returnee migrants who are deprived of the same on account of inconsistent and unpredictable policy with no positive steps. Nevertheless, structural arguments invoking such legitimate expectation will depend on factual circumstances concerning each of the different individuals.

42 *Environmental Foundation Limited vs. Mahaweli Authority 2010(1) Sri LR* at p.19 His Lordship Ratnayake

43 *Ravindra Kariyawasam, Chairman Centre for Environment and Nature studies vs. Central Environmental Authority, Sri Lanka Electricity Board, Board of Investment et al.*, SC FR 141/2015 dated 4th April 2019

International Migration Law Conventions

Sri Lanka ratified the Convention on the Protection of Rights of All Migrant Workers in 1990 (ratified by Sri Lanka in 1996) and in terms of Article 67(2) of the said Convention convey inter-state cooperation as a means to promote adequate economic conditions for migrants' resettlement, orderly return of migrant workers to their 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.[44]

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.[45]"

With reference to said *Eppawala Phosphate case*, her ladyship Shirani Thilakawardne observed in *Wijebanda vs. Conservator General of Forestry*[46] although international instruments and constitutional provisions are not legally binding, they constitute an important part of our environmental protection regime.

This judicial activism countered by emphasis on monism was criticized for trespassing into the legislative sphere in the *Sinharasa case* (*Nallaratnam Sinharasa vs. Attorney General)*[47]. However, according to Dr. Sonarajah the Indian Supreme Court justified its activism that it was merely ensuring that the advantage of treaty reaches citizens and it is not obstructed by executive lethargy in not incorporating into domestic law as follows:

"The Indian Supreme Court justified its activism on the ground that it was merely ensuing that the advantages of treaty reach citizens and it is not thawarted by executive lethargy in not incorporating into domestic law. It also pointed out that by doing so it was avoiding international responsibility of state which had an obligation to incorporate

44 Wicramasekera, Piyasiri (2019). Effective Return and Re-integration of Migrant Workers with special focus on ASEAN members, p9, p22, p 30

45 *2000 (3) SLR 243,* His Lordship A.R.B Amarasinghe

46 *Wijebanda vs. Conservator General of Forestry 2009(1) SLR 337*

47 2013(1) SLR 245

treaty into law. Public funds are invested into negotiating a treaty and the advantages of treaty must be available to citizen.[48]"

Thus, judicial incorporation of international conventions on migration is an ideal tool to be resorted to in ensuring effective return and reintegration in remedying drastic gaps in Sri Lankan migration law regime.

Conclusions

Return migration and reintegration, which are integral elements of the nexus between migration and economic development is a drastic gap in the legal regime governing migration and foreign employment. This legal regime includes systematic declarative statements formulated by ministers and Sri Lanka Bureau of Foreign Employment (SLBFE) as contained in National Labour Migration Policy 2008, Sub Policy National Action Plan on Return and Reintegration 2015, Strategic Plan 2022-2026 to National Policy and Action Plan on Migration for Employment 2023 -2027 etc. The said policy declarations emphasize the significance of return migration and reintegration from the point of departure and the same is imputed with statutory underpinnings by Section 15(f) of the Sri Lanka Bureau of Foreign Employment Act, which is the power of the SLBFE to do anything necessary and incidental to the objects of bureau. Even though said policy declarations are not directly amenable to judicial review and the function of court is not to interfere with the province of policy maker a legal mechanism of remedying the said dilemma in terms of the migration law must be ascertained. In the process, a cautious application of the doctrine of Legitimate Expectation under public law appears a potential legal tool to be resorted in redressing the burning social issue concerning return and reintegration. This is because the drastic legal gap concerning return migration and reintegration dilemma is developed consequent to inconsistent, unpredictable policy, which is contrary to declared purposes of the same. The doctrine of legitimate expectation is based on rule of law and the same is characterized by consistency, predictability, certainty, formal equality and fairness being imputed to the conduct of public authorities. Therefore, public authorities like Ministry of Labour/Foreign Employment are not entitled to merely declare policy without creating legitimate expectation despite the absence of strictly enforceable rights in relation to policy declarations. In the circumstances, migrant employees and prospective migrant employees are entitled to invoke judicial review based legitimate expectation pursuant to systematically declared policy declarations like National Labour Migration Policy 2008, Sub Policy National Action Plan on Return and Reintegration 2015, Strategic Plan 2020-2026 to National Policy & Action Plan on Migration for Employment 2023-2027. Remedying inconsistent and unpredictable policy

48 P 26, Sonarajah, M, Reception of International Law in the Domestic Law in Sri Lanka in the Context of Global Experience

by resorting to legitimate expectation based on the principle of legal certainty at first sight appears as an interpretation unknown to the law. However, a cautious application of such legitimate expectation based on legal certainty, public trust doctrine and inalienable sovereignty of people under Article 3 of the Constitution provide fertile grounds for justifying consistent and predictable policy despite the absence of strictly enforceable right. Widespread and extensive guidelines and definitions of legitimate expectation lengthily analyzed in the *Vavniya Solar Power (Private) Limited vs. Ceylon Electricity Board, Sri Lanka Sustainable Energy Authority et al* pave way for innovative interpretations of the same in confronting this migration law dilemma. However unorthodox said interpretations may be it is high time that the voluntary organizations, legal fraternity and judiciary to combinedly ascertain the validity of said interpretations on account of the burning social necessity to remedy dilemma concerning return migration and reintegration. The existence of said declared policy under Sri Lanka Bureau of Foreign Employment Act in conjunction with republican features of the Constitution, public trust doctrine giving effect to even non-justiciable directive principles collectively justify such unorthodox legitimate expectation for consistent and predictable policy and positive action ensuring effective return. In other words, said legitimate expectation is based on inalienable sovereignty of people under Article 3 of the Constitution, mandatory duty on all organs of state including SLBFE to advance and secure fundamental rights under Article 4(d) along with the freedom of movement and return under Article 14(1) (i) of the Constitution. Moreover, Article 27(2) (d) and 27(8) in the chapter of Directive Principles of State Policy and Fundamental Duties strengthen such legitimate expectation. Effective return and re-integration could also be implemented in pursuance of judicial incorporation of International Migration Law Conventions like Convention for the Protection of Rights of All Migrant Workers. *Bulankulama vs. Ministry of Industrial Development* (*Eppawela Phosphate*) for judicial incorporation of International law as soft law, public trust doctrine, distinction between prerogative writs and orders in the nature of writs under article 140 in *Heather Theresa Mundy*, giving effect to Directive Principles combined with public doctrine in *Wattegedara Wijebanda vs. AG* culminated in recent fundamental rights application over *ground water contamination by Chunnamkam power station* and *Wilpattu deforestation cases* provide a conducive legal platform for creation of legitimate expectation in the migration context. Even though the broad form of substantive legitimate expectation ensuring effective return and reintegration seems unorthodox and conflicts with macro-economic and macro-political policy at first sight it will undoubtedly be worthwhile pragmatic legal effort to be attempted especially in the paramount interests of peoples' sovereignty. Even though the approaches ascertained in this paper are frequently resorted in our environmental protection law regime the

same is hardly utilized in the migration law context. Furthermore, the mechanism of judicial incorporation of international migration law treaties and conventions like Protection of the Rights of All Migrant Workers stands collateral facet justifying said orthodox legitimate expectation for consistent and predictable policy. This form of dynamically progressive interpretation in the spear of public law has already taken place in relation to Environmental Protection Law regime and it is high time to apply same dimension to migration law regime especially in the context of urgent social need for remedying dilemma in return migration and reintegration. Therefore, time has come for voluntary organizations like environmental foundation limited/Centre for Environmental Justice to step in to the shoes of migration public and strive to ascertain a remedy for this burning social issue. Thus, whenever a suitable situation arises a paramount duty is placed on the court to cautiously interpret law dynamically within desirable legal limits to ensure optimum utility of such novel but unorthodox legitimate expectation and international migration conventions in pursuance of desperate social need for remedying the dilemma concerning return migration and reintegration.

Evolution and Impact of Sri Lanka's Maritime Legal Framework within the International Law of the Sea Context: Institutional Structure and Implementation

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1. Introduction

Situated strategically in the Indian Ocean, Sri Lanka holds significant maritime territory, including territorial seas[1], exclusive economic zones (EEZs)[2], and continental shelf areas. Governing these zones necessitates a robust legal framework to protect national interests, ensure sustainable resource management, and uphold international obligations. This comprehensive paper delves into Sri Lanka's legislative landscape concerning maritime law, encompassing both domestic enactments and international agreements, also highlighting landmark judgments shaping the law of the sea and the damage claiming process.

2. Legislative Framework for Marine Environmental Protection

Sri Lanka's Constitution[3] underscores the government's duty to protect the environment for the community's benefit and emphasizes every individual's responsibility to preserve nature's wealth. However, the absence of a dedicated authority for marine environmental protection poses a challenge. Foundational legislation like the Territorial Sea and Maritime Zones Act[4] delineates maritime boundaries and zones, while subsequent acts like the Maritime Zones Law[5] refine regulatory provisions to align with international standards.

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1 Sri Lanka's territorial sea limit is defined by the Territorial Sea and Maritime Zones Act no. 22 of 1976, which establishes the baseline from which the breadth of the territorial sea is measured. According to this Act, Sri Lanka claims a territorial sea extending up to 12 nautical miles (approximately 22.2 kilometers) from the baseline.

2 Sri Lanka's Exclusive Economic Zone (EEZ) is established and regulated by the provisions of the United Nations Convention on the Law of the Sea (UNCLOS), to which Sri Lanka is a party. According to UNCLOS, an EEZ is an area beyond and adjacent to the territorial sea, extending up to 200 nautical miles (approximately 370.4 kilometers) from the baseline.

3 Constitution of Sri Lanka. Colombo: Government Press, 1978.

4 Maritime Zones Act no 22 of 1976

5 Maritime Zones Law of 2010

The Merchant Shipping Act[6] and the Fisheries and Aquatic Resources Act[7] address maritime safety, pollution prevention, and fisheries management, ensuring sustainable resource utilization. Additionally, the Coast Conservation Act[8] and subsequent amendments establish mechanisms for coastal zone management and conservation.

3. Institutional Framework for Maritime Security

Several administrative bodies were implemented to oversee maritime environmental protection, including the Central Environmental Authority, Coast Conservation Department, Marine Environment Protection Authority, and Department of Fisheries and Aquatic Resources. Law enforcement agencies such as the Sri Lanka Police, Navy, Coast Guard, and Customs are crucial for ensuring compliance and combating illegal activities.

Basically, the Marine Environment Protection Authority plays a pivotal role in mitigating and preventing marine pollution, although challenges like limited powers and weak enforcement persist. Similarly, the Coast Conservation Department regulates coastal development activities, aiming to balance economic growth with environmental conservation.

3.1 Marine Environment Protection Authority (MEPA)

The Marine Pollution Prevention Act[9] empowers the Marine Environment Protection Authority. It has taken steps to prevent pollution and to implement international conventions related to the protection of the marine environment.

Furthermore, the institutions for the protection of the marine environment do not have adequate powers, do not have a mechanism to ensure accountability, weak law enforcement, lack of specific jurisdiction, lack of an effective mechanism for exchanging data between institutions, or coordination and cooperation between agencies. Lack of resources and adequate financial resources for technology can be identified as practical problems in protecting the marine environment. The responsibilities and functions of the authority include,

1. Ensure effective and efficient administration and implementation of the provisions of the Marine Pollution Prevention Act and regulations.
2. Formulate and implement a plan of action for the prevention, mitigation, control, and management of pollution caused by shipping activities and coastal maritime activities in Sri Lanka or any other declared maritime region.

6 Merchant Shipping Act no 52 of 1971
7 Aquatic Resources Act no 29 of 1996
8 Coast Conservation Act no 57 of 1981
9 Marine Pollution Prevention Act no. 35 of 2008

3. Take action to prevent, reduce, control, and manage pollution caused by shipping activities or other activities.
4. Take steps to manage, protect, and conserve the ground water of Sri Lanka or any other marine region, its foreground, and the coastal zone of Sri Lanka.
5. Establish an adequate and effective system for controlling oil, harmful substances, or other contaminants.
6. Formulate recommendations for compliance with all international conventions and applicable protocols in dealing with maritime pollution approved or approved by the Government of Sri Lanka.
7. Develop and implement an emergency plan to prevent oil pollution.
8. Supervise, regulate, and control the activities of persons exploring or exploring natural resources, including petroleum, or related activities.
9. Educating the community about the need to protect the marine environment.
10. Perform all actions or things that may be necessary to perform all or any of the above functions.
11. Protection and conservation of the terrestrial waters of Sri Lanka from contamination by Sri Lanka or any vessel declared under maritime law or thereafter issued under such law.
12. Conduct investigations and inquiries into any contamination arising out of a shipping activity or offshore maritime activity and take legal action.
13. To monitor all seawater transports and bunker operations in terrestrial waters in Sri Lanka or any other maritime region that may or may not be declared under the maritime law thereon, and to prevent pollution.

MEPA aims to reduce, control, and manage marine pollution caused by land and sea-related activities and formulate policies accordingly. Also, the technical contribution required for the implementation of those policies will be borne by the Technical Division of the Authority. It also issues licenses to cater to the needs of people engaged in coastal activities. MEPA is the leading body responsible for the prevention, control, and management of pollution in the marine environment of Sri Lanka.

It plays a very important role in the protection of the marine environment. Since August 2017, IUCN has been working with many agencies and MEPAs to develop policy strategies and the National Action Plan for the protection of Sri Lanka's maritime environment. The objective of this project is to incorporate activities based on the principles of sustainable development and sustainable development goals related to the marine environment.

3.2 Coast Conservation Department (CCD)

The coastal areas of Sri Lanka are rich in fisheries, tourism, and other maritime economies. Some coastal areas are densely populated due to the livelihood and economic benefits of coastal resources. Accordingly, with the growth of human activities, the natural coastal environment is under threat. Therefore, it is very important to regulate and manage coastal zone activities. The Coast Conservation Act[10] was introduced to measure the coastal zone and prepare a coastal zone management plan.

That is, the Act regulates and controls development activities in the coastal zone and makes provisions for coastal conservation in the coastal zone. To achieve these objectives, the Coast Conservation Division was established in 1984 as the Coast Conservation Department (CCD). Accordingly, the administration, control, custody, and management of the coastline are vested in the Director of the Coast Conservation Department.

The Coast Conservation (Amendment) Act[11] was amended. The powers of the Department will be further enhanced with the appointment of the Director General of Coast Conservation in July 2009. According to the Coast Conservation Act, a coastal zone survey should be conducted and a coastal zone management plan (CZMP) should be prepared. The coastal zone management plan was first implemented in 1990. Coastal resource management is of paramount importance in Sri Lanka when it comes to resource management strategies. The objectives of the CCD are to improve the quality of the coastal environment, to develop and manage coastal areas, to improve the living standards of coastal communities, and to promote and facilitate economic development based on coastal resources.

The Coast Conservation Act is a key law regarding coastal environmental protection in Sri Lanka. The Act empowers its Director General to issue orders without a court order. The Act has established a comprehensive mechanism for coastal management but has created gaps in the effective implementation of the law due to enforcement and control issues.

3.3 Department of Fisheries and Aquatic Resources

The department of fisheries has been established and delegated powers and functions under the Fisheries and Aquatic Resources Act[12]. The objectives of this act are to provide for the management, regulation, conservation, and development of fisheries and aquatic resources in Sri Lanka. The act also established the National Fisheries and Aquatic Resources Advisory Council. It regulates fishing activities, issues licenses for approved

10 Coast Conservation Act No. 57 of 1981

11 Coast Conservation (Amendment) Act No. 64 of 1988

12 Fisheries and Aquatic Resources Act No. 2 of 1996 as amended by Acts No. 4 of 2000, No. 22 of 2004, No. 35 of 2006, No. 35 of 2015, No. 2 of 2016 and No. 11 of 2017.

fishing activities, prosecutes offenses punishable by law, prohibits harmful fishing practices, and manages fisheries in identified areas.

3.4 National Aquatic Resources Research and Development Agency (NARA)

NARA is Sri Lanka's premier national body responsible for the research, development, and management of aquatic resources. NARA was established under the National Aquatic Resources Research and Development Agency Act[13]. The reason for setting up NARA can be identified as facing the challenges facing the 200 - nm Special Economic Zone.

4. Evolution of Maritime Law: Tracing the Development of Legal Frameworks Governing the Seas

International conventions and landmark judgments serve as catalysts for the development of the law of the sea by clarifying rights and obligations, establishing legal principles, promoting peaceful dispute resolution, enhancing international cooperation, and contributing to the evolution of customary international law. Through these mechanisms, the law of the sea continues to evolve to meet the challenges and opportunities of the maritime domain.

Judicial decisions contribute to the development of customary international law in the maritime domain. When consistent state practice aligns with judicial rulings, they can crystallize into customary norms that bind all states, even those that are not parties to specific conventions. International conventions may become reflective of customary international law as they gain widespread acceptance and adherence among states. This evolution reflects changing norms and practices in the international community.

4.1 International Agreements and Conventions Pertaining to Maritime Law

Sri Lanka's engagement with international treaties significantly influences its maritime governance framework. These international treaties and conventions complement Sri Lanka's domestic legal framework, providing guidelines for responsible maritime governance and environmental protection.

4.1.1 United Nations Convention on the Law of the Sea (UNCLOS):

Sri Lanka ratified UNCLOS in 1994, obligating the government to comply with current environmental laws and UNCLOS provisions. UNCLOS provides a comprehensive legal framework for maritime governance, covering navigational rights, marine environmental protection, and resource exploitation.

13 National Aquatic Resources Research and Development Agency Act No. 54 of 1981

4.1.2 International Convention for the Prevention of Pollution from Ships (MARPOL):

MARPOL sets standards for the prevention of marine pollution from ships. Sri Lanka's adherence to MARPOL reflects its commitment to mitigating maritime pollution and complying with international regulations.

4.1.3 Oslo Convention:

The Oslo Convention aims to prevent marine pollution from ship and aircraft waste, further enhancing Sri Lanka's efforts to protect its marine environment.

4.1.4 Rio Declaration:

Chapter 17 of the Rio Declaration emphasizes the protection and rational use of seas and coastal areas. Sri Lanka's adherence to the Rio Declaration underscores its commitment to sustainable maritime development.

4.2 Landmark Legal Cases in Maritime Law

Several landmark judgments have significantly shaped the jurisprudence surrounding the law of the sea. These judgments, among others, have contributed significantly to the development of the law of the sea, clarifying the rights and obligations of states and providing guidance on resolving disputes in maritime areas.

1. **Corfu Channel Case**[14] - Emphasizes the principle of innocent passage and the duty of states to ensure safety in their territorial waters.
2. **North Sea Continental Shelf Cases**[15] - Established principles for the equitable delimitation of maritime boundaries, emphasizing geographical factors and the principle of equidistance.
3. **Fisheries Jurisdiction Case**[16] - Reaffirmed the principle of the freedom of the high seas for fishing activities while acknowledging coastal states' rights to regulate fishing within certain limits.
4. **Case Concerning Military and Paramilitary Activities in and Against Nicaragua**[17] - Highlighted the importance of respecting territorial sovereignty, including maritime sovereignty, and the principle of non-intervention in the affairs of sovereign states.

14 United Kingdom v. Albania, 1949, ICJ Reports 1949, p. 4.

15 Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands,1969, ICJ Reports 1969, p. 3.

16 United Kingdom v. Iceland, 1973, ICJ Reports 1974, p. 3.

17 Nicaragua v. United States of America, 1986, ICJ Reports 1986, p. 14.

5. **Case Concerning Maritime Delimitation in the Black Sea**[18]- Underscores the importance of peaceful resolution of maritime disputes and adherence to established legal principles.

4.3 The impact of International Conventions and Landmark judgements on the advancement of maritime law

The above mentioned landmark judgments and international conventions play a crucial role in shaping and developing the law of the sea by providing clarity, establishing principles, and fostering cooperation among states. Here's how they contribute to the evolution of maritime law.

4.3.1 Clarification of Rights and Obligations

The Corfu Channel case and the North Sea Continental Shelf cases clarify the rights and obligations of states in maritime areas. They provide legal interpretations that help in resolving disputes and defining boundaries. UNCLOS provides a comprehensive framework for the rights and obligations of states concerning maritime issues. They outline principles such as territorial sovereignty, freedom of navigation, and environmental protection, offering clarity on how states should conduct themselves in the maritime domain.

4.3.2 Establishment of Legal Principles

Through their rulings, courts and tribunals establish legal principles that guide state behaviour in maritime matters. For example, the Fisheries Jurisdiction Case reaffirmed the principle of freedom of fishing on the high seas while recognizing coastal states' rights to regulate fishing within certain limits. International conventions codify legal principles governing various aspects of maritime activities, including pollution prevention, navigation rights, and resource exploitation. These principles provide a foundation for international cooperation and dispute resolution.

4.3.3 Promotion of Peaceful Resolution of Disputes

The case concerning maritime delimitation in the Black Sea underscores the importance of peaceful resolution of maritime disputes. By adhering to established legal principles, states can resolve disputes through negotiation, arbitration, or adjudication. International conventions provide mechanisms for resolving disputes between states, such as the compulsory dispute settlement procedures outlined in UNCLOS. By providing avenues for peaceful resolution, these conventions contribute to stability and cooperation in maritime affairs.

18 Romania v. Ukraine, 2009, ICJ Reports 2009, p. 14.

4.3.4 Enhancement of International Cooperation

The Case Concerning Military and Paramilitary Activities in and Against Nicaragua emphasized the importance of respecting territorial sovereignty and non-intervention and fostering cooperation among states. In MARPOL and the Oslo Convention, states commit to working together to prevent pollution and protect the marine environment.

4.3.5. Liabilities and Compensation Procedures in the Marine Pollution Case

The procedure for claiming damages under the law of the sea typically involves several steps, which may vary depending on the specific circumstances of the incident and the applicable legal framework. The general overview of the damage-claiming procedure can be identified as follows:

- **Identification of Damage**: The first step is to identify the damage caused by the incident. This could include physical damage to vessels, property, or the marine environment, as well as economic losses resulting from the incident.
- **Notification and Documentation:** Parties affected by the incident should promptly notify relevant authorities and parties potentially liable for the damage. It's essential to document the incident thoroughly, including collecting evidence, witness statements, photographs, and any other relevant information.
- **Assessment of Liability**: Depending on the nature of the incident, liability for the damage may lay with various parties, such as shipowners, operators, charterers, or other entities involved in maritime activities. It's crucial to determine the responsible party or parties for the damage.
- **Application of Applicable Law:** The applicable legal framework for claiming damages may include international conventions, national laws, and contractual agreements. Parties involved in the incident should identify the relevant legal provisions governing liability and damage claims.
- **Initiating Legal Proceedings:** If the parties cannot resolve the matter through negotiation or alternative dispute resolution methods, such as mediation or arbitration, they may initiate legal proceedings in the appropriate jurisdiction. This could involve filing a lawsuit or arbitration claim against the liable party or parties.
- **Evidence and Legal Arguments:** During legal proceedings, parties will present evidence and legal arguments to support their claims or defences. This may include testimonies from witnesses, expert reports, documentary evidence, and legal analysis of relevant statutes and case law.

- **Adjudication and Judgment:** The court or tribunal responsible for adjudicating the case will evaluate the evidence and legal arguments presented by the parties and issue a judgment determining liability and the extent of damages. The judgment may include orders for compensation to be paid to the injured parties.
- **Enforcement of Judgment:** Once a judgment is rendered in favour of the claimant, efforts may be required to enforce the judgment and secure payment of the awarded damages. This could involve legal mechanisms for enforcing judgments, such as garnishment of assets or seizure of property.
- **Appeal Process:** Parties dissatisfied with the judgment may have the right to appeal the decision to a higher court or appellate body. The appeal process allows for a review of the lower court's decision and may result in modifications to the judgment or a reaffirmation of the original decision.
- **Compliance and Settlement:** Once all legal avenues have been exhausted, the liable party or parties are expected to comply with the judgment and fulfill their obligation to pay damages. In some cases, parties may choose to settle the matter through negotiation, mediation, or other means outside of formal legal proceedings.

Overall, the process for claiming damages under the law of the sea involves a comprehensive legal and procedural framework aimed at resolving disputes and compensating parties for losses resulting from maritime incidents. Effective communication, documentation, and adherence to legal requirements are essential for navigating the damage-claiming procedure successfully.

In Sri Lanka, laws related to damage claims in maritime incidents are primarily governed by both domestic legislation and international conventions. Here are some key laws and conventions relevant to damage claims in Sri Lanka:

- **Merchant Shipping Act**[19]

  The Merchant Shipping Act regulates various aspects of maritime activities in Sri Lanka, including ship registration, safety standards, and liability for maritime incidents. It may provide provisions related to liability for damages caused by maritime accidents and the procedure for claiming compensation.

- **Carriage of Goods by Sea Act**[20]

  This Act governs the carriage of goods by sea and may contain provisions related to liability for loss or damage to cargo during maritime transportation. It may also specify procedures for filing claims for compensation for cargo damage.

19 Merchant Shipping Act No. 52 of 1971

20 Carriage of Goods by Sea Act No. 29 of 1983

- **Admiralty Jurisdiction Act**[21]

  The Admiralty Jurisdiction Act establishes the jurisdiction of the High Court of Sri Lanka in admiralty matters. It may provide procedures for filing admiralty claims, including claims for damages arising from maritime incidents.

- **International Conventions**

  Sri Lanka is a party to various international conventions that govern liability for maritime incidents and provide procedures for claiming damages. These conventions may include:

  - International Convention for the Unification of Certain Rules of Law relating to Collision between vessels (COLREG)
  - International Convention on Civil Liability for Oil Pollution Damage (CLC)
  - International Convention on Salvage (SALVAGE)
  - International Convention on Limitation of Liability for Maritime Claims (LLMC)
  - International Convention for the Safety of Life at Sea (SOLAS)

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

UNCLOS is not directly incorporated into Sri Lankan law, it provides a comprehensive framework for maritime activities, including liability for damages and procedures for claiming compensation. Sri Lanka's adherence to UNCLOS obligations may influence its domestic legislation and legal practices related to damage claims.

4.5. Case Laws

Judicial decisions in Sri Lanka may also establish legal precedents and principles governing liability for maritime incidents and procedures for claiming damages. Relevant case law may provide guidance on issues such as negligence, collision liability, salvage, and limitation of liability. Meanwhile, it's important to consult legal experts and relevant authorities in Sri Lanka for specific guidance on damage claiming procedures in maritime incidents, as the applicable laws and conventions may vary depending on the nature of the incident and other factors.

5. Recent developments in the maritime environment and laws

Sri Lanka has prioritized enhancing maritime infrastructure and regulatory frameworks to attract foreign investment and facilitate maritime trade. Efforts include port facility development, modernization of management systems, and alignment with international best practices.

21 Admiralty Jurisdiction Act No. 40 of 1983

6. Challenges and Future Directions

Despite a comprehensive legal framework, challenges persist in implementation and enforcement due to limited resources and institutional capacity. Emerging issues like IUU fishing and maritime pollution require proactive measures and regional cooperation for effective resolution.

7. Conclusion

Sri Lanka's legislative framework for maritime governance underscores its commitment to responsible stewardship of maritime resources and adherence to international norms. Continuous enhancement of legal frameworks, institutional capacity building, and regional collaboration are essential for effectively managing maritime resources and fostering sustainable development in the Indian Ocean region.

"Beyond Assistance: Exploring the Legal Complexities and Challenges Posed by Artificial Intelligence"

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1.0 Abstract

The rapid advancement of artificial intelligence (AI), which offers unprecedented assistance for automation, creativity, and decision-making, has completely changed industries. However, as AI grows more autonomous and transcends its role as a straight forward tool, it poses several intricate legal problems that traditional legal systems struggle to address. This research article critically analyzes the legal ramifications of AI's growing use in domains where human involvement was formerly essential, focusing on issues like regulatory flaws, liability for damages, and accountability gaps. By comparing the legal systems in the EU, UK, and USA and looking at emerging AI regulations, this study seeks to ascertain how modern legal systems could adapt to address the risks posed by AI. The paper highlights the need for robust legal frameworks to regulate AI while promoting innovation and ensuring accountability by examining these concerns and considering recent and historical legal precedents.

2.0 Introduction

"We cannot solve our problems with the same thinking we used when we created them."
- Albert Einstein -

This research article examines the complex ethical and legal dilemmas raised by AI technologies, which have drastically changed many industries and caused severe social unrest. Considering current legislation and cutting-edge technology, a solid legal framework is crucial as AI systems have a greater and more significant impact on essential areas like employment, healthcare, and legal services. The paper's discussions highlight the vital nexus between technology and law, highlighting the significance of regulatory actions to reduce risks and promote responsible innovation. Notably, the legal environment is complicated, especially as antiquated legislation sometimes cannot keep up with the rapid advances in artificial intelligence. The necessity for a comprehensive law that can adjust to these changing conditions is highlighted by

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issues like the possibility of discrimination in employment practices, unequal access to legal resources, and the difficulties with responsibility for AI-driven decisions.[1] The study also examines the attempts made by governments and organizations to establish ethical and legal frameworks that strike a balance between innovation, safety, and responsibility, highlighting the continuous battle to establish a unified worldwide approach to AI governance. Additionally, incorporating AI into legal practice creates additional problems, such as figuring out who is responsible for the harm by autonomous AI judgments, making the legal responsibility environment more complex.[2] The study highlights the urgent need for proactive legal methods that meet the issues offered by AI technology by exploring case studies and real-world ramifications. The ethical issues raised by these advancements are also particularly important since they influence the conversation about the use and regulation of AI, requiring constant examination to bring legal norms into line with changing social norms.[3] The study highlights that technologists, ethicists, and legislators must collaborate to develop legal frameworks that successfully govern AI while preserving human rights and social values in an increasingly digital environment.[4] These issues must be resolved to utilize AI's transformational potential while preventing inherent hazards entirely.

Several ethical and legal issues must be resolved to safely harness artificial intelligence's promise. The abuse of AI technology is a major worry as it may exacerbate already-existing social problems, including prejudice, fraud, and disinformation.[5] For example, the Biden administration in the USA has promoted an effects-based regulatory strategy

1 Executive Order on the Safe, Secure, and Trustworthy Development and Use of AI
https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/
Wheeler Tom, The three challenges of AI regulation – Brookings, 15/06/2023
https://www.brookings.edu/articles/the-three-challenges-of-ai-regulation/

2 Michael Da Silva, Horsley Tanya, Sing Devin, Legal concerns in health-related artificial intelligence: a scoping Review Protocol, 17/06/2022, Systematic Reviews 11, 123
https://systematicreviewsjournal.biomedcentral.com/articles/10.1186/s13643-022-01939-y
AI, Machine Learning & Big Data Laws and Regulations 2024 – China – GLI
https://www.globallegalinsights.com/practice-areas/ai-machine-learning-and-big-data-laws-and-regulations/china/

3 Ratcliff Chris J, Who Will Write the Rules for AI? How Nations are Racing to Regulate Artificial Intelligence, 08/11/2023
https://theconversation.com/who-will-write-the-rules-for-ai-how-nations-are-racing-to-regulate-artificial-intelligence-216900

4 OMB Releases Implementation Guidance Following President Biden's Executive Order on AI
https://www.whitehouse.gov/omb/briefing-room/2023/11/01/omb-releases-implementation-guidance-following-president-bidens-executive-order-on-artificial-intelligence/
Navigating the legal and ethical challenges of AI in healthcare - KPMG
https://kpmg.com/uk/en/home/insights/2024/03/navigating-the-legal-and-ethical-challenges-of-ai-in-healthcare.html

5 Executive Order on the Safe, Secure, and Trustworthy Development and Use of AI, 30/10/2023
https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/

rather than concentrating on the technology itself, stressing the significance of implementing current rules to lessen the consequences of AI-enhanced abuses.[6] This study emphasizes the importance of developing current legal frameworks or implementing laws to address the complex effects of AI implementation.

3.0 Ethical and Regulatory Dilemmas

3.1 Ethical dilemmas: An overview

The use of AI has complicated ethical ramifications that frequently overlap with legal issues. For instance, in the USA, AI systems employed in recruiting and employment procedures may unintentionally result in discriminatory outcomes, which is against federal law, according to a warning from the Equal Employment Opportunity Commission (EEOC).[7] Additionally, ethical concerns with AI, especially in sensitive fields like healthcare, frequently require close examination to guarantee adherence to legal and moral requirements.[8] The advent of initiatives like the Measures for Ethical Review of Science and Technology highlights the increasing awareness of the necessity of conducting ethical assessments before using AI technology, particularly in fields like healthcare and the biological sciences.[9]

3.2 Trust and Compliance

Establishing trust among stakeholders and the general public is essential to successfully integrating AI into different industries. Businesses face increasing pressure to uphold trust while negotiating the complicated legal environment around AI, especially in the healthcare and life sciences sectors.[10]

As AI technologies develop, the increasing need for continuous ethical evaluation and adherence to regulatory standards fosters a culture of responsibility within the scientific

6 Wheeler Tom, The three challenges of AI regulation – Brookings, 15/06/2023 https://www.brookings.edu/articles/the-three-challenges-of-ai-regulation/

7 Wheeler Tom, The three challenges of AI regulation – Brookings, 15/06/2023 https://www.brookings.edu/articles/the-three-challenges-of-ai-regulation/

8 Da Silva Michael, Horsley Tanya, Singh Devin, Legal concerns in health-related artificial intelligence: a scoping review protocol, 17/06/2023, 11, 123 https://systematicreviewsjournal.biomedcentral.com/articles/10.1186/s13643-022-01939-y

9 AI, Machine Learning & Big Data Laws and Regulations 2024 – China - GLI https://www.globallegalinsights.com/practice-areas/ai-machine-learning-and-big-data-laws-and-regulations/china/
OMB Releases Implementation Guidance Following President https://www.whitehouse.gov/omb/briefing-room/2023/11/01/omb-releases-implementation-guidance-following-president-bidens-executive-order-on-artificial-intelligence/

10 Navigating the legal and ethical challenges of AI in healthcare - KPMG https://kpmg.com/uk/en/home/insights/2024/03/navigating-the-legal-and-ethical-challenges-of-ai-in-healthcare.html

and technological community. Resolving these issues is crucial to achieving AI's revolutionary potential while preserving social values and individual liberties.[11]

3.3 Regulatory Landscape

Governments worldwide increasingly recognize the necessity of creating a regulatory framework for AI technology. Countries have started creating rules that balance innovation, safety, and ethical issues, particularly in North America, Europe, and Asia Pacific.[12]

3.3.1. Overview of Existing Legal Frameworks

The existing legal landscape around AI is characterized by the challenges presented by outdated legislation and the need for a comprehensive legal framework to accommodate developing technologies and business practices. Laws like Product Liability, E-Commerce, and Civil Procedural Law can serve as a foundation for the responsible management of AI, but they usually do not address the rapid advancements in technology and the ethical implications that go along with them.[13] The rising need for AI governance has spurred discussions concerning new legislative measures to guarantee adherence to evolving standards and public expectations.[14]

3.3.2. Regulatory Approaches and Challenges

3.3.2.1. Intellectual Property Rights

Another significant issue is the relationship between AI and intellectual property (IP) legislation. The issue of copyright ownership emerges as AI systems produce creative works, such as literature and music. This conundrum is brought to light by the recent lawsuit concerning AI-generated music on websites like Spotify, which raises questions regarding possible copyright infringement and the ownership of AI-generated property[15]. Current IP laws do not adequately address these issues, necessitating a reevaluation of how copyright is defined in relation to non-human creators[16].

11 Cohen Mark A,Law's 2023: AI Is Just Part Of The Story - Forbes https://www.forbes.com/sites/markcohen1/2023/12/14/laws-2023-ai-is-just-part-of-the-story/

12 Who will write the rules for AI? How nations are racing to regulate AI https://theconversation.com/who-will-write-the-rules-for-ai-how-nations-are-racing-to-regulate-artificial-inte

13 9 - China's Normative Systems for Responsible AI https://www.cambridge.org/core/books/cambridge-handbook-of-responsible-artificial-intelligence/chinas-normative-systems-for-responsible-ai/25A6636116359C1282F5874434CF467C

14 9 - China's Normative Systems for Responsible AI https://www.cambridge.org/core/books/cambridge-handbook-of-responsible-artificial-intelligence/chinas-normative-systems-for-responsible-ai/25A6636116359C1282F5874434CF467C

15 https://gableslawfirm.com/2024/10/legal-issues-with-artificial-intelligence-ai/#

16 Mecaj Enver Stela, Artificial Intelligence and Legal Challenges, Journal Juridical Opinion 20(34), 2022 180-196p https://doi.org/10.12662/2447-6641oj.v20i34.p180-196.2022

3.3.2.3. Data Privacy and Protection

Since AI systems frequently use enormous volumes of personal data for training and operation, data privacy is a crucial problem. People's right to privacy is seriously threatened by the possibility of sensitive information being misused or accessed without authorization. While European legal frameworks like the General Data Protection Regulation (GDPR) seek to safeguard personal information, they struggle to keep up with the quick advancement of AI technology[17]. Maintaining adherence to data protection regulations while utilizing AI's potential necessitates constant communication between legal and technological professionals[18].

3.3.2.4. Bias and Discrimination

Biases in training data can affect AI systems, resulting in unfair results in applications like lending, recruiting, and law enforcement. In the USA, biased AI systems have severe legal ramifications; if an organization's algorithms reinforce inequity, it might be sued under anti-discrimination laws[19]. Strict auditing and monitoring procedures are required to address these biases and guarantee adherence to ethical and legal requirements.

3.3.2.5. Liability and Accountability in AI

Another significant legal problem is the question of liability in connection with AI usage. The question of who is responsible for any damage or injury brought on by AI systems' increasing autonomy is becoming increasingly contentious. The intersection of insurance and regulation adds another level of complexity; liability insurers, even though they are not regarded as regulators, may impose limitations that might affect the development and use of clinical AI systems.[20] For example, it is still unclear who should be held accountable in the event of an accident caused by an autonomous vehicle-the owner, the software developer, or the manufacturer. This uncertainty questions how current legislation can be modified to guarantee responsibility in the AI era.[21]

17 Gerke S, Minssen T, Cohen G. Ethical and legal challenges of artificial intelligence-driven healthcare. Artificial Intelligence in Healthcare. 2020:295–336.
doi: 10.1016/B978-0-12-818438-7.00012-5. Epub 2020 Jun 26. PMCID: PMC7332220.

18 Ebers Martin, Regulating AI and Robotics: Ethical and Legal Challenges, 09.06.2019
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3392379

19 https://gableslawfirm.com/2024/10/legal-issues-with-artificial-intelligence-ai/#
Gerke S, Minssen T, Cohen G. Ethical and legal challenges of artificial intelligence-driven healthcare. Artificial Intelligence in Healthcare. 2020:295–336. doi: 10.1016/B978-0-12-818438-7.00012-5. Epub 2020 Jun 26. PMCID: PMC7332220.

20 Douglas McNair, Bill & Melinda Gates Foundation; and W. Nicholson Price II, University of Michigan Law School Health Care Artificial Intelligence: Law, Regulation, and Policy.
https://nap.nationalacademies.org/read/27111/chapter/9

21 Chidiogo Uzoamaka Akpuokwe, Adekunle Oyeyemi Adeniyi, & Seun Solomon Bakare. (2024). legal challenges of artificial intelligence and robotics: a comprehensive review. Computer Science & IT Research Journal, 5(3), 544-561. https://doi.org/10.51594/csitrj.v5i3.860

Clear rules are required in this dynamic context to define responsibilities and lessen the risks associated with AI technology.

3.3.2.6. Regulatory Framework

These difficulties are made worse by the lack of a unified regulatory framework for AI. Although several countries have started to design laws to control AI technology, there is still a lack of consistency across national boundaries[22]. Multinational firms find it more challenging to comply with this fragmentation, which emphasizes the necessity of international collaboration in creating uniform legal norms for the use of AI[23].

3.3.2.7. Unequal Access to Justice: A Worldwide Concern

The inequality in access to legal resources, which AI technology promises to alleviate, is a significant legal difficulty worldwide. Wealthier people and businesses frequently use their resources to outmaneuver fewer wealthy peers who find it difficult to obtain legal assistance in today's glaringly unequal judicial systems. Women and people of color are among the marginalized groups that are disproportionately affected by this structural inequity, which can result in unchecked corporate abuses.[24] AI legal services have the potential to democratize access to justice, but if they are not adequately regulated, they might unintentionally exacerbate already-existing gaps rather than lessen them.[25]

3.3.2.8. Regulatory Harmonization in AI Governance

Standardizing regulations across different jurisdictions is necessary to address the complexities of AI. Co-regulatory frameworks—which involve collaboration between governments and other stakeholders—have grown in popularity recently to create comprehensive and adaptable regulations.[26] However, only a small percentage of existing

22 Mecaj Enver Stela, Artificial Intelligence and Legal Challenges, Journal Juridical Opinion 20(34), 2022 180-196p
https://doi.org/10.12662/2447-6641oj.v20i34.p180-196.2022

23 Chidiogo Uzoamaka Akpuokwe, Adekunle Oyeyemi Adeniyi, & Seun Solomon Bakare. (2024). Legal Challenges Of Artificial Intelligence And Robotics: A Comprehensive Review. Computer Science & IT Research Journal, 5(3), 544-561.
https://doi.org/10.51594/csitrj.v5i3.860
Gerke S, Minssen T, Cohen G. Ethical and legal challenges of artificial intelligence-driven healthcare. Artificial Intelligence in Healthcare. 2020:295–336.
10.1016/B978-0-12-818438-7.00012-5. Epub 2020 Jun 26. PMCID: PMC7332220.

24 The legal profession in 2024: AI - Harvard Law School
https://hls.harvard.edu/today/harvard-law-expert-explains-how-ai-may-transform-the-legal-profession-in-2024/
The Promise and Peril of AI Legal Services to Equalize Justice
https://jolt.law.harvard.edu/digest/the-promise-and-peril-of-ai-legal-services-to-equalize-justice

25 The Promise and Peril of AI Legal Services to Equalize Justice
https://jolt.law.harvard.edu/digest/the-promise-and-peril-of-ai-legal-services-to-equalize-justice

26 The AI data challenge: How do we protect privacy and other ... - OECD
https://oecd.ai/en/wonk/the-ai-data-challenge-how-do-we-protect-privacy-and-other-fundamental-rights-in-an-ai-driven-world

regulations reflect these ideas, and there is still a conspicuous lack of outcome-based and risk-weighted laws specifically created for AI.[27] If the legal community does not accept these principles, the efficacy of legislative initiatives to keep up with fast-evolving AI technology may be hindered.[28]

4.0 Case Studies

4.1. Overview of Generative AI Litigation

Examining case studies involving organizations such as Microsoft, Anthropic, and OpenAI can help us better understand generative AI lawsuits' defenses, arguments, and outcomes. These case studies highlight the necessity of proactive legal tactics by offering specific instances of the legal concerns and ramifications for businesses utilizing generative AI technology. Notably, well-known instances demonstrate the value of legal expertise in navigating the complexities of generative AI litigation and offer practical guidance to businesses facing similar legal issues.[29]

Robert Williams Case[30]

The erroneous arrest of Robert Williams in January 2020 is among the most notable examples of harm caused by AI. This case is the first instance of an arrest in the US that has been made public due to a false match generated by facial recognition software. Williams was arrested outside his house in front of his family and neighbors after the Detroit Police Department used an AI-generated match from their face recognition system. The police made the arrest despite his repeated denials of guilt and allegations that the AI-generated match was flawed. He was held in an overcrowded jail for 30 hours until the charges were withdrawn for lack of evidence. Following that, Williams filed a lawsuit against the City of Detroit to make the police department responsible for their use of the faulty face recognition software. His story serves as a reminder of the dangers posed by AI systems, especially in law enforcement, where mistakes can have severe and permanent repercussions. In addition to monetary damages, the complaint calls for increased openness about applying face recognition technology and its possible effects on civil rights.[31]

27 AI regulation | Deloitte Insights
https://www2.deloitte.com/us/en/insights/industry/public-sector/ai-regulations-around-the-world.html

28 AI regulation | Deloitte Insights
https://www2.deloitte.com/us/en/insights/industry/public-sector/ai-regulations-around-the-world.html

29 The Legal Challenges of Generative AI: Navigating Lawsuits and Intellectual Property Rights
https://thelawspot.com/the-legal-challenges-of-generative-ai-navigating-lawsuits-and-intellectual-property-rights/

30 *Williams v. City of Detroit* 2:21-cv-10827 (ongoing case)

31 The new lawsuit that shows facial recognition is officially a civil Rights issue
https://www.technologyreview.com/2021/04/14/1022676/robert-williams-facial-recognition-lawsuit-aclu-detroit-police/
Williams v. City of Detroit - American Civil Liberties Union
https://www.aclu.org/cases/williams-v-city-of-detroit-face-recognition-false-arrest

4.2. Copyright Infringement Cases

A well-known case study in this field was a top AI firm charged with copyright infringement for producing visual material using generative AI. Several writers, including Jonathan Alter and Kai Bird, sued OpenAI and Microsoft in the *Alter v. OpenAI and Microsoft* case[32], claiming copyright infringement because their literary works were used without permission to train AI models such as GPT-3 and GPT-4. The plaintiffs alleged that these corporations violated the exclusive rights provided to writers under the Copyright Act by making millions of copies of copyrighted materials without authorization or payment, so establishing their multibillion-dollar enterprises.

The case unifies several related complaints and poses important queries on AI developers' obligations under copyright law, possibly establishing precedents for future conflicts involving AI and intellectual property rights. The continual conflict between technical advancement and the preservation of artistic creations in the digital era is highlighted by the case. Such cases' court processes and verdicts offer essential insights into how the law is developing concerning generative AI. They highlight the significance of comprehending copyright regulations related to AI-generated work and act as a resource for companies facing comparable difficulties.[33]

4.3. Impact on Legal Practices

Notable events have already occurred due to the use of generative AI in legal practice. For instance, in the judgment of *Mata v. Avianca, Inc.*,[34] an attorney presented a legal brief created with ChatGPT, a generative AI platform. The court was humiliated when it found out that this brief included references to other cases that were not true. This instance highlights the possible drawbacks of applying generative AI in legal settings, emphasizing the need for legal practitioners to be prudent when depending on AI generated information. However, several legal professionals think that generative AI may also improve the legal industry by helping attorneys and their clients deal with challenging legal situations.[35]

32 *Alter v OpenAI and Microsoft* Case: 1:23-cv-10211

33 The Legal Challenges of Generative AI: Navigating Lawsuits and Intellectual Property Rights https://thelawspot.com/the-legal-challenges-of-generative-ai-navigating-lawsuits-and-intellectual-property-rights/

34 *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023)

35 The legal profession in 2024: AI - Harvard Law School https://hls.harvard.edu/today/harvard-law-expert-explains-how-ai-may-transform-the-legal-profession-in-2024/
Recent cases raise questions about the ethics of using AI in the legal system https://www.npr.org/2023/12/15/1219512064/recent-cases-raise-questions-about-the-ethics-of-using-ai-in-the-legal-system

5.0. Overviw of Global AI Law Developments and Lessons to Learn

5.1. European Union

The Artificial Intelligence Act is going through the EU legislative process to create a thorough framework for AI governance. Enhancing protections for high-risk AI systems, especially concerning accountability and transparency, has been the subject of recent talks. Before using AI technologies that substantially impact people's rights, businesses would need to carry out thorough risk assessments and have mitigation plans in place, according to the changes suggested by the European Parliament. The EU is also placing a strong emphasis on moral standards for AI research, making sure that systems uphold fundamental rights and advance the welfare of society. This regulation strategy seeks to balance public safety, innovation, and trust in AI technology.[36]

5.2. United Kingdom

With the release of its White Paper on AI Regulation in March 2023, which presents a framework for AI regulation that encourages innovation, the UK government has made significant progress. Existing regulators will interpret and implement the five cross-cutting principles suggested in the White Paper within their respective fields. In February 2024, the government issued its answer after a consultation period, reaffirming its dedication to a flexible, non-statutory strategy that uses current regulatory frameworks rather than enacting new laws. With an emphasis on consumer protection and high risk applications, essential regulators such as the Competition and Markets Authority (CMA) and the Information Commissioner's Office (ICO) have started implementing these concepts. However, the UK is believed to lag behind other nations in establishing specific legislation.[37]

5.3. United States

Significant changes are being made to AI regulation in the USA at the state and federal levels. The Artificial Intelligence Act, recently passed in Colorado, requires creators of high-risk AI systems to be transparent about their operations and possible effects on people. Several jurisdictions are also proposing laws protecting consumers from algorithmic discrimination. Bipartisan efforts are being made at the federal level to develop thorough governance structures that handle national security issues associated

36 https://www.twobirds.com/en/insights/2024/uk/ai-regulation-in-the-uk-where-are-we-now#accordion-3

37 https://www.whitecase.com/insight-our-thinking/uks-context-based-ai-regulation-framework-governments-response
https://www.huntonak.com/privacy-and-information-security-law/uk-government-publishes-response-to-consultation-on-ai-regulation-white-paper
https://www.shlegal.com/insights/the-uk's-white-paper-on-ai-regulation-a-pro-innovation-approach

with enhanced AI capabilities. These changes show that there is increasing agreement that solid regulations are required to control the societal effects of AI.[38]

5.4. Insights from EU, UK, and USA

The regulatory strategies used by the EU, UK, and USA in relation to AI law can teach developing countries a lot. These countries may guarantee that AI technologies are researched and used responsibly while upholding the rights of their population by giving top priority to a comprehensive legislative framework akin to the EU's Artificial Intelligence Act. Building public trust in AI systems will need a focus on accountability and openness. Additionally, implementing a cooperative strategy with stakeholders from other industries can support innovation and assist in customizing legislation to local settings. AI developing countries can create a balanced regulatory framework that protects social interests while promoting technology growth by taking inspiration from global best practices.

6.0. Future Implications

Both the technology and the legal frameworks that regulate it stand to be significantly impacted by the ongoing legal issues surrounding AI. The possible results of these court cases may establish essential precedents that would impact almost all AI developers and generative AI applications in various industries. Lawmakers must contend with the difficult challenge of keeping up with the rapid advancements in AI technology, which frequently surpass the capabilities of current legal frameworks. This delay may result in regulatory loopholes that hinder innovation or permit the spread of potentially hazardous activities without sufficient inspection.[39]

6.1. Transition Challenges

The rapid development of technology creates both possibilities and challenges for the shift to efficient AI governance. Blockchain technology and self-driving vehicles have historically shown trends in which innovation outpaces regulation, underscoring the need for legislators to enact flexible legal frameworks that can successfully handle new issues.[40] Andrew Miller, head of Yale Law School's private law clinic, highlights the

38 https://www.deloitte.com/uk/en/Industries/financial-services/blogs/the-uks-framework-for-ai-regulation.html

39 OpenAI Punches Upward In Bigtime Legal Copyright Lawsuit That Will Surely Determine The Future Longevity Of Generative AI
https://www.forbes.com/sites/lanceeliot/2024/07/08/openai-punches-upward-in-bigtime-legal-copyright-lawsuit-that-will-surely-determine-the-future-longevity-of-generative-ai/
Four lessons from 2023 that tell us where AI regulation is going
https://www.technologyreview.com/2024/01/08/1086294/four-lessons-from-2023-that-tell-us-where-ai-regulation-is-going/

40 Four lessons from 2023 that tell us where AI regulation is going
https://www.technologyreview.com/2024/01/08/1086294/four-lessons-from-2023-that-tell-us-where-ai-regulation-is-going/

situation's dual character, expressing cautious optimism about the increased attention inside legal institutions and alarm over possible damages.[41]

6.2. The Need for Comprehensive Legal Frameworks.

Comprehensive regulations that directly address AI and concentrate on the results these technologies produce are desperately needed since legal frameworks and texts find it challenging to adjust to new technological realities. According to research, effective governance is hampered by the fact that many current AI legislations are not regarded as "AI laws" in and of themselves. Creating outcome-based and risk-weighted rules considering AI technology's particular difficulties will be crucial going forward.[42]

6.3. The Intersection of Law and Ethics

The nexus between ethical and legal issues will remain a significant focus as AI advances. It is critical to distinguish between ethical issues that represent current social norms and legal frameworks that may be outdated. A closer look at the connection between data privacy and AI-generated insights will also be necessary to guarantee that current rules sufficiently safeguard individual rights while encouraging innovation.[43] Legislators, engineers, and ethicists must ultimately collaborate to create practical and flexible rules to keep up with the rapidly evolving field of artificial intelligence.

7.0. Forging the Future: Recommendations for AI Legal Framework

The rapid development of artificial intelligence necessitates a thorough overhaul of our legal systems. This research provides the following suggestions for handling the intricate relationship between AI and law based on carefully examining present issues and developing trends.

First and foremost, creating comprehensive and transparent responsibility frameworks must be a top priority for governments everywhere. Both developers and consumers are at serious risk due to the present legal ambiguity around occurrences using AI. The research suggests creating a hybrid liability framework considering a reduced negligence standard for lower-risk systems and strict responsibility for high-risk AI

41 Recent cases raise questions about the ethics of using AI in the legal system https://www.npr.org/2023/12/15/1219512064/recent-cases-raise-questions-about-the-ethics-of-using-ai-in-the-legal-system

42 AI regulation | Deloitte Insights https://www2.deloitte.com/us/en/insights/industry/public-sector/ai-regulations-around-the-world.html
9 - China's Normative Systems for Responsible AI https://www.cambridge.org/core/books/cambridge-handbook-of-responsible-artificial-intelligence/chinas-normative-systems-for-responsible-ai/25A6636116359C1282F5874434CF467C

43 17 - Artificial Intelligence as a Challenge for Data Protection Law https://www.cambridge.org/core/books/cambridge-handbook-of-responsible-artificial-intelligence/artificial-intelligence-as-a-challenge-for-data-protection-law/84B9874F94043E8AFC81616A60BA69CC

applications. The duties of the various parties involved in the AI ecosystem, such as developers, deployers, and end users, should be clearly outlined in this framework. In order to provide an audit trail that can support liability decisions when accidents occur, organizations should be compelled to keep thorough records of the decision-making processes used by their AI systems.

Intellectual property law requires significant reform to accommodate AI-generated works and innovations, as current legal frameworks inadequately address the unique challenges posed by AI. This research advocates creating a new intellectual property rights category designed explicitly for AI-generated content. Such a framework must balance the need to encourage innovation with the public's interest in accessing and utilizing AI-generated works. Due to the accelerated pace of AI development and the diminished role of human creativity in AI outputs, the protection period for AI-generated works should be shorter than that of traditional IP rights. Additionally, transparent rules on attribution and ownership are essential, mainly when multiple parties are involved. The conventional notions of authorship, originality, and inventorship must be reconsidered in light of AI's creative potential, requiring a recalibration of legal theory to reward innovation while ensuring public access to AI-driven knowledge and artistic creations.

In the AI era, privacy protection must be fundamentally reimagined to address the unique challenges AI systems pose. This research advocates for the mandatory adoption of privacy-by-design principles in AI development, ensuring privacy considerations are embedded from the outset of system design. Organizations should be required to conduct regular privacy impact assessments, focusing on the specific risks posed by AI's ability to derive unexpected insights from large datasets. Strict data minimization standards should also be enforced, requiring companies to provide clear justifications for data collection and retention practices. Additionally, robust enforcement mechanisms and stringent penalties for violations must be implemented. AI's capacity to process vast amounts of data and generate unforeseen outcomes challenges traditional notions of consent and data minimization. Therefore, legal frameworks must evolve to address explicit privacy breaches and the more subtle implications of AI-driven data analysis and profiling.

The researcher advises putting in place a thorough framework for bias identification and mitigation to address the severe problem of algorithmic bias. It should be mandatory for organizations to perform comprehensive bias evaluations before using AI systems in delicate fields like criminal justice, healthcare, and employment. Trained independent auditors should use standardized testing techniques to conduct these evaluations. To guarantee that AI systems represent and honor cultural diversity,

companies should also be compelled to keep diverse development teams and include frequent community input. For high-risk AI applications, bias measurements should be regularly monitored and reported.

Effective AI governance requires international cooperation, focusing on establishing a global framework through international treaties and agreements. This research proposes creating a system that sets minimum standards for AI development and deployment while allowing for regional variations in implementation. An international organization should be formed to coordinate regulatory efforts, facilitate information sharing, and resolve cross-border disputes. Additionally, this body should maintain a global database of AI incidents and best practices to promote continuous learning and improvement in AI governance. The current fragmented approach to AI regulation, while perhaps inevitable during the early stages of technological development, presents significant challenges to international trade and technological innovation. The rise of disparate legal frameworks, such as the European Union's comprehensive AI Act and the more sector specific regulations in other countries, underscores the urgent need for international harmonization. However, such harmonization must be achieved not to stifle innovation or impose undue burdens on developing nations.

The legal system must change to handle situations involving AI successfully. The research recommends establishing specialist AI courts or tribunals with judges with technical understanding. These courts must have access to specialist tools for assessing AI systems and be backed by technical advisory panels. To ensure that they can successfully represent clients in AI-related problems, legal practitioners should be required to undergo training on AI technology and its ramifications. Standardized protocols should also be created to manage expert testimony and AI-generated evidence.

Moreover, the legal profession must develop new skills and methodologies to engage with AI technology effectively. This includes advancing technological literacy among legal practitioners and creating innovative approaches to evidence gathering, case analysis, and decision-making in AI-related cases. The potential integration of AI in legal practice further complicates this evolution, requiring legal experts to navigate both the use and regulation of AI technologies.

Consumer protection needs to be reinforced in the AI era. The research advises enacting obligatory disclosure standards for AI systems to guarantee that consumers are aware of when they are engaging with AI and how their data is being utilized. Organizations should explain AI systems' possibilities and limits in plain, non-technical terms. Additionally, customers should have access to human alternatives for necessary services and the freedom to refuse AI-driven judgments in delicate situations. A robust compensation scheme should be implemented when AI systems injure customers.

One critical conclusion of the study is the inherent tension between AI development and fundamental legal principles. The "black box" dilemma—where the opacity of AI decision-making processes conflicts with established legal concepts such as due process, transparency, and the right to an explanation—poses significant challenges, especially in areas where AI affects decisions impacting individuals' rights and freedoms. Given the technological limits in explaining AI decisions, the legal community must develop new strategies to ensure accountability and fairness in such cases.

Algorithmic bias and discrimination are particularly urgent issues for legal professionals. The study highlights that while existing anti-discrimination laws provide a useful foundation, they do not address how AI systems can perpetuate or exacerbate societal biases. This gap necessitates the creation of new legal tools and guidelines aimed at identifying, preventing, and remedying algorithmic discrimination.

Several key factors are essential for the evolution of AI-related legal frameworks. Legal systems must remain flexible to accommodate the rapid pace of technological advancements while providing stakeholders with sufficient legal certainty. Additionally, these frameworks must balance competing interests, such as protection versus innovation, intellectual property rights versus transparency, and individual privacy versus collective benefits. Given the global nature of AI technology, enhanced international cooperation in developing and enforcing AI regulations is also crucial.

The research recommends creating regulatory sandboxes where organizations can test new AI applications under controlled conditions to support innovation while ensuring safety. These sandboxes should be complemented by fast-track approval processes for low-risk AI applications and graduated regulatory requirements based on risk levels. Government funding should be allocated to support responsible AI development, particularly in areas with significant public benefit. Additionally, certification programs should be established to recognize organizations that demonstrate commitment to ethical AI development.

The study advises developing specialized research projects to examine new AI capabilities and their potential legal ramifications. With frequent review and update processes, regulatory frameworks should be structured flexibly to accommodate technological innovation. Regular scenario planning exercises are necessary to foresee and prepare for future advancements in AI technology. Increasing regulatory organizations' ability to react quickly to emerging problems is also essential.

Lastly, success measures must be developed to assess how well these suggestions work. These indicators should include qualitative evaluations of public trust in AI systems and the efficacy of international collaboration and quantitative ones like the decline in bias

incidents and legal problems connected to AI. Regular reporting on these parameters should help continuously improve the regulatory framework.

All parties involved in the AI ecosystem must maintain their commitment to implementing these suggestions. By doing this, we may establish a legislative framework that safeguards individual rights and society's interests while encouraging responsible AI innovation. As AI technology develops, regularly examining and updating these suggestions will be crucial to ensure they stay applicable and valuable.

8.0. Conclusion

The intersection of artificial intelligence (AI) and legal systems presents one of the most significant challenges in contemporary jurisprudence. As AI continues to evolve, several key conclusions from this study must guide the future development of legal frameworks. Current legal systems, designed for human agency and decision-making, are increasingly inadequate to address the complexities posed by autonomous AI systems. Fundamental legal concepts such as liability, causation, and foreseeability must be reimagined to reflect the distinct characteristics of AI technology. This rethinking goes beyond mere procedural changes, requiring a transformative shift in understanding legal responsibility and accountability in an AI-driven world.

The implications of these findings extend beyond the immediate concerns of the legal profession. AI forces society to reconsider foundational governance and regulatory principles in an era of rapid technological advancement. Legal regulation must not only adapt to AI's unique challenges but also align with broader societal norms and ethical standards, ensuring that the transition to AI-enhanced systems preserves justice and fairness.

In conclusion, while AI introduces profound challenges to existing legal institutions, it also offers an unprecedented opportunity for legal innovation. Developing appropriate legal frameworks for AI requires a comprehensive re-evaluation of core legal doctrines and social values, combined with technical expertise and forward-thinking regulatory strategies. As we move forward, the legal community must carefully balance promoting AI-driven innovation with protecting fundamental human rights and societal interests.

The path ahead demands continuous research, practical testing, and extensive international cooperation. Successful regulation of AI will rely on close collaboration among legal professionals, technologists, ethicists, and policymakers. Only through such coordinated efforts can we hope to develop legal systems that not only effectively regulate AI but also foster its positive contributions to society.

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