JSA LAW JOURNAL

2025 VOLUME XII

PUBLISHED BY THE JUDICIAL SERVICE ASSOCIATION OF SRI LANKA

JSA LAW JOURNAL

Volume XII

2025

JSA Law Journal 2025 - volume XII

Published by the Judicial Service Association of Sri Lanka

ISSN 2357-2884

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Page layout and printing: Printec, Colombo 10.
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3rd December 2025

It is with pleasure that I forward this message to the Law Journal published by the Judicial Service Association of Sri Lanka and to be launched on 20th December 2025, at the "Annual Judicial Conference".

Continuous judicial education is essential in today's rapidly changing legal landscape to ensure that the Judges administering justice are well informed about legal principles, best practices and ethical standards, to be better positioned to uphold the rule of law, respond to complex legal issues and to maintain the integrity and efficiency of the judicial system. To this end, the Law Journal published annually by the Judicial Service Association of Sri Lanka brings together contributions from Judicial Officers serving the length and breadth of this country, legal practitioners and scholars, who have examined contemporary legal themes with rigor and dept with the aim of inspiring further research, discussion and also encourage the legal fraternity to adopt and innovate in an increasingly complex legal environment.

While commending the dedication of the editorial committee, I also wish to place on record my appreciation for all Judicial Officers and court staff for all their untiring efforts during these challenging times.

P. Padman Surasena

P. Padman Surasena

Chief Justice

MESSAGE OF THE SECRETARY

It is my privilege to address you through this year's edition of the Annual Law Journal of the Judicial Service Association.

The year 2025 has been one of transition and collective resilience. We witnessed significant changes in leadership with the elevation of several senior office-bearers to the High Court. While these developments are a source of pride to our fraternity, they also required a period of adjustment. I sincerely appreciate the members who stepped forward to ensure continuity and stability during this time.

Despite these changes, the Association recorded several meaningful achievements reflecting our shared commitment to judicial wellbeing. A highlight of the year was the Judges' Day Out, which provided members and their families an opportunity for relaxation, fellowship, and renewed camaraderie. The enthusiastic participation reaffirmed the importance of strengthening bonds within our service.
We also engaged in constructive dialogue with the President's Secretariat and the Ministry of Justice and National Integration on long-standing concerns regarding salary allowances. I am pleased to note that these efforts have yielded positive results, with adequate financial allocations made in the national budget and the relevant Cabinet Paper scheduled for submission in early January. This marks a significant step toward enhancing the welfare and professional dignity of our members.

In further support of our members and their families, the Association successfully facilitated school admissions to national schools for 2026, as well as mid-term placements arising from official transfers. Additionally, the Judicial Service Association re-launched its official website this year, featuring an enhanced Publications section through which the current Annual Law Journal, along with all past editions of the Law Journal and JSA Newsletters, are now readily accessible, providing convenient access to the Association's complete body of scholarly and professional work.

As I write this message, Preparations are underway for our Annual Conference and Judges' Gala Night scheduled for 20–21 December. However, in view of the prevailing circumstances following the Ditwa cyclone, the Association has decided to host a modest fellowship dinner while proceeding with the Judges' Talent Show, in a spirit of sensitivity and solidarity. In keeping with this spirit, the Association also undertook a fundraising initiative and remitted the funds collected to the Government Flood Relief Fund.

As an Association established to promote the welfare of the judiciary, we commenced the year with a clear and determined vision for advancing judicial wellbeing. It is my hope that our programme of activities reflects this commitment, and I leave it to the membership to assess the extent to which we have fulfilled our objectives.

In presenting this edition of the Annual Law Journal, I extend my sincere gratitude to our members for their unity and cooperation, to the Editorial Board for their dedicated efforts, and to all contributors whose scholarly work continues to uphold our tradition of research, dialogue, and professional excellence.

Rajindra Jayasuriya

Editorial

At his best, man is the noblest of all animals; separated from law and justice he is the worst." *- Aristotle*

The significance possessed by law and justice in the society undoubtedly plays the most crucial role of applying a solid foundation to a legally stabilised and well mannered country. In the contemporary society, the judiciary system of the country is observed to be fast moving towards an era of technology. The year 2024 marked a significant milestone for the JSA of Sri Lanka, as our annual newsletters were published in e-version aligned with international standards.

Moreover in 2025, the high demand and the importance of using virtual platforms have been highlighted constantly during these times of hardships. The crucial damages caused to some of the main court complexes of the country by the utterly destructive natural disasters, have left everything at a point where it is necessary for most areas to be restarted from the very beginning. The extreme damages caused to the records and products that carried years of history and importance show all the more reasons as to why we should align more and more with technology and have everything sorted in its e-version, which has proved to be the most promising way of preserving every document, that are essential requirements for smooth functioning and efficient activity of the court, even after a natural hazard. The judiciary is what people turn to, in hopes of receiving justice and equality despite the circumstances.

As the editorial team of the JSA Law Journal of 2025, it us our hope that every court across the island, embrace the new technologies and such ways, as above all, our superior aim is to conduct a court of true justice and efficiency, with the supreme goal of serving the society.

The usage and necessity of the law journal lies with the academic side of law, which always acts as a helpful and guiding resource to our new recruits. The JSA Law Journal is the outcome of extremely dedicated individuals, who, despite their tight schedules, took time and effort to share their insights and experiences in their judiciary journey with us. The day to day work at the judiciary can not be in any way described easy. Therefore, we owe a huge gratitude to each and every professional who helped us out along the way.

Another reason as to why the JSA Law Journal is important is the Justice Nimal Gamini Amarathunga Memorial Award Competition, where the newest additions to the judiciary showcase their talents, which serves as a promising platform to expand their knowledge bases and set a leading example to the next generations of the judiciary that are yet to arrive.

Finally, we owe our most sincere gratitude to every wonderful individual whose guidance and support, made this journal possible. His Lordship Chief Justice Preeti Padman Surasena, Hon. Justice of the Supreme Court - Mr. Janak De Silva, Hon. Justice of the Supreme Court and Director of the Sri Lanka Judges' Institute - Mr. Sampath Abeykoon are reminded with great respect and gratitude. We are also truly thankful for the distinguished professionals who authored the knowledgeable articles in the journal. Last, we extend our heartiest gratitude to the office bearers of JSA of Sri Lanka, for standing by us and contributing with everything in their power, for the success of the JSA Law Journal, 2025.

Following the relaunch of the Judicial Service Association (JSA) website on 23rd August 2025 with a modern design, Member Portal and full ownership of the domain "jsasl.lk", developed under the CSR initiative of Microweb Global—We are pleased to inform our readers that this year's Annual Judges Journal will also be available online in the Publications section, providing convenient digital access to all members.

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ENGAGE, TRANSFORM, SUSTAIN
LAW AS AN INSTRUMENT OF SOCIAL CHANGE

JANAK DE SILVA

Judge of the Supreme Court
Honorary Bencher, Gray's Inn of London
Honorary Senior Fellow (within Law), University of Melbourne
Hubert H. Humphrey Fellow (Michigan State University,USA)
BCL (Oxford), LL. M. (London)

Distinguished members of the department of law, University of Jaffna, invitees, ladies and gentlemen and dear students,

It is a privilege to be participating at the 2nd Jaffna International Law Conference. I extend my deep appreciation to Dr. Vinod Surana and Kosalai Mathan, Head of the Department of Law for the honor extended.

My research revealed that a faculty of law was to have been established at the University of Jaffna as far back as 1974. It is yet to materialize. However, in 2005 the LL.B degree programme had commenced with a Department of Law set up within the Faculty of Arts. In my view, the history of an institution does not determine its utility. On the contrary, its utility depends on the ability to respond to the changing demands of legal education.

This second international law conference signifies that the department of law has responded to this challenge positively. The conference theme law as an instrument of social change is an important subject in this era of globalization and technological advancement.

It focuses on the relationship between law and social change. The classical view is that law is a product of social change. This happens when law has to respond to social developments brought about by significant advances made in areas such as science and technology. For example, DNA fingerprinting was first developed by Dr. Alec Jeffreys in 1984. Two years thereafter, it was first introduced as evidence in the USA. However, it took more than a decade and half for DNA fingerprinting to be judicially recognized in criminal cases in Sri Lanka in the Hokandara murder case[1].

[1] Sajeewa alias Ukkuwa and Others v. The Attorney-General (Hokandara Case) [2004 (2) Sri.L.R. 263]

There have also been times, where the law had to respond to barbaric human behaviour that shocked a nation's consciousness and generated nationwide demonstrations resulting in public outcry for legal reform.

On December 16, 2012, India was shocked by a barbaric incident of gang rape and murder in what is now known as the Nirbhaya case. Six males battered and raped a 23-year-old woman on a bus before throwing her on the road. Five of them were adults, while one was a 17-year-old minor. One of the adult males died in custody while the other four were convicted and sentenced to death which was carried out in 2020. According to the Juvenile Justice Act of 2000, the 17-year-old-minor was given the maximum sentence of three years' imprisonment in a reform facility. This incident led to amendment of that Act with the Juvenile Justice (Care and Protection of Children) Act, 2015 which allows minors in the age group of 16-18 to be tried as adults if they commit heinous crimes.

William Graham Sumner, a sociologist, and a leading proponent of the classical view that law was only a product of social change and not a tool of social change famously said that "stateways cannot change folkways.[2] " Sumner expounded that law could never move ahead of the customs or mores of the people and that legislation that was not firmly rooted in popular folk-ways was doomed to fail. The suggestion was that social change must always be glacier-like in its movement and that mass change in attitudes must precede legislative action. This classical view is now disputed. As Wolfgang Friedmann says, "the law through legislative or administrative responses to new social conditions and ideas, as well as through judicial re-interpretations of constitutions, statutes or precedents increasingly not only articulates but sets the course for major social changes"[3]. He explained this to be a basic trait of the modern world.

There are a multitude of examples of how law acted as an instrument of social change. The Supreme Court of the United States in Brown v. Board of Education of Topeka[4] ordered southern states to desegregate their schools. The Supreme Court of Sri Lanka has in the exercise of its just and equitable jurisdiction in fundamental rights applications used law as an instrument of social change. The recognition of the right to life, right to livelihood[5] and right to be free from the degradation of the environment[6] are some of the examples.

[2] Jack Greenberg, Race Relations and American Law (New York: Columbia University Press, 1959), pp. 2-3

[3] 1972:513

[4] [347 U.S. 483 (1954)]

[5] Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others (Eppawela Case)[(2000) 3 Sri.L.R. 243]

[6] Ravindra Gunawardena Kariyawasam v. Central Environment Authority and Others (Chunnakam Power Plant case) [(2019) 3 Sri.L.R. 21]

The thematic areas for this international law conference are Pedagogical Transformation, Cultural Transformation, Digital Transformation, Governance Transformation and Economic Transformation. Let me share a few thoughts on economic and pedagogical transformation.

Most of us know that Adam Smith, is considered to be the father of modern economics. He is better known for his magnum opus *An Inquiry into the Nature* and *Causes of the Wealth of Nations* commonly known as the *Wealth of Nations.*

Smith expounded that the theory of supply and demand in economics is based on three principles. Supply is the amount of a good or service that producers are willing to sell at different prices and supply increases as price rises. Demand is the quantity of a good or service that consumers wish to buy at different prices and that demand decreases as price rises. Equilibrium is the point where supply and demand intersect, determining the market price. These principles are deeply rooted in the term invisible hand coined by Smith who argued that markets can effectively and efficiently self-correct to allocate resources and capital best.

What is not so well known is that Smith also lectured jurisprudence and was conferred the title of Doctor of Laws (LL.D.) by the University of Glasgow. My brief reference to the teaching career of Adam Smith was to highlight the interaction between law and economics.

Economic theory is not always reflected in human behaviour. Smith himself was aware of factors such as monopoly power that can distort markets. That is why you need laws to control monopolies and anti-competitive practices. This is an example of how law interacts with economic theory and acts as an instrument of social change.

It highlights the need for law schools to actively engage and explore the interface between law and economics. This field emerged in the United States during the early 1960s, primarily from the work of scholars from the Chicago school of economics. It is now a subject in all leading law schools in the world.

Sri Lanka was a founding member of the General Agreement on Tariffs and Trade in 1947 and a founding member of the World Trade Organization. It has in recent times actively engaged in Free Trade Agreements. Several laws such as Anti-Dumping and Countervailing Duties Act No.2 of 2018 and Safeguard Measures Act No. 3 of 2018 have been enacted to give effect to its obligations under the WTO agreements. This has created opportunities for lawyers trained in law and economics.

These developments highlight the need for law schools in Sri Lanka to respond to the economic transformation taking place in order to empower the legal community in Sri Lanka to address the inequalities in the international economic order.

It requires a revision of the curriculum to introduce subjects which examines the interface between law and economics. During my keynote address at the inauguration ceremony of the Master of Laws by coursework programme 2023/2024 of the Faculty of Law, University of Colombo, I stressed on the importance of introducing into the curriculum modules connected with Law and Economics. I am happy to note that the Faculty of Law, University of Colombo has now introduced a course on Law and Economics. The Department of Law, University of Peradeniya has International Investment Law, International Trade Law and Business Law as part of the undergraduate curriculum.

The official web site of your department shows that Investment Law, International Trade Law and Business Law are modules of the undergraduate programme. I urge you to look beyond and include Law and Economics as a module in the programme. I am confident that Dr. Vinod Surana and his firm will appreciate the importance of such an initiative and be an important stakeholder in its implementation.

Increasingly, the attention of the world is drawn towards environmental sustainability in the wake of climate change. Nevertheless, for the South it is nothing new. Many of the leading religions of the world which had its origins in the South, underscores the importance of protecting the environment.

According to Hinduism, when a person is engaged in killing creatures, polluting wells, and ponds and tanks, and destroying gardens he goes to hell (Padmapurana, Bhoomikhanda 96.7-8). In Buddhism, the Kutadanta Sutta states that it is the responsibility of the government to protect trees and other organic life and that government should take active measures to provide protection to flora and fauna. The Qur'an states "It is he who made you trustees of the earth…Indeed your Lord's retribution is swift…" (6:165).

The Romans were well aware of the fundamental obligation on man to protect the environment. According to Justinian: 'By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea. No one, therefore is forbidden to approach the sea-shore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations …The particular people or nation in whose

territory public things lie may permit all the world to make use of them, but exercise a special jurisdiction to prevent anyone from injuring them. In this light even the shore of the sea was said, though not very strictly, to be a res public: it is not the property of the particular people whose territory is adjacent to the shore, but it belongs to them to see that none of the uses of the shore are lost by the act of individuals … with the opinions of other jurists, we must understand populi Romani esse to mean "are subject to the guardianship of the Roman people". (Sandards, Thomas Collett, The Institutes of Justinian (3rd ed.,1865) pp.167–168.)

In spite of these virtuous directions, humanity has failed by giving primacy to economic development at the cost of environment sustainability which has brought about disastrous consequences. As aptly expounded *In Encyclical Letter Laudato Si' Praise be to you by Pope Francis* (at para 66): 'The creation accounts in the book of Genesis contain, in their own symbolic and narrative language, profound teachings about human existence and its historical reality. They suggest that human life is grounded in three fundamental and closely intertwined relationships: with God, with our neighbour and with the earth itself. According to the Bible, these three vital relationships have been broken, both outwardly and within us. This rupture is sin. The harmony between the Creator, humanity and creation as a whole was disrupted by our presuming to take the place of God and refusing to acknowledge our creaturely limitations. This in turn distorted our mandate to "have dominion" over the earth (cf. Gen 1:28), to "till it and keep it" (Gen 2:15).

As I expounded in *Ministry of Environment, Energy and Climate Change and others v Woodlands Holdings Ltd and another*[7], "Although the right to live and enjoy a clean and healthy environment is referred to in academic discourses as a 'third generation right', it is in my view one of the fundamental, if not the most fundamental right of a human being. None of the myriads of other fundamental rights, including civil and political rights, can be meaningfully exercised by a human being in the absence of a clean and healthy environment which can sustain life. Man must live to exercise any of the fundamental or human rights bestowed upon him. A clean and healthy environment is a sine qua non for the meaningful expression of any other fundamental right or human right".

[7] [2024] 2 LRC 449

Belatedly, international law, which has and continues to be driven by western ideals, is seeking to respond to the challenges of climate change. There are some optimistic developments. The International Tribunal for the Law of the Sea (ITLOS) delivered an advisory opinion on May 21, 2024, finding that States have a legal obligation to protect the world's oceans and marine biodiversity from climate change in accordance with the United Nations Convention on the Law of the Sea (UNCLOS). The world is watching with bated breath the decision of the ICJ in the Advisory Opinion sought by the UN General Assembly on States' Obligations in respect of climate change.

I am happy to note that the department of law has included Environmental Law as a module in the fourth year and hope that the international dimension is part or will be included in the future.

My brief examination of the thematic areas of Economic Transformation and Pedagogical Transformation shows that the conference agenda will undoubtedly serve as a fertile ground for productive exchange of views and exploring new thinking. The Department of Law must be congratulated for organizing an important international conference of this nature. I am grateful for the invitation to be part of it and wish you all a successful and rewarding deliberation.

**** Speech at the Jaffna International Law Conference 2025***

"MAGISTRATE AS AN INQUIRER ON SUDDEN DEATHS; IS HE A LIFE SAVER?"

DR. SUMUDU PREMACHANDRA

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L.L.B (OUSL), LL.M (Aberdeen-UK), Ph.D (SUSL),
Barrister and Solicitor in Fiji,
Judge of the Court of Appeal

27 years of my judicial life, I can still remember my first case as a judicial officer. Can you remember yours? I was appointed as a judicial officer on 01st of July 1998. After a full term of judicial training at the Sri Lanka Judges Institute (I was fortunate to be trained as a judge under esteemed Justices such as Justice J.F.A. Soza, Retired Judge of the Supreme Court and Justice Douglus Wijeratne, Retired Judge of the Court of Appeal, at this juncture, I place my utmost tribute to them), I was appointed as the Magistrate of Elpitiya, in the Southern Province. That was my first station. I had to assume duties with effect from 01st January 1999. Normally, we take our oath of office in front of the High Court Judge of the Province or before the District Judge. Elpitiya was situated far beyond a major city, so I had to travel to Galle to take my judicial oath as the Magistrate. Unfortunately, due to New year's day, all judicial officers had gone to their home town to celebrate the New Year, so I had to get the oath before Mr. Wijepala Mahagodage, JPUM, who was the Acting Magistrate for 31st of December 1998. If I remember correctly, it was a Poya Holiday. I took the oath around 9am, and I was at the chambers. Police Seargent Mendis, came with a B Report and saluted! My God, that was my first case; it was filed under the section 296 of the Penal Code, it was a murder, an Inquest had to be started! Despite New Year day, I had to go to Elpitiya Hospital Mortuary and thereafter scene visit. That is how my judicial life started! Thus, my first case involved with an Inquest.

Ever since, As Magistrates of Elpitiya, Anuradapura, Kurunegala, Kandy and Warakapola, almost 11 and 1/2 years as a Magistrate, I have performed nearly 780 odd (I entered the particulars of inquests including B number for each case in a ledger book with outcome, hence I managed to track down the Inquests) Inquests in my judicial life.

Beginning off an Inquest

How does an inquest begin? Section 21 of the Code of Criminal Procedure Act (No. 15 of 1979) imposes public to give information in certain offences; it says;

"21. Every person aware-

(a) of the commission of or the intention of any other person to commit any offence punishable under the following sections of the Penal Code namely, 114, 115, 116, 117, 118, 119, 120, 121, 122, 126, 296, 297, 371, 380, 381, 382, 383, 384, 418, 419, 435, 436, 442, 443, 444, 445 and 446 ;

(b) of any sudden or unnatural death or death by violence, or of any death under suspicious circumstances, or of the body of any person being found dead without it being known how such person came by death,

shall in the absence of reasonable excuse-the burden of proving which shall lie upon ***the person so aware-forthwith give information to the nearest Magistrate's Court or to the officer in charge of the nearest police station or to a peace officer or to the Grama Seva Niladhari of the nearest village*** *of such commission or intention or of such sudden unnatural or violent death or death under suspicious circumstances or of the finding of such dead body."*

When such information was received by a peace officer, under section 22 of the Code Of Criminal Procedure Act (No. 15 of 1979), a peace officer bound to report certain matters; it enacts;

"22. Every peace officer shall forthwith communicate to the nearest Magistrate or inquirer having jurisdiction or his own immediate superior officer any information which he may have or obtain respecting-

(a) the commission of or the attempt to commit any offence within the local jurisdiction in which he is empowered to act;

(b) the occurrence therein of any sudden or unnatural death or of any death by violence or under suspicious circumstances;

(c) the finding of the dead body of any person without it being known how such person came by death".

When the information is received by a peace officer or an officer in charge of police, Magistrate or Inquirer having jurisdiction shall start an Inquest forthwith. It should be noted that Sri Lanka's Inquest system has originated from the British coroner system and it is currently covered by the sections 369 to 373 Code of Criminal Procedure Act No. 15 of 1979. Above sections enact, the death inquirers; such as Magistrates and Inquirers into sudden death to carry out

inquests in sudden and unnatural deaths to ascertain the cause and manner of death. Autopsies are performed by qualified medical officers upon the order of the Magistrate or Inquirers into sudden deaths, the later are commonly known as Coroners. It should be noted that maternal deaths, although not specified in the Code of Criminal Procedure, undergo mandatory autopsies. It should be shown, in the face of mass disasters in recent history; including the 2004 tsunami, 2019 Easter bombing and COVID-19 pandemic, Sri Lanka adapted the regulations to overcome the medico-legal challenges in the management of the deceased. [1]It is seen that when the tsunami first struck the eastern coastline and southwestern part of Sri Lanka the death were approximately 35,000 people[2] and Inquests were held island wide through the special team of Magistrates.

What is an Inquest?

An inquest is a judicial inquiry to ascertain the facts relating to an unnatural death. Simply, an inquest is held when someone dies from other than natural causes. As every citizen has a right to life, if his or her death is suspicious or unnatural, the State is obliged to know what was the cause to its citizen's death. It is a fact-finding mission. There are no 'accused' parties and no 'defence'. An Inquest is not a trial, and no one will be 'found guilty' or sentenced at the end of the Inquest. An Inquest is like a public inquiry, presided over by a Magistrate or an Inquirer into Sudden Deaths and its purpose is to establish the truth of how death came about. The Magistrate will decide whether there is prima facie (on the face of it) evidence of any criminal offence or negligence, and whether this might have been responsible for any of the deaths[3].

In relation to the definition above, what is an inquest in **WESSEL MARAIS Vs ELIZABETH TILEY,** IN THE SUPREME COURT OF SOUTH AFRICA, CASE NO. 377/88, SMALBERGER, JA – Decided on 30 MARCH 1990, as follows;

> *"An inquest is an official investigation into a death occurring otherwise than from natural causes, which has not been the subject of a criminal prosecution...*
>
> *The function of an inquest is to determine the identity of the deceased person; the cause or likely cause of death; the date of death; and whether*

[1] Medico-Legal Death Investigation Systems – Sri Lanka Dinesh M.G. Fernando*, Kasun Bandara Ekanayake Department of Forensic Medicine, Faculty of Medicine, University of Peradeniya, Peradeniya, Sri Lanka; https:// sljfmsl.sljol.info/articles/7923/files/submission/proof/7923-1-28435-1-10-20220928.pdf#:~:text=In%20 the%20face%20of%20mass,pandemic%2C%20Sri%20Lanka%20adapted%20the (accessed on 27/10/2025)

[2] https://en.wikipedia.org/wiki/2004_Indian_Ocean_earthquake_and_tsunami (accessed on 27/10/2025)

[3] Inquests and doctors, LBM Fernando Consultant Judicial Medical Officer, General Hospital, Matara,https://gmj.sljol.info/articles/1120/files/submission/proof/1120-1-4184-1-10-20090928.pdf, accessed on 09/09/2025.

the death was brought about by any act or omission involving or amounting to an offence on the part of any person … The underlying purpose of an inquest is to promote public confidence and satisfaction; to reassure the public that all deaths from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences, and so that persons responsible for such deaths may, as far as possible, be brought to justice4.

Further, in South Africa, CILLIe, JP and MARAIS, J in ***Timol and Another v Magistrate, Johannesburg and Another*** 1972(2) SA 281 (T) at 287 H to 288 A held that:

"For the administration of justice to be complete and to instill confidence, it is necessary that, amongst other things, there should be an official investigation in every case where a person has died of unnatural causes, and the result of such investigation should be made known. Therefore the Inquests Act provides that, if there is reason to believe that a death has occurred, that such death was not due to natural causes and that it was not followed by the institution of criminal proceedings, there shall be an inquest as to the circumstances of the death… the inquest must be so thorough that the public and the interested parties are satisfied that there has been a full and fair investigation into the circumstances of the death".

In addition, in ***PP v. Shanmugam & Ors*** [2002] 6 MLJ 563. Malaysian Court considered the applicable procedure and rules of evidence and the magistrate's duty when conducting a death inquiry is to act as a coroner in order to determine the cause of death of the deceased person. In that Suriyadi J (as he then was) observed that:

"The magistrate court had assumed the powers and duties of a coroner's court. A coroner's inquest was a court of law, though not a court of justice, because it was essentially set up to investigate and ascertain the cause of death. Apart from being shackled by a limited mandate, a coroner was also not bound to follow the usual procedure of law courts. The position of the magistrate in the instant case was no different to that of a coroner when holding an inquiry of death, and thus, the magistrate was similarly not bound by the usual procedure of courts of law and the normal rules of evidence…"

[4] Vide; https://www.saflii.org/za/cases/ZASCA/1990/40.pdf, accessed on 10/09/2025

It was held by Dzaiddin J (as he then was) in ***Re Loh Kah Kheng*** [1990] 2 MLJ 126., Court of Malaysia, that:

> *"It must be remembered that the function of a magistrate holding an inquiry is to inquire when, where, how and after what manner the deceased came by his death and also whether any person is criminally concern in the cause of such that. The "cause of death" is defined under section 328 to include not only the apparent cause of death as ascertainable by inspection or post mortem examination of the body of the deceased, but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death and so as to whether his death in any way from, or was accelerated by any unlawful act or omission on the part of any other person"*

Standard of Proof in Inquest

It is to be stressed that Inquests are not similar to criminal trials. It is apparent when compared to a criminal trial, an Inquest does not involve any parties, charge, or trial. In other words, no accused is tried during an Inquest. However, if a crime is committed, a suspect is arrested, non-summary procedure could be instituted soon after the Inquest. The Inquirer may consider all factors connected to the death of the deceased and is not bound by the rules of evidence for the court to investigate. This means that the hearsay evidence presented at the hearing can be considered by the court when making decisions about the deceased's death. The court is not constrained by the standard procedures and laws used in regular trials[5].

In ***Re Inquest into the Death of Sujatha Krishnan, deceased,*** [2009] 5 CLJ 783. It was held that;

> *"this is not a criminal trial, but an inquiry to make a finding of fact. To do that, the evidence adduced must be credible as to become the basis of the coroner's finding. No one is on trial. Therefore, hearsay and secondary evidence is allowed but hearsay evidence must be scrutinised with caution. As the finding of the inquiry is legally binding, the facts must be proven beyond reasonable doubt"*

Further in ***R v South London Coroner, ex p Thompson,*** (1982) 126 SJ 625, in UK, Lane LCJ stated:

[5] THE STANDARD OF PROOF IN INQUESTS: LESSONS FROM MALAYSIA AND OTHER JURISDICTIONS, 31 (S1) 2023 IIUMLJ 55 – 82, (https://journals.iium.edu.my/iiumlj/index.php/iiumlj/article/ download/873/413/3087 accessed on 10/09/2025)

"An inquest is a fact-finding exercise and not a method of apportioning guilt…In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation…"

Lord Widgery CJ in ***R (Barber) v. City of London Coroner*** [1975] 1 WLR 1310 at 1313, was referred to by Watkins LJ where he observed that the proof of suicide must not be anything less than beyond reasonable doubt, as anything less is unthinkable.

In Australia, an Inquest into the death of Azaria Chantel Loren Chamberlain, [2012] NTMC 20, it was held that the test of balance of probabilities is used in coronial jurisdiction. The standard of reasonable satisfaction "increases with the seriousness of the allegation. The Court applied ***Briginshaw principle***[6], that means the seriousness of an allegation and the gravity of its consequences require stronger, more convincing evidence to satisfy the civil standard, which was applied in Anderson v Blashki [1993] VR 89.

In ***Re Anthony Chang Kim Fook,*** [2007] 2 CLJ 362. Sulong Matjeraie J (as he then was) observed that:

"It must be borne in mind that in an inquest, there are no parties, there is no indictment, there is no prosecution, there is no defence and there is no trial. It is simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use, see R v South London Coroner; ex parte Thompson [1982] 126 SJ 625 DC."

SUPREME COURT OF CANADA, in ***Faber v. The Queen,*** [1976] 2 S.C.R. 9, Date: 1975-03-26, Laskin C.J held that Contempt Committal for refusing to testify at an inquest is justified and application for writ of prohibition is refused.

British Columbia Court of Appeal in ***R. v. McDonald*** (1968), 2 D.L.R. (3d) 298 held that;

[6] In Victoria, Australia in the case of ***Anderson v Blashki*** [1993] VR 89 it was held that the standard of proof to be applied by the coroner in investigating a death is the civil standard of the balance of probabilities (see also ***Briginshaw v Briginshaw*** (1938) 60 CLR 336). In the infamous case of ***Inquest into the death of Azaria Chantel Loren*** Chamberlain [2012] NTMC 020, it was held by the High Court of Australia that in the coronial jurisdiction, the test applied is a balance of probabilities test.

"A person who may be, but has not been, charged with an offence under the Criminal Code or under a penal provincial statute with respect to his conduct or actions involving the death of a person, is a compellable witness at a Coroner's inquest inquiring into that death. The maxim nemo tenetur seipsum accusare does not exempt him from testifying[7]"

Further, in ***R v HM Coroner for North Humberside, ex parte Jamieson*** [1995] 1 QB 1 at paragraph 26, Lord Bingham referred to the duty to ensure that the "relevant facts are fully, fairly and fearlessly investigated"

In ***R(Hambleton) v Coroner for the Birmingham Inquests*** (1974) [2018] EWCA Civ 2081 Lord Burnett LCJ said at [48]

"A decision on scope represents a coroner's view about what is necessary, desirable and proportionate by way of investigation to enable the statutory functions to be discharged. These are not hard-edged questions. The decision on scope, just as a decision on which witnesses to call, and the breadth of evidence adduced, is for the coroner. A court exercising supervisory jurisdiction can interfere with such a decision only if it is infected with a public law failing. It has long been the case that a court exercising supervisory jurisdiction will be slow to disturb a decision of this sort… and will do so only on what is described in omnibus terms as Wednesbury grounds. That envisages the supervisory jurisdiction of the High Court being exercised when the decision of the coroner can be demonstrated to disable him from performing his statutory function, when the decision is one which no reasonable coroner could have come to on the basis of the information available, involves a material error of law or on a number of other well-established public law failings."

In ***R (Mack) v HM Coroner for Birmingham*** [2011] EWCA Civ 712; [2011] Inquest LR 17 at paragraphs 8 and 9, Toulson LJ explained: "… the coroner [has] a wide discretion – or perhaps more appropriately a wide area of judgment – whom it is expedient to call".

In ***Maughan, R v Senior Coroner for Oxfordshire V The Chief Coroner for England and Wales*** [2019] EWCA civ 80 UK Court of Appeal upheld the decision of the Divisional Court that in suicide cases the standard of proof for short form and narrative conclusions was the civil test of balance of probabilities not the criminal standard of beyond reasonable doubt.

[7] https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2689/index.do#_ftn10 (accessed on 10/09/2025)

In ***R(Morahan) v HM Assistant Coroner for West London*** [2022] EWCA Civ 1410 Lord Burnett of Maldon LCJ, giving the judgment of the court, explained at [7]: "an Inquest remains an inquisitorial and relatively summary process"

It was concluded by the Supreme Court of United Kingdom in ***R (on the application of Maughan) v Her Majesty's Senior Coroner for Oxfordshire*** (Respondent) [2020] UKSC 46, that the standard of proof required to establish suicide and unlawful killing in Inquests is the balance of probabilities, not beyond reasonable doubt. Thus, all Inquest findings must now meet the civil standard of proof.

Sri Lankan frame work

An " inquirer into sudden death" (ISD) is an officer who was appointed by the Minister of Justice under section 108 of the Criminal Procedure Code[8] who investigates deaths that are sudden, unexpected, violent, or suspicious, aiming to determine the cause, manner, and circumstances of death. Inquirer into sudden death often works with a doctor or pathologist, may request a post-mortem (autopsy), and can hold an Inquest to find out how and why the death occurred, especially if the cause is unnatural or unknown.

In ***Jayawardena v. Dharani Wijaytllake, Secretary, Ministry of Justice and Constitutional Itffalrs and Others,*** [2001] 1 SLR 132, His Lordship Mark Fernando, J. held that the office of Inquirer Involves functions of a public nature. According to the CCP and other statutes, the following deaths must be requested for an Inquest.

1. All natural deaths where the cause of death is not known.
2. Natural deaths with known cause of death, but any suspicion arises.
3. All the deaths on admission at POD irrespective of the circumstances of the death.
4. Accidents include road traffic accidents, industrial accidents, domestic accidents, aviation accidents, naval accidents, and locomotive accidents.
5. Deaths due to suicidal acts.
6. Deaths due to violence (Homicide).

[8] The Minister may appoint any person by name or office to be an inquirer for any area the limits of which shall be specified in such appointment

7. All deaths in custody include inmates of prisons, police custody, lawful and unlawful detention, patients in the mental hospital, leprosy hospital, TB hospital, elder's homes, children's homes, certified schools, etc.
8. Death due to medical, surgical, or anesthetic procedures immediately afterward.
9. Death following administration of blood, blood products, or a drug.
10. Death due to animal bites, rabies, or tetanus.
11. Maternal deaths
12. Vaccine-related deaths[9].

Following Circulars of the Ministry of Justice and Ministry of Heath give guidance and procedure in relation to Inquest in Sri Lanka.

- Circular NO- 04/2007 and No- 03/2004 of Ministry of Justice regarding the appointment, payments, disciplinary control of ISDs.
- Circular NO- 03/2008 of the Ministry of Justice regarding inquests on maternal deaths, deaths from accidents, suicides, deaths from firearm injuries, and deaths where the cause of death is unknown
- Circular NO- 01/2010 of the Ministry of Public Administration and Home affairs points out the payments of the ISD.
- DGHS also issued a letter dated on12-01-2011 stating about mandatory inquest and autopsy for maternal deaths.
- Circular No. 01-25/2011 by Ministry of Health regarding conducting Post- Mortem Examination on Maternal Deaths
- Circular No- 01-25/2012 by Ministry of Heath regarding guidelines of pediatric autopsy following immunization-related deaths
- Government Gazette notification (23/09/2011)
- This Gazette notification states recruitment and qualifications of ISD[10]

[9] ***"Request for an Inquest and Medical Officers – A Brief update"*** BATTICALOA MEDICAL JOURNAL, Volume 15, Issue 01 May 2022, Biannually, The official publication of the Batticaloa Medical Association, ISSN 1800 - 4903

[10] Ibid

Section 369 of the Criminal Procedure Code specifically enacts that an Inquest of death shall not be held except under the provisions of this Code. Section 370 makes the provisions as follows;

> "(1) Every inquirer on receiving information that a person –
>
> (a) has committed suicide; or
>
> (b) has been killed by an animal or by machinery or by an accident; or
>
> (c) has died suddenly or from a cause which is not known,
>
> ***shall immediately proceed to the place where the body of such deceased person is and there shall make an inquiry and draw up a report of the apparent cause of death,*** *describing such wounds, fractures, bruises, and other marks of injury as may be found on the body and such marks, objects, and circumstances as in his opinion may relate to the cause of death and stating in what manner such marks appear to have been inflicted"*

It is to be noted, when the information of death is received, Inquirer shall proceed to the scene and commence Inquest proceedings. In the proceedings, the Inquirer makes notes regarding the scene, wounds and any damage that happened to the body, make the body be identified by a known person and refer it (body) for an autopsy. Section 143 of the Criminal Procedure Code provisioned as follows;

> *"If in a proceeding instituted under section 136 the case appears to be one of culpable homicide the* ***Magistrate shall, unless for reasons to be recorded by him he thinks it inexpedient, go to the spot where such offence appears to have been committed and if the accused be present before him shall proceed to hold such part of the inquiry directed by Chapter XV*** *as may be necessary, and if the accused be not present shall hold an examination of such persons as may seem to him to be able to give material evidence. Such examination shall be recorded in the manner provided in section 138 (2)."*

This clearly shows that non summary proceedings can be instituted under chapter XV if the accused is present before him. Recording a statement has to be in a manner set out in section 138(2), that is reduced into writing and shall be explained to the person who made it and get the signature and the Magistrate has to sign and put the date[11].

[11] "138(2) Every examination held by the Magistrate under subsection (1) shall be reduced into writing and after being read over and if need be interpreted to the person examined shall be signed by him and also by the Magistrate and dated."

The section 370(1) makes an Inquirer to draw up a report of the apparent cause of death, signed and send it to the Magistrate[12]. Such a report creates a reasonable suspicion that an offence is committed, Magistrate should start criminal proceedings. It should be noted that Magistrate may take over Inquest proceedings[13] or commence Inquest under the section 370(4) and it says;[14]

"370(4) Anything herein contained shall not preclude a Magistrate from forthwith holding an inquiry under the powers vested in him by section 9, whenever any of the events mentioned in paragraphs (a), (b) and (c) of subsection (1) of this section have been brought to his notice"

In the Inquest, inquirer can issue notice compelling witness to be present[15] at the inquiry and give evidence. If he fails to come, he can issue warrant to arrest such person[16]. A person who

In these proceedings, one might think the Inquirer functions as a judicial officer. In ***Seneviratne v. The Attorney-General*** [17] TENNEKOON, J considered the nature of Inquest proceedings.

In that case, one Lokugama Vidanalage Podi Appuhamy alias Dodampe Mudalali of No. 228, Main Street, Ratnapura, who was brought to the C. I. D. Office for questioning in connection with the suspected coup, had leapt out of the C. I. D. Office window at the New Secretariat Building at about 2.30 a.m., and that he had died at the General Hospital after admission and Officer-in-Charge, Fort Police Station, requested that a Magisterial inquiry be held into this death. After the Magisterial Inquest, the Magistrate held that the death was a case of suicide. Three and half months later of the verdict, one L. V. Stephen, a brother of the deceased filed an affidavit that death was occurred under suspicious circumstances and moved for a fresh Inquiry. After considering the fresh evidence, the Magistrate altered the verdict suicide to homicide and held there is a reasonable suspicion that a crime had been committed. His Lordship held;

[12] 370(2) "The report shall be signed by such inquirer and shall be forthwith forwarded to the nearest Magistrate."

[13] "370(3) If the report or other material before him discloses a reasonable suspicion that a crime has been committed the Magistrate shall take proceedings under Chapter XIV and XV and in such event the record of the inquiry and the inquirer's report shall be annexed to the record of the proceedings before the Magistrate."

[14] Section 9(iii) of Criminal Procedure; "to inquire into all cases in which any person shall die in any prison or mental or leprosy hospital or shall come to his death by violence or accident, or when death shall have occurred suddenly, or when the body of any person shall be found dead without its being known how such person came by his death."

[15] 370 (5) Any inquirer may, for the purpose of any inquiry under this Chapter, if he considers it expedient, issue process to compel the attendance of any witness to give evidence before him, or to produce any document or other thing.

[16] 370(6) If any person so summoned fails or neglects to attend at the time and place specified in such summons, the inquirer may issue his warrant for the apprehension and production before him of such person

[17] 71 NLR 439

"it must be noted immediately that the function of an inquirer or a Magistrate acting under Chapter 32 of the Criminal Procedure Code is not to investigate an alleged crime or offence. Indeed, the whole inquiry proceeds upon the basis that the cause of death is yet to be ascertained. The learned Magistrate was mistaken when in his second 'verdict' he stated "The court is required only to ascertain whether the evidence discloses a "reasonable suspicion" that an offence has been committed". It is clear from the sections of law quoted above that the function of an inquirer or Magistrate under Chapter 32 is to hold an enquiry into the cause of death and to state as a finding what in his opinion was the cause of death. The recording of the finding concludes the inquest of death."

His Lordship, holding that writ of certiorari does not lie to quash Inquest findings and noted further;

"The Magistrate or inquirer holding' an inquest is not called upon to determine any question affecting the rights of the subject. He is only called upon to enter upon a voyage of discovery; there are no parties before him claiming any right or liberty and no proposition advanced by any person the correctness or otherwise of which he is called upon to pronounce upon definitively. A person who is examined by the inquirer or Magistrate at an inquest and who gives evidence tending to show that the cause of death was suicide or homicide or accident cannot be regarded as a party propounding a question for determination by the investigator…

…Where the function is not judicial in character, whatever other remedies may be available, the prerogative writs of certiorari or prohibition will not be available to question acts of such authority which are ultra vires of its legal powers. The existence of the right to summon witnesses and to examine them on oath can never by itself be conclusive of the question whether a statutory function is judicial…

To my mind the functions o f a Magistrate or inquirer holding an inquest of death are o f a non-judicial character."

Thus, the function of the inquirer is held as non-judicial character despite he can issue summons and warrants to get evidence to find the cause of death.

Another interesting case is ***W. Maheshika Madhubhashini v. W.D.J. Welagedera*** [18]. In that case that the Petitioner, wife of the deceased, has pleaded the revisionary jurisdiction of Court of Appeal inter alia, challenging the additional

observations made by the learned Magistrate of Attanagalla. While the Petitioner agrees that the death of the deceased was caused by haemorrhage from internal injuries resulting from gunshot wounds which falls within the Magistrate's powers under Section 370 of the Code of Criminal Procedure Act , the Petitioner challenged that the additional observations made by the Magistrate, including the rejection of the pillion rider's testimony as false, the conclusion that he had attempted to portray the incident as murder, the finding that the incident was not murder but may have occurred due to police shooting when the deceased failed to stop, and the ultimate determination that the incident was caused by the negligence of the suspect police officer in handling his firearm. The Petitioner contended that in making these findings, the Magistrate exceeded the scope of her jurisdiction under Chapter XXX of the Code and therefore seeks revision of that part of the order.

His Lordship Preethi Padman Surasena (As His Lordship then was) considered the in-depth analysis of procedure and differentiated the functions of Inquirer and Magistrate. His Lordship noted;

> *"It would be prudent at the outset to observe that the duties section 370 entrusts to an inquirer are different at some occasions, to the duties it entrusts to a Magistrate. Further, such different sets of duties could easily be separated from each other as they are required to be performed at two different stages of the inquest proceedings.*
>
> *It is section 370(1) which basically refers to the duty of an inquirer. Thus, one needs to distinguish and clearly identify the nature of the office of 'inquirer'. Section 2 of the Act has defined who an 'inquirer' is. According to section 108 of the Act it is the Minister who appoints any person by name or office to be an inquirer for any area the limits of which shall be specified in such appointment. It must be stressed here that the inquirer's duty as set out in section 370(1) is to draw up a report of the apparent cause of death. In addition to the distinction between an inquirer and a Magistrate referred to above, another occasion at which such distinction could be observed is section 371 of the Code of Criminal Procedure Act"*

In this judgment, His Lordship considered the difference between "Cause of Death and Apparent Cause of death as;

[18][CA (MC Revision) 17/2014 C.A.M. 02.03.2017.

"It is to be noted that the meaning of the term "cause of death" in section 373(1) is different to the term "apparent cause of death" in section 370(1) of the Act.

What is contemplated in section 373(1) is the cause of death determined by a Medical Officer upon performing a post mortem examination. In other words, it is the cause for that person's death which is generally described in medical terms by a Doctor. It must also be borne in mind that a Medical Officer is not engaged in hearing evidence etc., in the run up to his conclusion regarding the cause of death referred to in section 373(1) of the Act. It would only be the conduct of the post mortem examination and the analysis reports if any, prepared pursuant to laboratory tests of any sample that he may have obtained and forwarded for analysis during the conduct of the post mortem examination which would form the basis for his finding of the cause of death.

On the other hand, what section 370(1) contemplates is the apparent cause of death as revealed by all the material available. This material would include the evidence of witnesses who may have testified before the inquirer. The apparent cause of death set out in the report drawn up by an inquirer referred to in section 370(1) of the Act goes a step beyond the threshold of cause of death referred to in section 373(1) reported by a Medical Officer. 'The former is declared after consideration of the latter', is how this Court could express this phenomenon in the briefest possible

way. In other words, the cause of death referred to in section 373(1) reported by a Medical Officer upon performing a post mortem examination is made use of by the inquirer in the process of his arriving at a finding regarding the apparent course of death as per section 370(1)."

His Lordship held that role of a Magistrate at an Inquest would be under section 370 (3) of the Criminal Procedure Code to do, if the report or other material before him discloses a reasonable suspicion that a crime has been committed is to take proceedings under Chapter XIV and XV.

In the above case, it was further considered when to grant bail if crime has been committed; His Lordship noted;

"Thus, it would be incumbent upon the learned Magistrate to decide after considering the report of the inquirer and other material before him, whether the suspect can be categorized as a person suspected of being

concerned in committing or having committed an offence of murder. It would be this decision that would determine whether he should enlarge the Suspect Respondent on bail.

Therefore, the role of the Magistrate at this point, would be to ascertain whether the Suspect Respondent could be reasonably suspected or accused of being concerned in committing or having committed, an offence punishable with death or with life imprisonment. If the Suspect Respondent falls under this category he shall not be released on bail except by a judge of the High Court.

It would be useful at this stage also for learned Magistrate to bear in mind that his role is only to ascertain whether there is a reasonable suspicion that any offence has been committed. It is thus, important to understand that there is no necessity for a Magistrate to arrive at a firm conclusion at this stage as to the nature of the offence that has been actually committed.

The importance of the restrictions placed on the scope of the duty of the Magistrate is justifiable by the fact that the investigation has to proceed beyond this point also until it reaches its completion."

In this case, His Lordship highlighted that the function of an inquirer or Magistrate acting under Chapter XXXII of the Code of Criminal Procedure is **not to investigate an alleged offence,** but merely to **ascertain the apparent cause of death** and record a finding accordingly. Once the finding is made, the Inquest is concluded. If the inquirer's report or other material placed before the Magistrate discloses a reasonable suspicion that an offence has been committed, the Magistrate may institute criminal proceedings, though such power does not alter the nature of the Inquest itself. The Court emphasized that it was unnecessary for the Magistrate to determine at this stage whether any witness had given false evidence or to conclusively decide the manner of the shooting, as the inquiry should only focus on whether there is reasonable suspicion of a crime. The Court further noted that the post-mortem report had not yet been received when the impugned order was made, rendering the Magistrate's finding that no offence under section 296 of the Penal Code had been committed premature.

This judgment underscored that Magistrates must confine themselves to the limited duty imposed by **section 370(3)**-to ascertain whether material discloses reasonable suspicion-and avoid making definitive findings that may prejudice future proceedings. Importantly, the Court set aside the Magistrate's findings-rejecting conclusions that the witness Heripitiyalage Sachin Chaturanga was

untruthful, that the incident was not a murder, and that it was a negligent shooting by the police-on the basis that such determinations were made without jurisdiction. The Court accordingly directed the learned Magistrate to proceed under Chapters XIV and XV of the Code in accordance with law, emphasizing that its intervention was limited to correcting the Magistrate's improper conclusions and did not alter the finding as to the cause of death or determine the offence committed.

Conclusion

As we noted that an Inquest is held in public and is a formal process. Unlike a Magistrate Court or a High Court case, there is no prosecution and defence. However, the witnesses or interested parties may be represented by lawyers under section 41(1) of the Judicature Act[19]. Once the information received, the Inquirer or Magistrate should proceed to the vicinity of death and should be made apparent and visible injuries of the body as it is. Corpus of the deceased should not be turned upside down as normally does, as it is matter for the Judicial Officer to give definite cause of death. Unless section 143 of the Criminal Procedure Code, the inquirer should visit the scene and make a note. Exact location of the incident should also be mentioned if indue course, jury or trial judge may visit to understand how the incident happened. Other more important thing is to identify the death body. Corpus must be identified and if corpus is decayed, Inquirer must put questions how the witnesses identified the death body. Identification could be done by facial features, some marks on the body, tattoos, clothes which were worn at the death. Sometimes, identification is done by DNA profiling. Wrong identification of the death body may lead to miscarriage of justice. It is heard that two decades ago, a wife of a known culprit has identified a decomposed body by stating that she identified by clothes, later it was revealed that death certificate was filed and all cases were terminated and lived happily with the wife in a faraway place in another identity, throwing sand to the eyes of law. Thus, identification is a crucial issue if the body is decomposed. Normally, at least, two related identifications are needed for established deceased identity before autopsy. In the Tsunami disaster, autopsies were ordered by taking photographs as a state of emergency. If there are congestion at mortuaries, after taking close photos an autopsy can be ordered. However, there must be recorded cogent reasons for that. At the vicinity of the crime, the Inquirer should call loudly and invite witnesses to give evidence with regard to the death. He should inform witnesses to give evidence and come

[19] 41(2) Every person who is a party to any proceeding before any person or tribunal exercising quasi-judicial powers and every person who has or claims to have the right to be heard before any such person or tribunal shall unless otherwise expressly provided by law be entitled to be represented by an attorney-at-law.

forward, otherwise, the value of the evidence would be deteriorated, could be suspected under cross examination, in a future trial. If people or witnesses are afraid of coming forward to give evidence, Inquirer should ask public to give statements to the police and the security could be provided in the name of administration of justice.

Thereafter, the inquirer should order autopsy to know the exact cause of death. The Inquirer decides who to call as a witness and evidence must be called without delay. If the evidence gathering was postponed there may be concoction and the truth could be faded. In this investigation, the Inquirer will request a statement from family members, doctors, or anyone who may have relevant information. Evidence is to be taken under oath and must be recorded, explained and signature of the deponent should be taken with certificate of accuracy of the evidence. No lawyer is allowed to cross examine the witness. However, in practice through the Inquirer aggrieved party may put questions to ascertain the truth. It should be allowed in observing audi alterm partem rule.

Section 2(1) of Evidence Ordinance shows the applicability of Evidence Ordinance as follows;

It says;

> *"This Ordinance shall apply to all judicial proceedings in or before any court other than courts martial, but not to proceedings before an arbitrator."*

Since, inquest was not treated as judicial proceedings, the application of Evidence Ordinance in Inquest proceedings is slender. Thus, one can argue hearsay evidence could be admitted.

It should be noted; if apparent crime is committed, Magistrate should take over the Inquest without allowing Inquirer into Sudden Death (ISD) to do Inquest. These offences are under Penal Code sections 296, Murder, 297 Culpable Homicide and 298 death cause by rash and negligent Act. It is seen that some Magistrates, due to workload, Inquests of section 298 cases are done by ISDs. It is not advisable as these cases may be indicted in High Court or charged in the Magistrate Court and proceedings should be in the case file (such as Yangalmodara Bus-Railway Accident Case). The scrutiny must be done in every case as the Magistrate, as the Chief Inquirer of the Area, otherwise, a crime may go down with collusion. The findings mainly could be homicide, accidental or suicide. However, you should only pronounce apparent cause of death, not as a homicide or otherwise.

Wrong cause of death may lead to uncertainty, if accidental death is pronounced as a suicide, the rights of the deceased such as pension, insurance policy or other benefits be forfeitured on your observation. If any suspicion that a crime has been committed, you should order officer in charge of the Police to do further investigation and arrest the culprit. In this regard, on the application, under section 124 of the Criminal Procedure Code[20], you should make proper orders in assisting the investigation.

Further, it should be noted that Inquest should be held where the incident took place. Sometimes, the deceased is out of the jurisdiction while under treatment in a General Hospital, deceased may have passed away. The inquirer cannot cross the jurisdiction as he does not have an authority to hold an Inquest in another jurisdiction. Then, what you should do is to make the request (do not order, you cannot order another Magistrate to do a body visit, you should kindly request) to do body visit and send observations and on that observation, doctors autopsy report and oral evidence, you should pronounce apparent cause of death. Once apparent cause of death is pronounced Magistrate or inquirer should order death to be registered under section 3l of the Births & Deaths Registration Act (Cap 129).

Another fact is once the autopsy is done, you should allow the body to be buried in an identical place, not to cremate as it might be exhumated for further investigation, such as Wazeem Thajudeen Case. Thus, never allow to cremate however, if the death is straight forward on the application of deceased relatives, reasons to be recorded, you may seldom allow to cremate the corpus.

As noted above, an Inquest proceeding is a fact-finding mission to ascertain apparent cause of death, not otherwise. Inquirer into Sudden death is appointed by the Minister thus in terms of Article 170 which is the Interpretation Article in the Constitution[21], he cannot be a judicial officer. However, if an Inquest is being done by a Magistrate he comes under the term "judicial officer". In ***Upali Newspapers Ltd. v. Eksath Kamkaru Samithiya and Others*** [1999] 3 SLR 205, His Lordship Kulatilaka, J., held that LT President is a judicial officer since they are appointed by the Judicial Service Commission. Now, question is that

[20] Every Magistrate to whom application is made in that behalf shall assist the conduct of an investigation by making and issuing appropriate orders

[21] The relevant provision reads thus:

"Judicial officer means any person who holds office as - any Judge of the High Court or any Judge, presiding officer or member of any other Court of first instance, tribunal or institution created and established for the administration of justice or for the adjudication of any labour or other dispute but does not include a person who performs arbitral functions or a public officer whose principal duty or duties is or are not the performance of functions of a judicial nature."

can a Magistrate perform a non-judicial character within his judicial office. If an inquirer can issue summons or warrant, can his action be treated as Quasi-Judicial. If so, does writ lie against the inquest findings? These are some foods for thought.

If Magistrate is vigilant, He or she can find the real culprit in holding an Inquest within the legal norm. It is a hard task when you do an Inquest on death in excising private defense under section 89 of the Penal Code. Then, the issue of bail will arise. In that event, it is advisable to start non summary proceedings and decide whether there is a case to commit to High Court. In that, Magistrate can be a life saver in acerating what is the truth.

NOVUS ACTUS INTERVENIENS AND REMOTENESS IN DELICT: A JUDICIAL ANALYSIS FOR THE SRI LANKAN BENCH

MAHIE WIJEWEERA

High Court Judge (Civil), Ratnapura

Introduction

In Sri Lanka, the doctrines of novus actus interveniens and remoteness are fundamental legal concepts governing the limits of civil liability for wrongful acts. Rooted in Roman Dutch delict but profoundly influenced by English tort law, these doctrines are central to achieving fair and predictable judicial outcomes. The Sri Lankan legal system, focusing on compensation rather than punishment, requires judges to distinguish between consequences that naturally flow from a defendant's breach and those that are too remote or interrupted by new, independent events. This write-up provides a structured framework for that analysis.

I. Foundations of Delict, Tort, and Liability

Delictual liability in Sri Lanka governs civil claims for harm outside contract, originating from Roman-Dutch Law, notably the aquilian action (for patrimonial loss) and actio iniuriarum (for intentional violation of personality rights).

Essential Elements:

1. Commission of a wrongful act or omission
2. Fault (culpa or negligence, and dolus or intention)
3. Causation (both factual and legal)
4. Harm or loss
5. Damage must not be too remote (remoteness)

The State (Liability in Delict) Act No. 22 of 1969 explicitly holds the Sri Lankan State equally liable as a private party for delicts caused by its servants.

II. Factual and Legal Causation

A. The "But For" Test: Factual Causation

Factual causation answers the question: Would the harm have occurred "but for" the defendant's act? If the answer is no, the wrongful act is a factual cause of the harm.

Key Authority:

- **Barnett v Chelsea and Kensington Hospital Management Committee** :[1] Despite the doctor's negligence in refusing to see a patient, the patient would have died from arsenic poisoning regardless. The "but for" test was not satisfied, and thus, there was no causal link for the death.

Sri Lankan Parallel:

- **Priyani Soysa v Arsecularatne (per Dheeraratne J) :**[2] "It is incumbent upon the plaintiff to establish that but for the wrongful act or omission of the defendant, the harm or damage would not have ensued. The causal link thus requires that the defendant's conduct be a sine qua non of the damage suffered."

B. Legal Causation (Remoteness)

Even where factual causation is met, legal causation asks whether, for reasons of fairness, justice, or policy, liability should be limited. This is the domain of remoteness and novus actus interveniens.

III. Remoteness: The Foreseeability Test

Remoteness refers to the requirement that only losses of a "reasonably foreseeable type" at the time of the breach are actionable.

Key UK Authorities:

- ***Overseas Tankship (U.K.) Ltd v Morts Dock & Engineering Co Ltd :***[3] Furnace oil was negligently spilled into a harbour. The oil caught fire on floating debris, destroying a wharf. The Privy Council held that liability was limited to the foreseeable consequences, fouling of the wharf, and did not extend to the fire damage, which was not reasonably foreseeable at the

[1] Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428

[2] Priyani Soysa v Arsecularatne (2005) 2 Sri L.R. 1 (per Dheeraratne J

[3] Overseas Tankship (U.K.) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No. 1) [1961] AC 388

time. This case established the foreseeability of the type of damage as the test for remoteness.

- ***Haynes v Harwood*** [4]**:** The defendant's negligence left a horse-drawn van unattended in a crowded street. A policeman was injured while attempting to stop the horses to prevent injury to others. The Court of Appeal held the rescuer's injuries were a foreseeable consequence of the original negligence.

Smith v Leech Brain & Co Ltd [5] **:** This case confirms the "thin skull" rule: a defendant must take their victim as they find them. If the type of harm (e.g., a burn) is foreseeable, the defendant is liable for the full consequences, even if the victim's pre-existing condition (a predisposition to cancer) made the ultimate injury far more severe than could have been anticipated.

Writer's Note: While the foundational principle a "tortfeasor must take his victim as he finds him" is firmly embedded within Sri Lankan law's approach to causation and damages, the specific terminology of the 'thin skull rule' is seldom explicitly invoked in reported judgments. The rule's rationale, however, is implicitly applied by courts when assessing whether an defendant is liable for the full, unforeseen consequences of a wrongful act, where the victim's peculiar susceptibility exacerbated the harm.

Sri Lankan Application:

- ***Bank of Ceylon v Cargills (Ceylon) Ltd*** [6] : The Supreme Court limited a bank's liability for losses suffered by a company, finding that the chain of causation was broken by intervening events, demonstrating the application of remoteness in a commercial context.

- ***Jinadasa and Another v Sam Silva*** [7] **:** Explores the impact of procedural acts and "acts of God" on delictual liability, reinforcing that not all factual consequences have legal significance.

[4] Haynes v Harwood [1935] 1 KB 146

[5] Smith v Leech Brain & Co Ltd [1962] 2 QB 405

[6] Bank of Ceylon v Cargills (Ceylon) Ltd (1991) 1 Sri L.R. 219

[7] Jinadasa and Another v Sam Silva (1994) 1 Sri L.R. 233

IV. Novus Actus Interveniens

A. Concept and Application

A novus actus interveniens is a new, independent, and unforeseeable act that becomes the sole effective cause of the harm, thereby breaking the chain of causation from the original wrongdoer.

Sri Lankan Benchmark:

- ***Collettes Ltd v Bank of Ceylon*** [8] **:** A leading authority where a bank was defrauded by a third party. The Supreme Court held that the fraudulent acts of the third party constituted a novus actus, breaking the chain of causation between the bank's initial negligence and the ultimate loss.

UK Guidance:

- ***Knightley v Johns*** [9] : Following a road accident caused by the defendant's negligence, a police officer committed a series of negligent acts while managing the scene, leading to a second accident. The Court of Appeal held that the police officer's negligence was a novus actus.

- ***Lamb v Camden LBC*** [10] : The defendant council's negligence damaged a house, making it vacant. Squatters subsequently moved in and caused further damage. The Court of Appeal held that the criminal acts of the squatters were a novus actus, breaking the chain of causation.

B. When Defenses Fail: Acts Not Sufficiently Independent

Courts will reject a novus actus defense if the intervening act is a natural, foreseeable, or reasonable response to the situation created by the defendant.

- **Haynes v Harwood (supra):** A rescue attempt is a classic example of a foreseeable intervening act that does not break the chain.

- **R v Pagett**[11] **:** The defendant used his pregnant girlfriend as a human shield and shot at police. The police returned fire, killing the girlfriend. The court held that the police's reasonable and justified response did not break the chain of causation from the defendant's criminal acts.

[8] Collettes Ltd v Bank of Ceylon (1984) 2 Sri L.R. 254

[9] Knightley v Johns [1982] 1 WLR 349

[10] Lamb v Camden LBC [1981] QB 625

[11] R v Pagett (1983) 76 Cr App R 279

Principle: Only extraordinary, voluntary, and truly independent acts break the chain; mere reactions, rescues, or legally justified responses typically do not.

V. Doctrinal and Policy Perspectives in Sri Lanka

- **Compensatory Focus:** The system aims to restore the injured party, not to punish the wrongdoer.
- **Judicial Discretion:** Judges must consider all facts and policy factors, harmonizing Roman-Dutch principles with the practical realities of the Sri Lankan context. There is a discernible tendency in Sri Lankan courts to take a slightly more flexible, fact-specific approach to causation than the sometimes stricter English applications, often emphasizing what is "just and fair" in the circumstances.
- **Insurance Context:** While rarely stated explicitly, the widespread availability of liability insurance is an unspoken backdrop against which these doctrines are applied, influencing the court's perception of where the loss should fairly fall.

VI. Practical Guide for Judges: A Decision Framework

1. Establish Factual Causation: Apply the "but for" test. Did the harm result from the alleged act? If no, the case fails.
2. Test for Remoteness: Was the kind or type of damage reasonably foreseeable at the time of the breach? If no, the loss is too remote.
3. Assess for a Novus Actus: Did a new, independent, and unforeseeable event occur that became the sole effective cause of the harm?
4. Apply the "Thin Skull" Rule: If the type of harm is foreseeable, the defendant is liable for the full extent of the injury, even if the claimant's unique vulnerability magnified the damage.
5. Emphasise Restoration: Focus on making the injured party whole, within the logical limits set by the above doctrines.
6. Avoid Hindsight: Assess foreseeability from the perspective of a reasonable person at the time of the defendant's act, not with the benefit of knowing what ultimately happened.

Red Flags for a Potential Novus Actus:

- A deliberate, informed, and voluntary act by a third party (e.g., fraud, criminal damage).
- Grossly negligent medical treatment that is the sole cause of death (R v Jordan).
- The claimant's own unreasonable and voluntary act that knowingly exacerbates the injury (McKew v Holland).

VII. Special Applications: Medical Negligence and Self-Harm

A. Medical Negligence as Novus Actus

The courts are generally reluctant to find that subsequent medical negligence breaks the chain of causation.

- **R v Jordan**[12] **:** The defendant stabbed the victim, who was later hospitalised. The victim had largely recovered from the original wound but then died after being administered an antibiotic to which he was known to be intolerant. The Court of Appeal held this "palpably wrong" treatment was the cause of death, breaking the chain from the original stabbing.
- **R v Cheshire**[13]**:** The Court of Appeal refined the test, stating that only in the most "extreme and unusual" cases would medical treatment break the chain. As long as the original injury remains a "significant and operative cause of death," the chain is intact, even if medical negligence contributed.
- **Principle for Judges**[14]**:** Ordinary medical mistakes do not break the chain. Only "gross" or "palpably wrong" treatment that is the sole cause of the harm will operate as a novus actus.

B. Acts of Self-Harm

- ***McKew v Holland & Hannen & Cubitts (Scotland) Ltd*** : The claimant suffered a leg injury from the defendant's negligence, making his leg prone to giving way. He then attempted to descend a steep staircase without a handrail or assistance, fell, and suffered further injury. The House of Lords

[12] R v Jordan (1956) 40 Cr App R 152
[13] R v Cheshire [1991] 1 WLR 844
[14] McKew v Holland & Hannen & Cubitts (Scotland) Ltd [1969] 3 All ER 1621

held this was a daft and unreasonable thing to do, breaking the chain of causation.

- ***R v Kennedy (No 2)*** [15] **:** The defendant prepared a syringe of heroin and handed it to the victim, who self-injected and died. The House of Lords held that the victim's free, voluntary, and informed act of self-injection broke the chain of causation.

Summary Guidance: A victim's act will only be a novus actus if it was a free, voluntary, and informed choice. Acts done under compulsion, confusion, or as a foreseeable consequence of the original injury will not break the chain.

VIII. Conclusion

Sri Lankan delict law, grounded in Roman-Dutch tradition and thoughtfully enriched by English tort principles, provides a clear, principled roadmap for analysing causation, remoteness, and novus actus interveniens. The development of noteworthy local jurisprudence, as seen in landmark cases like Collettes Ltd v Bank of Ceylon and Priyani Soysa v Arsecularatne, demonstrates a mature and nuanced approach. By applying the structured framework outlined above, the trial bench is well-equipped to deliver just and consistent outcomes, effectively balancing the imperative of restoration with the necessary and logical limits on legal responsibility.

[15] R v Kennedy (No 2) [2007] UKHL 38

INDEPENDENCE OF THE JUDICIARY AND ETHICS

DR. CHANDRADASA NANAYAKKARA

Democratic societies demonstrate their commitment to the rule of law in various ways. In the administration of justice, this is achieved by having clearly defined laws, limited police powers, dispensing justice through an independent and impartial judiciary in an open trial process, adherence to the rules of evidence, and access to lawyers, among other measures.

The judiciary is a significant branch of government, with the highest courts playing a crucial role in interpreting and safeguarding the Constitution. An independent judiciary, free from political influence and with adequate guarantees to maintain impartiality, is vital to protecting the rule of law in a democracy. An independent judiciary is a priceless possession of any country, and it should be independent of the other branches of government. -the executive and legislative.

The importance of judicial independence cannot be overstated. Judges must possess the autonomy to make decisions free from influences or directives imposed by the legislative and executive branches, as well as any undue external pressures. This independence is essential for safeguarding the integrity of the justice system for the benefit of those who seek redress against perceived legal injury or executive excess. Confidence of the people in the impartial dispensation of justice is the binding force for acceptance of the justice delivery system in any country.

The judiciary in this country is built upon time-honoured traditions and practices that its members are expected to uphold, passed down through generations. At the heart of any profession lies a deep commitment to ethics; judicial ethics serves as a critical safeguard for maintaining its dignity and integrity. In essence, judicial ethics represent the moral principles and standards that guide judicial behaviour. In the judicial realm, ethical considerations hold profound public significance and should reflect enduring values.

While judicial ethics are designed to address a broad range of behaviours, they cannot cover every conceivable scenario. Between the extremes of conduct lies a vast spectrum, where the appropriateness of a response must be tailored to the specific circumstances and the severity of the incident.

However, our country has been fortunate to avoid the severe scandals that have affected other nations; it is essential to understand the significance of upholding ethical standards within the judiciary. Past violations of professional norms have

not had a substantial impact on the overall integrity of the judicial system. Today, however, such standards must be vigilantly maintained amid increased public scrutiny and awareness.

We are now in an era of heightened public scrutiny regarding judicial performance and roles. Judges today, unlike in the past, live and work in the full glare of publicity and are no longer immune and insulated from constructive criticism by the members of the public and media. Their work and decisions are under constant observation, with every action analysed by the community. It is important to recognise that some criticisms aimed at the judiciary are warranted, and judges cannot be deemed beyond reproach.

A judge should be courteous to counsel, especially those who are young and inexperienced, as well as to the litigants and all those concerned in the administration of justice. A lack of courtesy, partiality, and prejudice, and a want of fairness on the part of the judge. He should avoid interrupting counsel in their arguments except to clarify his mind on some point not clear to him. He should not give in to the temptation to display his learning or premature conclusions. Judicial pedantry can be disastrous. A wagging tongue and swollen head are occupational diseases of many judges.

Judges must be discerning about their associations to uphold their commitment to impartiality, and must exercise great caution regarding their associations. Close relationships with parties or attorneys involved in a case or court staff—or friendships that might be perceived as compromising their judgment—could necessitate recusal to preserve the appearance of impartiality. Judges should proactively avoid situations that might lead others to question their integrity. A judge's success depends on the relationships he fosters, and his moral character is intrinsically linked to the company he keeps. In **Buddhism, the Dhammapada, a respected source of guidance, emphasises the importance of aligning oneself** with the wise and distancing oneself from the foolish and undeserving. Similarly, the Mahamangala Sutta extols the virtue of associating with the desirable and avoiding the undesirable. Therefore, judges must be discerning in their associations to uphold their commitment to impartiality.

Entrusted with the responsibility of maintaining judicial independence and moral integrity, judges must steadfastly honour this duty. A failure to uphold these standards not only undermines the public's trust in them but also compromises their role as champions of justice. These ideals have inspired judges throughout history and continue to resonate with their essential functions today.

Our society has weathered numerous social and economic changes over the years, yet the judiciary has not only endured but has emerged stronger. The ideals, principles, and values upheld by the judiciary have remained steadfast, nurturing and evolving our legal system over centuries. It embodies qualities such as objectivity, independence, discipline, and procedural fairness. Our judicial system stands as a vital national asset, and this country is fortunate to have a distinguished tradition of judicial excellence. The reputation of the judiciary is paramount, and it is the responsibility of judges to preserve that image actively.

Judges have a duty to perform their roles with promptness and care, acknowledging that time is valuable for both lawyers and litigants. Consequently, punctuality in attending chambers and court is crucial. The weighty responsibility of maintaining public trust in the judiciary demands that judges consistently exemplify professionalism and ethical behaviour.

It is in the lower court, particularly the magistrate courts, that the citizens most often have contact with the judiciary. Today, as the court of first instance, the magistrate courts handle the bulk of cases, and virtually all criminal cases start in that court and are resolved and disposed of there. Therefore, it is there that the public forms its first impression of the justice process prevailing in this country. Public impression of the whole judicial system is moulded and shaped to a great extent by the conduct and behaviour of the judges who preside over these courts.

A notable concern about these courts is the inconsistency in bail decisions across magistrates' courts, stemming from the discretionary powers granted to magistrates. There are extreme variations and differences between their practices and those of other courts in how they approach various issues. Even within the same court, vast disparities and differences are seen in such matters as approaching bail applications and sentencing. Moreover, variations in the interpretation of the same legal provisions or precedents by different magistrates' courts resulting in conflicting and divergent outcomes are also seen in these courts. Even authoritative decisions handed down by some eminent judges of the superior courts are of little relevance to some magistrates and are observed in the breach. The range of inconsistent rulings results in unequal treatment of individuals facing similar charges and potentially undermines public confidence in the judicial system. As such, judges should be guided by established principles and precedents when making bail orders, ensuring that these decisions are based on sound legal reasoning and relevant considerations.

In this respect, the most recent judgement delivered by Justice Yasantha Kodagoda, with the concurrence of then Chief Justice Murudu Fernando and Justice

Thurairaja, underscores the urgent necessity of magistrates to be properly trained in making informed and thoughtful decisions, particularly when considering police requests for remanding suspects in bailable offences. In this case Supreme Court emphasized the need for magistrates to act in a judicious manner when considering bail applications. It is a cornerstone of our criminal justice system that a person is presumed innocent until proven guilty and convicted according to law. Fundamentally, he should not be deprived of his liberty until then. This principle should be uppermost in the minds of the magistrates when making bail orders.

A judge is a product of his own experience and the background from which he comes. The quality of justice depends greatly on the quality of those who dispense it. As the American jurist Cardozo once remarked, the task of judging is not for everyone, as it is not comparable to any other job. It demands seriousness, integrity and a mindset distinct from the rest of society. American jurist Cardozo further observed," In the long run, there is no guarantee of justice except the personality of the judge. Lord Denning once said, " When a judge sits on the Bench to try a case, he himself is on trial before his countrymen". Therefore, it is on his behaviour and conduct that they will form their opinion about the system of justice prevailing in the country. It is the judge who must bring honour to the seat of justice. Therefore, the conduct of each magistrate can either enhance or damage the public image of the judiciary.

Judges' functions are not primarily concerned with presiding over courts, but their work extends to all parts of the judicial process, such as the administration of the office work.

In any realistic appraisal of the role of the judiciary, we cannot overlook its shortcomings and weaknesses. In the process of dispensing justice, a judge may honestly err, which is pardonable, but one should consciously and deliberately deviate from the path of justice. Public perception of the judiciary is of utmost importance in this context. Judges operate in an environment where their conduct is observed closely, and they must face constructive criticism from both the public and the media. Therefore, maintaining the integrity and prestige of the judicial institution is imperative. Like other institutions, the judiciary and its members are subject to scrutiny, and their decisions are evaluated rigorously.

It is often said that justice is not a cloistered virtue; it must be able to withstand public scrutiny and commentary from those engaged with the judicial system. A judge's official conduct must be free from any appearance of impropriety, and their personal behaviour—both on and off the bench—as well as everyday lifestyle choices, should exemplify integrity and be beyond reproach.

Every judicial officer must strictly adhere to the established standards and norms expected by the public. They are charged with embodying the moral character and temperament fitting for their role. Should a judge fail to meet these expectations, they have an obligation to vacate their valued position, as their continued presence could threaten the judicial system and cultivate a toxic atmosphere. The integrity of our judiciary must remain uncompromised; any erosion of these standards can have profound repercussions, affecting the entire system and society as a whole.

Dr Justice Chandradasa Nanayakkara is a retired judge of the Court of Appeal. He was educated at Wesley College, Colombo. He holds an MA in International Relations and an LL.M from the University of Colombo and received his PhD in law from the National Law School of India University, Bangalore. At the time of his retirement, he was one of the most senior judges, having served the Sri Lankan judiciary for nearly 27 years. Dr Nanayakkara was enrolled as an attorney-at-law by the Supreme Court of Sri Lanka in 1968.

Dr Nanayakkara won recognition for his integrity and deep commitment to his work as a judge. He commenced his judicial career from the very up to become a judge of the Court of Appeal. During his whole career as a judicial officer, he worked with the realization that the judiciary of the country has a vital role to play in protecting the liberty of the subjects, as courts are constantly involved in making decisions and orders, which impact on their rights and liberty. His service as a judge was well admired by a wide variety of social groups such as legal experts, lawyers, academics and other civil society organizations, for he handled most skillfully and bravely one of the longest and controversial cases (Embilipitiya Students disappearance case) in which some high ranking army officials were accused of having kidnapped more than 25 students from Embilipitiya Maha Vidyalaya) Involving human rights in Sri Lanka. After he retired from judicial service, Dr Nanayakkara served on several presidential commissions of inquiry. As a judicial officer, he participated in many international and local legal seminars and symposia and made valuable contributions.

PROSPECTIVE AND RETROSPECTIVE EFFECT OF A JUDGMENT AND RETROSPECTIVE EFFECT OF A STATUTE

JUSTICE PRADEEP KIRTISINGHE

Retired Judge of the Court of Appeal

A pressing concern encountered by the Judiciary of a multitude of jurisdictions including Sri Lanka, is ascertaining whether the Judicial Decisions of their predecessors should be given prospective or retrospective effect when the need to address such question arises. Two of the many different occasions when such a need may arise are where a party (an Individual or the Government) had acted in reliance of a judicial interpretation of a piece of legislation or any other legal rule which had subsequently been held to be erroneous in which case the party (the said Individual or Government Agents) may possibly incur a civil liability for the action it took unless the Court makes a decision that the said judicial interpretation should be given retrospective effect OR secondly, where certain events in a matter before the Court make it unclear whether the ratios in previous judgments at the time of the relevant event/incident should be given retrospective effect in the event a subsequent and more recent judgment propounding a contrary finding is available. The article examines the means by which courts in a number of jurisdictions go about making findings on whether the rulings in Judicial Decisions should have prospective effect or retrospective effect in determining what the applicable law was at the relevant time in the past.

I INTRODUCTION

With the recurrence of the instances where the judiciary is required to address the question as to whether a Judicial Decision should be treated prospectively or retrospectively, for the purpose of assisting the judiciary in their task of deciding on the same the necessity arises for the formulation of a uniform test to be applied inclusive of the considerations that need to be heeded before arriving at a conclusion.

Accordingly, the Judiciary of the United States has attempted to set out the correct approach in this regard by formulating a test to determine the effect judicial Decisions need to be given (prospective or retrospective) which will be laid down under IV. Furthermore, in III the various approaches adopted by the judiciaries of other jurisdictions such as the United States of America, United Kingdom,

Canada, the European Union and India along with the attitudes and opinions of their Judiciaries towards the prospective and retrospective application of judicial Decisions, will be examined.

It is also important to note that judicial Decisions pertaining to any area of law such as Property Law, Administrative Law, Contract Law, etc are prone to be subject to being given prospective effect or retrospective effect by the judiciary in the event the circumstantial facts and considerations pertaining to the matters heard before the judiciary warrant such a necessity.

II THE PROSPECTIVE-RETROSPECTIVE DISTINCTION

Judicial Decisions are generally presumed to be prospective in nature, i.e., it does not normally affect that which has gone, or completed and closed up already. Changes made by a Judicial Decision may be in relation to some rule or principle of common law and in some cases the change will be brought about by the overruling of prior Judicial Decisions or by an extension or modification of prior law. However, particularly a problem arises in instances where the judiciary may arrive at a finding that certain Judicial Decisions need to be given retrospective effect, i.e., be deemed to have been the controlling law at a past date. Thus, the resulting position is that the Judiciaries of various jurisdictions have faced the dilemma of having to identify the law that was applicable in a past date and reflect on the approaches taken by other jurisdiction in deciding whether to give Judicial Decisions prospective effect or retrospective effect.

In the advent of the daunting task of discerning whether Judgments are prospective or retrospective in nature, a useful case that deals with the examination of the fine line between the said prospective effect and retrospective effect of Judicial Decisions is the judgment of His Lordship Janak De Silva J in the Court of Appeal case of Banumathy Puvirajakeerthy V Nadarajah Indranee1 dated 22nd of July. This case concerned an appeal against the judgment of the learned District Judge of Batticaloa dated 20th of April 2000. His Lordship Janak De Silva J discussed the applicability of the ratio in the case of Dadallage Anil Shantha Samarasinghe V Dadallage Mervin Silva and another2 and decided by His Lordship Sisira de Abreu J on 11th June 2019 to the matter in question and held that the principle introduced in Dadallage Anil Shantha Samarasinghe V Dadallage Mervin Silva and another3 had no retrospective effect on the application by the Defendant-Appellant on the premise that applying the ratio in the said case would cause injustice to the Plaintiff who was entitled to rely on the then applicable judicial precedent of Sri Lanka ports Authority and another V Jugolinija- Boal East.4

Accordingly, this Court of Appeal decision is a fine example in the local context which depicts the approach taken by our Courts in determining whether judgments should be treated as being of prospective effect or retrospective effect.

As was examined in detail by His Lordship in the aforementioned case, in instances where the judiciary is called upon to decide on the retrospectivity or prospectivity of Judicial Decisions, it is extremely crucial to scrutinize the various approaches adopted by the other jurisdictions before arriving at a conclusion.

III EVOLUTION OF THE PROSPECTIVE-RETROSPECTIVE DEBATE

A. Prospective Overruling

There are several senses in which judicial ruling on the state of the law may be said to have been overruled prospectively. The overruling decision will be given purely prospective effect when the court applies the 'old law' but proclaims that the 'new law' is to be deemed to be the operative law as from the date of the judgment. But equally a decision may be described as having been overruled prospectively when the court applies the 'new law' to the case before it and declares that this law will be applied in other pending litigation, but it will not be applied in proceedings instituted after the court's judgment if those proceedings relate to events which occurred before the judgment.

On an examination of the historical background of prospective overruling of Judicial Decisions, it can be observed that it has its origins in the United States since the judgment of Bingham V Miller5 in 1848 and until the landmark case of Chevron Oil Co. V Huson,6 it was the consensus of the Federal and State Courts that it was constitutionally permissible and often equitable for judgments to be given prospective operation. Furthermore, Justice Cardozo in Great Northern Railway Co. V Sunburst Oil & Refining Co.7 held that the constitution neither requires nor prohibits retrospective overruling. The US Federal Courts of this era were of the opinion that to hold otherwise would lead to an inequitable situation where transactions had been concluded relying on the previous state of the law would be undermined by the retrospective/retroactive application of a new rule recognized in a recent judgment. However, in 1971 the US Supreme Court in Chevron Oil Co. V Huson8 took a different approach to this question of operation and held that judgments should as a rule apply retroactively, and that there should be exceptional circumstances for the judgment to be applied solely on a prospective basis.

Nevertheless, in the United Kingdom case of Arthur J S Hall & Co. V Simons9 Lord Hope made the first judicial statement which endorsed the idea that prospective

overruling may be a legitimate court function. He stated that 'I consider it to be a legitimate exercise of your Lordships' judicial function to declare prospectively whether or not the immunity - which is a judge-made rule - is to be available in the future and, if so, in what circumstances.10

Later, in National Westminster Bank PLC V Spectrum Plus Ltd and others (in liquidation),11the House of Lords attempted to reconcile these seemingly divergent strands of judicial opinions. Lord Nicholls writing for the majority acknowledged the principled objections taken to prospective overruling by the UK system in the past viz. the usurpation of the legislative function by Court when they declared law as only applying to the future and treating decisions taken before and after the judgment differently. However, Lord Nicholls and the House of Lords were willing to leave the door ajar for prospective only operation of judgments as long as the following high threshold was met. At Paragraph 40 of the judgment in National Westminster Bank PLC V Spectrum Plus Ltd and others (in liquidation)12 it was held that,

"Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be "compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions".

As can be observed in India Cement Ltd V State of Tamil Nadu13 the position in India is such that, prospective effect can be given not only to cases where an earlier decision is overruled but also to cases which decides an issue for the first time.

B. Retrospectivity of Judicial Decisions

Beginning with the case of Linkletter v Walker14 in 1965 the United States Supreme Court developed principles according to which it was sought to limit the retroactive effects of those of its decisions on constitutional issues in which it overruled prior interpretations of the United States Constitution.

In the context of the United Kingdom in 1966, the House of Lords issued a practice statement in which it announced that it no longer regarded itself as bound by its prior decisions and that it would be prepared to overrule such decisions if

it thought them to be wrong.15 The statement adverted to considerations that would be taken into account in determining whether prior decisions should be overruled. An implicit assumption was that overruling decisions would have retrospective effect.

Some of the Law Lords were late to express support of prospective overruling as observed in cases such as Ex parte Hudson16, Milangos V George Frank (Textiles) Ltd17, Morgans V Launchbury18, Aries Tankers Corporation V Total Transport Ltd19 and Prudential Assurance V London Residuary Body20, though in no case to date has the House of Lords had the occasion to pronounce finally on the legitimacy of that technique or of other techniques for limiting the temporal effects of Judicial Decisions.

In an Article on the Retrospectivity of Judicial Decisions21, an Australian Scholar observes that in cases such as Edward V Edward Estate22 and Fleming V Hannah23 the Canadian Courts have so far not approved a practice of prospective overruling. But the Canadian Supreme Court has considered it appropriate in some cases to postpone the operation of judgments which declare governmental acts to be invalid on constitutional grounds such as on the ground that legislation or other governmental action contravenes the Canadian Charter of Human Rights and Freedoms.

In Percy V Hall24, Schiemann LJ made reference to the jurisprudence developed by the European Court of Justice in relation to the retrospective operation of its rulings, as if to suggest that it should be at least considered by the House of Lords at some point. It can be observed that the European Court generally treats its rulings as having retrospective effect, but it has also claimed authority to limit the retrospective effect of its rulings by imposing limits on their temporal operation. Such limitations may be imposed in the interests of legal certainty and to preserve acquired rights. Accordingly, the European Court will not impose a temporal limitation unless a party has requested that it should do so. If it accedes to such a request, it may for example decide that legislation of a member state is to be regarded as invalid, not from the date on which it was enacted but from a date prior to the Court's ruling. In the case of Commission of the European Communities V Council of the European Communities25, it was held that the Court may postpone the operation of its ruling that regulations contravene Union law so as to give time for new regulations to be made. In the case of European Parliament V Council26, the Court annulled the budget of an institution of the Union, but only from the date of its judgment thereby giving the said judgment prospective effect.

In any event, it is important to note that a common feature of all these jurisdictions is that in deciding whether to accord retrospective application of Judicial Decisions, the judiciaries of any jurisdiction would first and foremost attach importance to the relevant considerations and circumstantial facts of the matters heard before them before deciding on the same.

IV TESTS FORMULATED AND APPLIED BY THE UNITED STATES

The test applied by the United States Supreme Court to decide whether a judgment should apply prospectively hinged on the manner in which the following three questions would be answered:

Whether the decision to be applied non-retroactively establishes a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression? (was the rule genuinely new);

Secondly, if in light of the new rule's purpose and effect, retroactive application would further or retard its operation? and

Thirdly, the extent of the inequity imposed by retroactive application, namely the injustice or hardship that would be caused by retroactive application.

This test underwent further modification in the 1990s. During this period, the United States Supreme Court took the position that whenever a particular issue has been newly decided in a case and applied to the parties to that litigation, that proposition of law would necessarily have to be applied retroactively to other pending litigation on the same question, irrespective of whether such litigation had been initiated prior to the judgment as held in the case of James B. Beam Distilling Co. V Georgia27.

In the aforesaid James B. Beam Distilling V Georgia28, it was held that transactions which had attained a degree of firm finality either because of a statute of limitations or the doctrine of res judicata would not be affected by the retroactive application of a new legal rule.

The abovementioned position was explained in the case of Harper V V.A. Department of Taxation29 as follows:

"When this Court applies a rule federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all evets, regardless of whether such events predate or postdate our announcement of the rule..." Thus,

the widely accepted legal position regarding this question at federal level is that a new proposition of law that has been applied to the parties to the litigation must necessarily be applied retroactively to other pending cases on the same question of law. In an immigration case decided in 2011, the United States Ninth Circuit Court of Appeal in Nunez-Reyes V Holder30 held that judgments cannot be made prospective in relation to third party cases on the same question but at the same time be applied retroactively to the parties to the litigation. An example of a judgment that has been applied on a 'purely prospective' basis is Barnett V First National Insurance Co. of America31. The Court went further and held that one can still rely on the tests in the Chevron Oil Co. case32 and decide to apply the judgment prospectively with regard to all parties concerned.

V OTHER RELEVANT CONSIDERATIONS

It can be observed that the Judiciary would deliberate on the equitable considerations and other considerations (public policy, national security, public health, etc) and circumstantial facts of the matters heard before them before deciding on the prospectivity or retrospectivity of judgments.

For example, as clearly highlighted in an article in the Law Net Website, in the context of Intellectual Property Rights of Sri Lanka, the retrospectivity in Judicial Decisions whereby there would be a retroactive application of new legal rules, would most likely lead to potential dire economic consequences. Therefore, in such an occasion, the priority of Policy Makers and Law Reform Committees is to examine the question whether in such circumstances, a mechanism for ameliorating the effects is possible in the event the current law as it stands, calls for the need to engage in such a study. The author of the said Article goes on to observe that when a court determines that changing an established legal rule is more important than heeding the doctrine of stare decisis, that decision may affect those who acted in accordance with the prior rule if the new rule renders those actions inappropriate particularly in the context of property interests33.

It has often been said that courts in the United States will be more inclined to apply a new rule of law on a purely prospective basis when it comes to the fields of contract and property. This is because litigants in this area of the law would generally have relied substantially on the previous state of the law when ordering and implementing their transactions. Similarly, due to the United States legal system's discomfort with ex-post facto criminality, the courts there have often applied judgments which criminalize conduct that was previously legal (i.e. judgments that expand criminal liability) on a prospective basis i.e. to acts and conduct which occur subsequent to the date of the decision.

Therefore, it is evident that the United States system has now embraced the position that judgments should as a rule be applied retrospectively/retroactively to the parties concerned and pending litigation of third parties on the same question. Nevertheless, the US courts have left the door ajar for purely prospective application of judgments, when justice and equity so desire such a step although traditionally the UK courts have been reluctant to adopt a practice of prospective overruling as can be observed in the cases of Birmingham Corporation v West Midland Baptist (Trust) Association Inc.34, Kleinwort Benson Ltd. v Lincoln City Council35, R. v Governor of Brockhill Prison, ex p Evans (No. 2)36 and Arthur J S Hall & Co. v Simons.37

VI In the area of the civil law, there are several practices and procedure which are deeply ingrained in our legal system. There are several recent judicial pronouncements which have deviated from these practices which had ingrained in our legal system and therefore it becomes important to consider the retrospective effect of these judgments.

One such practice was that where a document is admitted in a civil case subject to proof but when tendered and read in evidence at the closing of the case is accepted without objection, it is admitted as evidence in the case. This principle was introduced in to our law by Samarakoon, C.J. in the case of Sri Lanka Ports Authority and another Vs. Jugolinija Boal East (1981) 1 Sri L.R. 18 and was followed in the case of Balapitiya Gunananda Thero Vs. Talalle Dhammananda Thero (1997) 2 S.L.R.101

In the case of Dadallage Anil Shantha Samarasinghe VS Dadallage Mervin Silva and another (S.C.Appeal 45/2010) Justice Sisira de Abrew held that when the document in issue is a notarially executed deed it has to be proved according to the provisions of the Evidence Ordinance even in a situation where it has been accepted without objection at the closing of the case. The retrospective effect of this judgment was discussed in the case of Banumathy Puvirajakeerthy thero vs. Nadaraja Indranee (C.A.1222/2000 F – D.C.Batticaloa 4340/L). I have referred to this case earlier.

ISSUING ALTERNATIVE COMMISSIONS TO SURVEYORS IN PARTITION ACTIONS

A controversy arose in this area of procedure after the pronouncement of several recent judgments and the legislature had to introduce certain amendments to the Partition Law to resolve this controversy.

Under the provisions of the Partition Act No.16 of 1951 a party to a partition action could take out an alternative commission to any surveyor in the panel.

Section 23 (i) of the Partition Act No.16 of 1951 reads as follows;

" where a defendant in a Partition action avers that the land described in the plaint is only a portion of a larger land which should have been made the subject matter of the action or that only a portion of the land so described should have been made such subject matter, the court may on such terms as to the deposit or payments of costs of the survey as the court may order, **issue a commissions to a surveyor** directing him to survey the extents of land referred to by the defendant".

This practice was deeply ingrained in our legal system and continued even after the Partition Law No.21 of 1977 came in to operation. Section 16(2) of the Partition Law No.21 of 1977 deals with the issuing of alternative commissions. Section 16(2) of the Sinhala text reads as follows:

"මේ වගන්තියේ 1 වන උප වගන්තිය යටතේ මිනින්දෝරු වරයකුට නිකුත් කරනු ලබන අධිකාරි පත්‍රය, මේ පණතේ දෙවන උපලේඛණයේ දැක්වෙන ආකෘතියට සමානුකූල විය යුතු අතර එයට, පැමිණිලිකරුගේ ලේඛණගත නීතිඥවරයා විසින් සත්‍ය පිටපතක් බවට සහතික කරන ලද පැමිණිල්ලේ පිටපතක් අමුණා තිබිය යුතුය. නඩුව විනිශ්චය කිරීම සඳහා පැමිණිලිකරු විසින් පෙන්වා දී ඇති ඉඩමට වඩා විශාල ඉඩමක් හෝ ඊට කුඩා ඉඩමක් හෝ මැනීම අවශ්‍ය බව යම් පාර්ශවකරුවකු විසින් කියා සිටිනු ලැබූ අවස්ථාවක, මැනීමේ ගාස්තු හෝ වෙනත් ගාස්තු පිලිබඳව යම් නියමයන් පිට, එම මැනීම සඳහා මිනින්දෝරුවරයකුට බලය දෙන අධිකාරි පත්‍රයක් අධිකරණය විසින් එම පාර්ශවකරුගේ වුවමනාව පිට නිකුත් කල හැකිය."

Section 16(2) of the English text reads as follows:

" The commission issued to a surveyor under sub-section (1) of this section shall be substantially in the form set out in the 2nd schedule to this law and shall have attached thereto a copy of the plaint certified by the registered Attorney for the plaintiff. The Court may, on such terms as to cost of survey or otherwise, issue a commission at the instance of any party to the action, authorizing the surveyor to survey any larger or smaller land than that pointed out by the plaintiff where such party claims that such survey is necessary for the adjudicature of the action".

It is to be noted that there is an inconsistency between the wordings of the Sinhala text of the section and the English text of the section. Sinhala section refers to a මිනින්දෝරු වරයකුට and the English section refers to the surveyor.

According to the Sinhala section the alternative commission can be issued to any surveyor in the panel. According to the English section it has to be issued to the commissioner.

In the case of Hengada Vithanachchi Sumanasena vs. G.K.Premaratne (C.A.1336/99 F with C.A.1337/99 F C.A.minutes 06.03.2014)

Justice A.W.A.Salaam has made pertinent observations on this controversial issue. It was revealed in the appeal that the District Judge identified the corpus upon a plan made by another surveyor, not being the commissioner, with the consent of the parties disregarding the preliminary plan.

Justice Salaam held as follows;

"The facts disclosed above as regards the two commissions issued, the letter having been issued in blatant violation of Section 16 (2) of the Partition Law makes it abundantly clear that the Learned District Judge has acted in violation of the imperative provisions of the Partition Law. Hence it will be a travesty of justice to allow the judgment and interlocutory decree to stand in this case, as the Learned District Judge has failed to identify the corpus in reference to a legally admissible preliminary plan".

"The consent of the parties cannot confer power or authority in court, unless such a power has not been conferred by the statute."

In the case of Hettige Don Tudor and others vs. Hettige Don Ananda Chandrasiri – (S.C.Appeal No.134/16. S.C. minutes 19.02.2018) the Supreme Court held as follows:

"The provisions under Section 16 does not recognize any second plan in a partition action. In any single partition action, there should be only one preliminary plan that is made by the court commissioner and all the plans relied upon by the parties are to be super-imposed on the said preliminary plan. After the preliminary plan is made and filed in court, if necessary, the trial court is entitled to issue a commission to the Surveyor General to prepare a plan to identify the corpus, on its own motion or at the instance of the parties to the action. If the necessity arises to survey any larger or smaller land than that pointed out by the plaintiff where a party claims that such survey is necessary for the adjudication of that action, such commission can be issued to the same commissioner who made the preliminary plan. It cannot be issued to another surveyor. In the case in hand, the court had issued another commission to another surveyor which is quite contrary to the provisions of the Partition Law".

Both these judgments are based in the English text of Section 16(2).

After the pronouncement of these judgments by the Superior Court there was an upheaval in the District Courts. The litigants who had taken out alternative commissions through the surveyors other than the commissioner were compelled to take out the alternative commission through the commissioner. In many cases the commissioner was dead. The parties were compelled to take out a commission to the Surveyor General incurring high expenditure. The Government Surveyors did not know how to prepare a Partition plan. Therefore, it is important to take into consideration the retrospective effect of the judgments of Hengada Vithanachchi Sumanasena vs. G.K.Premaratne and Hettige Don Tudor and others vs. Hettige Don Ananda Chandrasiri and consider whether the ratio of these two judgments would apply to the partition action pending in various courts on 06.03.2014 the date of the pronouncement of the judgment in Hengada Vithanachchi Sumanasena vs. G.K.Premaratne.

In the case of K.Kugabalan Vs.Sooriya Mudiyanselage Ranaweera (S.C.Appeal No.36 of 2014 S.C.minutes 12.02.2021), in a dissenting judgment Justice Amarasekara held as follows:

"Thus, if the practice is not inconsistent with the rule laid down by a statute or to the long-standing practice or usage, it has the force of law. Hence, in my view when this court proclaim and established practice invalid in toto or partially limiting its application to certain areas or scopes this court has to be very careful, since, it mat caused serious repercussions to people who acted relying on such practice as law up to that moment; Not only in the case such proclamation is made, but, even in others which have been already decided and pending in appeal due to the reason that a party can take up the position that such practice as no legal consequences in toto or relating to certain areas or scopes even though a new legal possession that is ceataed by case law has no retrospective effect.

In the case of Samarakoon Mudiyanselage Samarakoon and another Vs.Mohomed Mohomadu Sally Fajurdeen (S.C.Appeal No.6/2012) it was held thus, "every court is the guardian of its own records and Master of its own practice and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it, for an inveterate practice in law generally stands up on principles that are founded in justice and convenience" –(Broom's Legal Maxims 10th Edition Page 82).

It was further held as follows:

"A court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure contractive or inconsistent with the rules laid down by statute or adopted by ancient usage" – Halsbury's Laws of England 04th Edition Vol.10 Paragraph 703)

In the case of Lelwala Guruge Upasena Vs. Lelwala Thapassi Sthavira and others (SP/HCCA/GA/138/2018 F – D.C.Galle P/15118) by Wijeweera HCJ held that, the principle introduced by the judgments of Hengada Vithanachchi Sumanasena vs. G.K.Premaratne and Hettige Don Tudor and others vs. Hettige Don Ananda Chandrasiri has no retrospective effect on this appeal which was before the High Court (Civil), Galle and shall only be operative with prospective effect. He went one step further and observed that the Sinhala text of Section 16 (2) of the Partition Law should take precedence over those judicial pronouncements which has been decided without due regard to the Sinhala version of the Partition Law.

In deciding this issue attention should be given to the practice that prevailed in court at the time the alternative commissions were issued. The practice of the court was to permit a defendant to get an alternative commission to another surveyor in the panel. Therefore, it is to be observed that the principle of retrospect and prospective application of judgments should be considered favourably for the aforementioned practice which prevailed in courts.

Thus, the legislature was compelled to amend Section 16(2) of the Partition Act to remedy the situation.

The amended section reads as follows;

16 (2) ආ (1) වන උප වගන්තිය යටතේ නිකුත් කරන ලද අධිකාරි පත්‍රය ක්‍රියාත්මක කිරීමේදී මිනින්දෝරුවරයා විසින් සකස් කරන ලද පිඹුර (18) වන වගන්තිය යටතේ අධිකරණය වෙත යැවීමෙන් පසුව, අධිකරණය විසින්,

i) (1) වන උප වගන්තියේ සඳහන් කරන ලද මිනින්දෝරුවරයකු වෙත හෝ (73) වගන්තියේ සඳහන් කරන ලද මිනින්දෝරුවරයින්ගේ ලැයිස්තුවේ නිශ්චිතව නම් දක්වා ඇති වෙනත් යම් මිනින්දෝරුවරයකු වෙත (1) වන උප වගන්තිය යටතේ නිකුත් කරන ලද අධිකාරි පත්‍රය යටතේ මනින ලද ඉඩමක යම් විශාල හෝ කුඩා බිම් කොටසක් මැනීමට හෝ

ii) (1) වන උප වගන්තියේ සඳහන් කරන ලද මිනින්දෝරුවරයා හැර 73 වන වගන්තියේ සඳහන් කරන ලද මිනින්දෝරුවරයන්ගේ ලැයිස්තුවෙහි නිශ්චිතව නම් දක්වා ඇති වෙනත් යම් මිනින්දෝරුවරයකු වෙත (1) උප වගන්තිය යටතේ නිකුත් කරන ලද අධිකාරි පත්‍රය යටතේ මනින ලද ඉඩම නැවත මැනීමට

බලය ලබාදෙමින් අධිකරණයේ මෙහෙයවීම මත හෝ නඩුවේ යම් පාර්ශවකරුවකුගේ ඉල්ලීම මත වැඩිදුරටත් වූ අධිකාරි පත්‍රයක් නිකුත් කිරීමට නියම කල හැකි අතර .....

Maxwall on "the interpretation of statute (12th Edition by Langan) says thus;

"Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which came into existence after the statutes were passed unless a retrospective effect is clearly intended. It's a fundament rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the act, or arises by necessary and distinct implication" (Page 215)

In general, when the substantive law is altered during the pendency of an action, the right of the parties are decided according to the law as its existence when the action was begun, unless the new statute shows a clear intention to vary such rights (Page 221).

However, the presumption against retrospective construction has no application to enactments which effect only the procedure and practice of the courts. No person has a vested interest in any cause of procedure (Republic of Costa Rica Vs.Erlanger (1874) 3 Chd 62)

To avoid all controversies the legislature has thought it fit to give a retrospective effect expressly to the amended Section 16(2) of the Partition Law. Thus, the Section 16 of Act No.27 of 2024 reads as follows:

16. සැක දුරු කිරීම සඳහා, ප්‍රධාන ප්‍රඥප්තියේ 16 වන වගන්තියට මේ පනතේ (3) වන වගන්තිය මගින් කරන ලද සංශෝධන මේ පනත ක්‍රියාත්මක වන දිනයේ දී ප්‍රධාන ප්‍රඥප්තියේ විධි විධාන යටතේ ගොනු කරනු ලැබ අවසන් නොවූ යම් නඩුවකට, නඩු කටයුත්තකට හෝ අභියාචනයකට අදාල විය යුතු බව මෙයින් ප්‍රකාශ කරනු ලැබේ.

VII CONCLUSION

As held in the case of Boddington v British Transport Police38, when the doctrine that Judicial Decisions operate retrospectively is applied to a judicial ruling that a governmental act is invalid, the logical result might seem to be that the act is to be treated as 'invalid at the outset for all purposes and that no lawful consequences can flow from it'.

Upon further examination of the practical application of the approaches on the prospective and retrospective effect of Judicial decisions, it is evident that some Courts have sought to moderate the retrospective doctrine by imposing temporal limits on the operation of their judgments such as the European Court. The Supreme Court of the United States and Australia's High Court have, however, denied themselves authority to limit the temporal operation of their judgments by the technique of prospective overruling, even when it is of the selective variety. Prospective overruling as they have said, is incompatible with the exercise of power.

The decision of the Australian High Court in Ha v New South Wales39 also seems to indicate that if the court holds legislation to be unconstitutional, the legislation must be treated void ab initio and the court will not postpone the operation of its judgment to a date in the future. The High Court has not, however, clearly rejected the possibility that, like the Supreme Court of Canada, it may in some circumstances postpone the operation of its judgment. As such in the Ha case40, the Court held the State's legislation to be unconstitutional in that it violated Section 90 of the Federal Constitution. All seven members of the Court disclaimed the authority to overrule prospectively and Brennan CJ, McHugh, Gummow and Kirby JJ opined verbatim as follows,

"This court has no power to overrule cases prospectively. A hallmark of the judicial process has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from the non-judicial power. Prospective overruling is thus inconsistent with judicial power on the ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations. If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law."

Courts may also limit the temporal operations of their orders. Instead of ordering that an administrative decision be set aside from the date on which it was made, a court may order that the decision be set aside as from the date of the judgment or from a later date. A court may also decide to postpone the operation of an order to be set aside ab initio.

As examined above, there may be instances where a person acts in reliance of judicial interpretation of valid legislation which are later overruled. A judicial determination that legislation is ultra vires will usually mean that the legislation was invalid ab initio. Judicial overruling of prior Judicial Decisions on the meaning and effect of valid legislation will normally be treated representing the law as from the time the legislation was made.

The foregoing analysis indicates the need to clearly lay down a uniform set of principles which are applied by courts in the determination of the prospective and retrospective effect of Judgments.

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DETERMINING THE CATEGORY OF HURT UNDER SRI LANKAN LAW: A GUIDE FOR THE JUDICIARY

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Introduction

In the administration of justice, the categorization of injuries under the Penal Code plays a pivotal role in determining the severity of offenses and the appropriate legal outcomes. Section 311 of the Sri Lankan Penal Code, which defines "grievous hurt," serves as a key framework in this process (Penal Code of Sri Lanka, 1995 Amended Version). In addition to the grievous and non-grievous categories of Hurt, another type of Hurt does exist in the legal terminology: injuries that are fatal in the ordinary course of nature.

Determining the type of hurt is a crucial step in medico-legal investigations, as it influences the legal consequences and the interpretation of the alleged act. The categories include non-grievous injuries, grievous injuries, and injuries fatal in the ordinary course of nature, each of which has specific medical and legal implications (Karmakar, 14th Edition; Jeeva Niriella, 2020) . These classifications are integral to medico-legal documentation, such as the 'Health 1135 Form' also known as the 'Medico Legal Report (MLR) widely used in Sri Lanka. In addition to this, Police 20' or the 'Medico Legal Examination Form (MLEF) is also used in the initial stages of medico-legal examination through which the necessary information is communicated to the police.

From a medico-legal perspective, the classification of hurt provides the judiciary with a structured way to assess the severity of injuries, while for medical practitioners, it offers a guideline to document findings systematically (WHO guidelines on trauma classification; Thilakarathna, 2019). For instance, distinguishing between injuries that are "fatal in the ordinary course of nature" and those "endangering life" require careful clinical and forensic evaluation. This differentiation ensures accurate categorization, enabling the courts to deliver appropriate judgments (Ashworth, 7th Edition; Amarasinghe, 2020). Below is an explanation of each category with its practical applications for junior doctors and legal professionals.

This article provides a comprehensive explanation of Section 311 and its sub-sections (311(a) to 311(i)), offering a clear understanding of how to assess and classify injuries under the law. This guide also incorporates categories of hurt as outlined in the health 1135 Form used in Sri Lanka.

Types of categories of Hurt:

The 'Health 1135' Form, commonly used in Sri Lanka for medico-legal documentation, classifies hurt into the following categories:

01. **Fatal in the ordinary course of nature (FOCN)** – This includes any injury that will results in death unless prompt and proper treatment is given to the patient.

02. **Grievous injuries** - Injuries which cannot be categorize under FOCN but can be categorized under one or more limbs of the section 311 of Sri Lanka penal code (Penal Code of Sri Lanka, 1995 Amended Version;).

03. **Non-Grievous injuries** - All other injuries that do not fall under the above two types.

The above three categories are stated in the order of severity. However, there is another category of injury which is named as ' Necessarily Fatal Injuries' but these are never seen in the clinical examination of patients but encountered at autopsy.

Categories of Hurt in Medico Legal Report (Health 1135 Form)

The **Medico Legal Report** (Health 1135 Form), commonly used in Sri Lanka for medico-legal documentation, classifies hurt into the following categories:

1. Non-Grievous Hurt

Non-grievous Hurt includes injuries that are minor and do not fall under ' injuries fatal in the ordinary course of nature' or could be included under any of the limbs specified in Section 311 of the Penal Code. These injuries are usually superficial and do not cause long-term disability or severe pain (Niriella, 2020).

Examples:

- Superficial abrasions or contusions.
- Minor lacerations or cuts that do not involve deep tissues.

- Mild tenderness or pain without significant functional impairment.
- Practical Use for Medical Officers:
  - » Document the injury's location, size, and nature clearly in the medico-legal examination form.
  - » Specify if the injury is consistent with the alleged cause (e.g., fall, minor assault).
  - » Avoid using terms like "grievous" unless the injury clearly meets criteria under Section 311.
- **Practical Use for the Judiciary**

The category of **"Non-Grievous Injuries"** is used by the judiciary for several key purposes in legal proceedings, particularly in criminal and civil cases. These include:

- » **Determining the Severity of the Offense** – Non-grievous injuries indicate that the harm caused to a victim is not severe or life-threatening, which affects the classification of the crime and the applicable legal provisions.
- » **Deciding Criminal Liability and Sentencing** – Courts use this classification to determine the appropriate punishment. Offenses causing non-grievous injuries typically result in lesser penalties compared to those causing grievous hurt.
- » **Assessing Compensation and Damages** – In civil cases, the judiciary considers the extent of non-grievous injuries when awarding compensation to victims for medical expenses, pain, and suffering.
- » **Bail and Remand Decisions** – The classification of an injury as non-grievous can influence whether an accused person is granted bail or remanded in custody, as minor injuries may not warrant prolonged detention.
- » **Establishing Intent and Use of Force** – The nature of injuries helps the court assess whether excessive force was used, whether the act was intentional or accidental, and if there was any negligence involved.

» **Guiding Medico-Legal Testimonies** – Forensic medical officers and experts present their findings in court based on injury classification, helping the judiciary make informed decisions.

This categorization ensures proportionality in legal outcomes, balancing justice for both victims and accused individuals.

2. Grievous Hurt

- Injuries falling under any of the limbs of Section 311.
- Requires detailed documentation, including descriptions of:
  - » Injury size, shape, and depth.
  - » Mechanism of injury (e.g., blunt or sharp force).

This category will be discussed in details later in this article.

3. Fatal in the ordinary course of nature (FOCN):

FOCN refers to injuries that would inevitably result in death if not treated promptly. These injuries are inherently incompatible with life due to the extent of damage to vital organs or systems. However, commonly in the clinical medico-legal practice the doctor sees the patient after the necessary medical or surgical interventions have been done, the patient's condition is stable, and he/she is out of danger. Therefore, in determining the category one has to analyze the initial/ original situation and the condition of the patient rather than considering the current situation.

- **Examples:**
  - » Head trauma leading to intra cranial haemorrhages, brain lacerations etc.
  - » Complete aortic rupture or perforation of a major blood vessel.
  - » Penetrating injuries to the abdomen causing widespread peritonitis or hemorrhage.
  - » Crush injuries causing irreversible shock or multi-organ failure.

- **Distinction from Endangering Life:**
  - » Fatal injuries are irrecoverable without immediate and advanced medical intervention.
  - » "Endangering life" indicates an existing threat to life, whereas "FOCN" implies an inevitable outcome without care.
- **Practical Use for Medical Officers:**
  - » Document the severity and implications of the injury, emphasizing why it is fatal.
  - » Use language that reflects the immediate lethality of the injury, such as "fatal in the ordinary course of nature."
  - » Ensure collaboration with specialists to confirm findings if the injury's nature is complex or disputable.

How It Can Happen:

- ✓ **Severe Brain Injuries:** Extensive head trauma leading to brain herniation, intracranial hemorrhage, or diffuse axonal injury.
- ✓ **Massive Blood Loss:** Injuries that result in rapid and uncontrollable bleeding, such as severed major arteries (aortic rupture, femoral artery laceration).
- ✓ **Chest Trauma:** Injuries that cause total lung collapse, cardiac tamponade, or complete aortic transection.
- ✓ **Abdominal Injuries:** Ruptured spleen, liver, or bowel leading to fatal peritonitis or hemorrhagic shock.
- ✓ **Crush Injuries:** Severe musculoskeletal trauma leading to irreversible shock or multi-organ failure.

The category "Fatal in the ordinary course of nature" is a medico-legal classification of injury severity, commonly used in forensic pathology and legal proceedings. This classification plays a crucial role in judicial determinations regarding homicide, culpable homicide, and grievous hurt under criminal law.

Application in the Judiciary

- **Legal Definition & Interpretation**
  - » Injuries classified as **"fatal in the ordinary course of nature"** are those which, by their very nature, would **invariably cause death** unless medical intervention is provided.
  - » It is distinct from **"sufficient to cause death,"** which implies that while death is likely, there remains some possibility of survival.
- **Role in Criminal Trials**
  - » This classification helps courts assess **criminal liability** in cases of **homicide or assault.**
  - » It is frequently cited in **murder trials** under penal codes, where intention and the nature of injuries are key considerations.
- **Expert Medical Testimony**
  - » Forensic pathologists provide expert opinions during trials to determine whether an injury was **necessarily fatal** or if survival was possible with treatment.
  - » Judges and prosecutors rely on forensic reports to **differentiate between murder and culpable homicide not amounting to murder** (based on the nature of injury and intent).
- **Comparison with Other Categories of Injuries**
  - » **Grievous hurt:** Causes serious bodily harm but does not necessarily ends fatally.
  - » **Fatal in the ordinary course of nature:** Death is certain unless extraordinary medical intervention is provided.

Judicial Impact

- **Harsher Punishments:** If an injury is deemed "fatal in the ordinary course of nature," courts are more likely to convict under murder charges rather than manslaughter or grievous hurt.

- **Intent Analysis:** This category helps determine whether the accused had the intention to kill (mens rea).

- **Medical Negligence Cases:** This classification may also play a role in assessing whether a delay in medical treatment contributed to death.

Any injury deemed fatal in the ordinary course of nature falls under serious legal consequences, often considered in homicide-related offenses. Even if a victim survives due to advanced medical care, the initial injury may still be classified as "fatal in the ordinary course of nature." **Documentations** in the bed head ticket, Autopsy reports, emergency intervention details, and expert forensic opinions are crucial in establishing the fatal nature of the injury. Courts assess whether the injury was inflicted with intent to kill or if it resulted from reckless or negligent actions.

4. Endangering Life

Injuries that pose an immediate and existing threat to the victim's life fall under this category. While not necessarily fatal with prompt treatment, these injuries can rapidly deteriorate if left unattended.

- **Examples:**
  - » Haemorrhages leading to hypovolemic shock.
  - » Head injuries with intracranial bleeding but of a lesser amount than in FOCN, other types of brain injuries which are less than FOCN.
  - » Penetrating chest injuries causing pneumothorax or cardiac tamponade.
  - » Abdominal injuries resulting in organ injuries or peritonitis.
- **Key Indicators:**
  - » Signs of shock: low blood pressure (<100 mmHg systolic), rapid pulse (>100 bpm), cold and clammy extremities.
  - » Difficulty breathing or cyanosis in chest injuries.
  - » Rigidity and guarding in abdominal injuries suggestive of internal damage.

- **Practical Use for Medical Officers:**
  - » Evaluate and document vital signs meticulously.
  - » Record findings such as pallor, consciousness levels, and any visible severe injuries.
  - » Use clear terms like "life-threatening" in the medico-legal report when injuries show potential to worsen significantly without intervention.

The differentiation between FOCN and endangering life purely will be a medical decision based on facts found during medical examination and treatment.

Grievous injuries:

Section 311 of the Penal Code of Sri Lanka

Section 311 states:

311. The Following kinds of hurt only are designated as "grievous" :-

a. Emasculation

b. Permanent privation or impairment of the sight of either eye

c. Permanent privation or impairment of the hearing of either ear

d. Privation of any member or joint

e. Destruction or Permanent impairment of the powers of any member or joint

f. Permanent disfiguration of the head or face

g. Cut or fracture, of bone cartilage or tooth or dislocation or subluxation of bone, joint or tooth

i. Any injury, which endangers life or in consequence of which an operation in-volving the opening of the thoracic, abdominal or cranial cavities is performed

h. Any injury, which causes the sufferer to be in severe bodily pain or unable to follow his ordinary pursuits, for a period of twenty days either because of the injury or any operation necessitated by the injury.

Each limb of Section 311 provides specific criteria for classifying an injury as grievous. Below, we explore these in detail.

Detailed Explanation of Section 311 Subsections

311(a): Emasculation

Emasculation refers to rendering a man permanently incapable of procreation or sexual function. This may occur due to:

- **Anatomical emasculation: Physical removal or severe injury to genital organs.**
- **Physiological emasculation: Loss of sexual function caused by nerve damage or trauma.**

It can be considered as one of the most severe forms of the following kinds of hurt designated as grievous under Section 311 of the Penal Code of Sri Lanka due to its lasting impact on an individual's physiological and psychological well-being.

311(b): Permanent privation or impairment of the sight of either eye

Definition: Permanent loss of vision in one or both eyes either total or partial.

How It Can Happen:

» **Blunt Trauma:** A strong blow to the eye can cause optic nerve damage, retinal detachment, or globe rupture leading to irreversible blindness.

» **Penetrating Injuries:** Sharp objects like knives, glass shards, or shrapnel can directly damage the eye structures, causing permanent loss of sight.

» **Chemical Burns:** Exposure to strong acids or alkalis (e.g., industrial chemicals, acid attacks) can lead to corneal opacification and complete visual impairment.

» **Severe Infections:** Untreated infections like endophthalmitis or severe conjunctivitis can lead to blindness due to scarring and damage to vital eye structures.

» **Medical Negligence:** Incorrect surgical procedures, anesthesia errors, or delayed treatment of ocular trauma can contribute to permanent vision loss.

Medico-Legal Importance:

» **Classification Under Section 311:** Any case of irreversible vision loss qualifies as grievous hurt under the Penal Code and may result in severe legal consequences for the perpetrator.

» **Assessment of Intent:** Cases involving deliberate acts (e.g., acid attacks, violent assaults) often attract harsher legal penalties compared to accidental injuries.

» **Impact on Victim's Life:** Permanent vision loss can significantly impair the victim's quality of life, ability to work, and social independence, making compensation claims and sentencing considerations critical in judicial proceedings.

» **Medical Documentation:** A comprehensive ophthalmological examination, including visual acuity tests, fundoscopic evaluation, and imaging (CT/MRI for trauma cases), is essential to establish the extent of damage and permanency of the impairment.

This includes injuries that cause total or partial and irreversible blindness in one or both eyes. Examples: Severe eye trauma leading to blindness, Nerve damage preventing vision recovery etc.

311(c): Permanent privation or impairment of the hearing of either ear

Definition: This refers to the total or partial permanent/irreversible loss of hearing in one or both ears, significantly impacting the individual's ability to communicate and interact with their environment.

How It Can Happen:

» **Blunt Trauma:** Head injuries from falls, assaults, or road accidents can damage the auditory nerve or disrupt the inner ear structures, leading to permanent hearing loss.

» **Penetrating Injuries:** Sharp objects penetrating the ear canal can cause severe damage to the eardrum and inner ear, resulting in irreversible deafness.

» **Acoustic Trauma:** Prolonged exposure to high-decibel noise, such as explosions or industrial machinery, can cause sensorineural hearing loss.

» **Infections and Diseases:** Severe infections like meningitis, chronic otitis media, or viral illnesses such as mumps can lead to nerve damage and permanent hearing impairment.

» **Ototoxic Medications:** Certain drugs, including high doses of antibiotics (aminoglycosides) and chemotherapy agents, can cause irreversible hearing loss by damaging the cochlea.

Medico-Legal Importance:

» **Classification Under Section 311**: Any permanent hearing loss qualifies as grievous hurt under the Penal Code, influencing sentencing and legal consequences.

» **Assessment of Intent:** Cases where hearing loss results from intentional acts (e.g., violent assaults or exposure to harmful substances) may carry harsher legal implications.

» **Impact on Victim's Life:** Permanent hearing loss affects communication, employment, and social interactions, leading to significant psychological and economic burdens.

» **Medical Documentation:** Comprehensive audiological assessments, including pure tone audiometry and brainstem auditory evoked response (BAER) tests, are essential to confirm the extent and permanency of hearing impairment.

This refers to injuries causing complete or partial and permanent deafness in one or both ears. Common causes:

311(d): Privation of Any Member or Joint

This refers to the complete and permanent loss of a limb, organ, or joint, rendering the affected body part non-functional. The term "member" generally refers to body parts such as hands, feet, fingers, or toes, while "joint" refers to the structures that connect bones, allowing movement.

How It Can Happen:

» **Traumatic Amputation:** Severe accidents, machinery-related injuries, or high-impact assaults can result in complete loss of a limb.

» **Surgical Amputation:** In some cases, medical conditions such as severe infections, gangrene, or crush injuries necessitate the surgical removal of a body part.

» **Severe Joint Damage:** High-impact injuries, fractures with dislocations, or untreated infections (such as septic arthritis) can result in irreversible loss of joint function.

» **Severe Burns or Frostbite:** Extensive tissue damage from burns or frostbite may require amputation, leading to permanent loss of a member.

Medico-Legal Importance:

» **Classification Under Section 311:** If an individual suffers a permanent loss of a limb or joint due to an assault or accident, it qualifies as grievous hurt under the Penal Code.

» **Impact on Victim's Life:** The loss of a limb or joint has profound physical, psychological, and economic effects, affecting employment, mobility, and daily functioning.

» **Intent and Causation:** Courts consider whether the loss was due to deliberate violence, negligence, or unavoidable medical conditions.

» **Medical Documentation:** Comprehensive medical reports, including surgical records, radiographic evidence, and rehabilitation needs, are crucial for legal proceedings and compensation claims.

311(e): Destruction or Permanent impairment of the powers of any member or joint

Definition: This refers to a condition where a body part (such as a limb) or joint remains intact but has lost its normal function either partially or completely. Unlike privation, where the body part is lost, this category deals with functional impairment due to nerve damage, muscle loss, or structural injury.

How It Can Happen:

» **Nerve Damage:** Injuries to major nerves, such as the brachial plexus or sciatic nerve, can result in paralysis or severe weakness in the affected limb.

» **Joint Ankylosis:** Severe trauma or chronic inflammatory diseases like rheumatoid arthritis can cause stiffness and immobility in joints.

» **Muscle Atrophy:** Long-term disuse following severe injuries, fractures, or neurological conditions can lead to muscle wasting, reducing power and control over a limb.

» **Tendon or Ligament Damage:** Ruptures or severe injuries to tendons and ligaments (e.g., Achilles tendon rupture or torn knee ligaments) can impair movement and strength.

» **Severe Burns or Scarring:** Extensive burns can lead to contractures that restrict mobility and function of limbs or joints.

Medico-Legal Importance:

» **Classification Under Section 311**: Any injury leading to permanent impairment of a limb or joint function qualifies as grievous hurt under Sri Lankan law.

» **Assessment of Severity:** The extent of functional impairment—whether partial or total—can influence the gravity of legal consequences.

» **Impact on Victim's Life:** Loss of function affects mobility, employment, and daily activities, which courts may consider when determining compensation or sentencing.

» **Medical Documentation:** Detailed clinical examinations, imaging (X-rays, MRI, nerve conduction studies), and functional assessments are essential to establish the permanence of the impairment in medico-legal cases.

The limb or joint remains intact but no longer functions. This may occur due to nerve damage, paralysis, or severe muscle injury.

311(f): Permanent Disfiguration of the Head or Face

Definition: This refers to any injury that results in lasting and visible alteration to the victim's facial or cranial appearance, impacting their identity and social perception.

How It Can Happen:

- **Deep Lacerations or Cuts:** Sharp force injuries from knives or glass can leave permanent scars.
- **Burns:** Chemical or thermal burns can cause scarring and loss of facial features.
- **Fractures:** Severe facial bone fractures, especially involving the nose, jaw, or cheekbones, can lead to permanent asymmetry.
- **Nerve Damage:** Injuries leading to facial nerve paralysis can cause loss of facial expression or asymmetry.

Medico-Legal Importance:

- **Classification Under Section 311:** Any permanent facial disfigurement qualifies as grievous hurt.
- **Impact on Victim's Life:** Psychological trauma, social stigma, and loss of employment opportunities can be significant factors in legal proceedings.
- **Medical Documentation:** Photographic evidence, dermatological assessments, and plastic surgery consultations can help in assessing the extent of disfigurement.

Disfiguration refers to a permanent or severe alteration of a person's appearance due to injury, disease, or a medical condition. It affects external body parts, particularly visible areas like the face, neck, and limbs, leading to social, psychological, and functional impairments. However, according to the Sri Lankan law disfiguration of only the head and face is considered as grievous injury. Since the law has not defined the meaning of disfiguration it creates an ambiguity in decision making among the medical professionals.

Courts may consider factors such as the victim's age, gender, and occupation when assessing disfiguration.

311(g): Cut or fracture, of bone cartilage or tooth or dislocation or subluxation of bone, joint or tooth

Definition: This category includes any injury that results in a break in the continuity of a bone, dislocation of a joint, or the loss of a tooth.

How It Can Happen:

- **Direct Trauma:** Blunt force injuries from road traffic accidents, falls, or assaults can cause fractures or dislocations.
- **Sharp Force Trauma:** Penetrating injuries can lead to fractures, especially in facial bones.
- **Tooth Fractures or Loss:** Assaults involving punches or weapon strikes to the face can lead to broken or avulsed teeth.

Dislocation and Subluxation in Relation to a joint:

The total misalignment of articular surfaces of bones at a joint is called dislocation and partial misalignment is known as subluxation.

Dislocation and Subluxation in Relation to a Tooth:

- **Dislocation of a Tooth (Dental Avulsion):** A complete displacement of a tooth from its socket due to trauma. The tooth is entirely removed from its position, requiring immediate reimplantation to preserve function.
- **Subluxation of a Tooth:** A partial displacement of a tooth where the tooth remains in the socket but is loosened, often resulting in pain, bleeding, and mobility.

Medico-Legal Importance:

- **Classification Under Section 311:** Any fracture, regardless of severity, qualifies as grievous hurt.
- **Assessment of Force Used:** The type and severity of the fracture can provide insight into the force applied and intent of the assailant.
- **Medical Documentation:** X-rays, CT scans, and dental examinations are crucial for confirming the presence and extent of fractures.

311(h): Any injury, which endangers life or in consequence of which an operation involving the opening of the thoracic, abdominal or cranial cavities is performed

Definition: This category includes injuries that pose an immediate and significant risk to life or necessitate an operation involving the opening of the thoracic (chest), abdominal, or cranial (skull) cavities. Such injuries require urgent medical intervention and may lead to life-threatening complications.

Injuries that necessitate surgical intervention involving the opening of the thoracic, abdominal, or cranial cavities. Severe head injuries requiring a craniotomy, deep penetrating wounds necessitating thoracotomy, and internal bleeding requiring laparotomy all fall under this classification. Even if medical intervention saves the victim's life, the severity of the injury remains relevant in judicial determinations.

How It Can Happen:

- **Severe Blood Loss:** Injuries involving major blood vessels, such as the carotid artery or femoral artery, can cause hemorrhagic shock, leading to death if untreated.
- **Head Injuries:** Skull fractures with brain hemorrhage (intracranial hematomas) may require craniotomy (surgical opening of the skull) to relieve pressure. This has to be carefully evaluated as most forms of intracranial haemorrhages are known to result in death if prompt and proper treatment is not given. The difference of opinion would be based on the size and amount of haemorrhage.
- **Thoracic Trauma:** Penetrating chest wounds affecting the lungs, heart, or major blood vessels often necessitate thoracotomy (surgical opening of the chest) to control bleeding and repair damage.
- **Abdominal Injuries:** Stab wounds, blunt trauma, or ruptured organs (such as the spleen or liver) may require laparotomy (surgical opening of the abdomen) to manage internal bleeding or organ perforation.

Medico-Legal Importance:

- **Classification Under Section 311:** If an injury is determined to be life-threatening or requires major surgery for treatment, it qualifies as grievous hurt under the Penal Code.

» **Significance of Surgical Intervention:** Even if the patient survives due to timely medical care, the need for a major operation confirms the severity of the injury.

» **Assessment of Intent:** The court may consider whether the injury was inflicted deliberately with the intent to cause grievous harm or if it was an unintended consequence of an altercation.

» **Medical Documentation:** A detailed surgical report, including imaging studies (CT scans, MRIs), operative findings, and post-surgical outcomes, is essential to establish the severity of the injury in legal proceedings.

However, the difference between FOCN and injuries which endanger life may very minimal, making it almost mandatory for the medico legal consultant decide the exact category of hurt in some instances.

311(i): Any injury, which causes the sufferer to be in severe bodily pain or unable to follow his ordinary pursuits, for a period of twenty days either because of the injury or any operation necessitated by the injury.

Definition: This refers to injuries that cause prolonged and severe bodily pain or prevent the victim from performing their ordinary daily activities for a continuous period of at least 20 days. This incapacity may result directly from the injury itself or due to a surgical operation necessitated by the injury.

How It Can Happen:

» **Soft Tissue Injuries:** Severe bruises, deep muscle tears, or tendon injuries can cause prolonged pain and restricted movement.

» **Fractures and Dislocations:** Even minor fractures or joint dislocations can lead to long-term pain and difficulty in daily activities.

» **Surgical Interventions:** Operations such as orthopedic procedures, internal fixation of fractures, or abdominal surgeries may require an extended recovery period beyond 20 days.

» **Nerve Damage:** Injuries affecting major nerves can cause persistent pain, sensory disturbances, or partial paralysis, significantly limiting normal functioning.

» **Infections and Wound Healing Issues:** Secondary infections, slow-healing wounds, or post-operative complications may prolong incapacity.

Medico-Legal Importance:

» **Classification Under Section 311:** If an injury or subsequent medical intervention results in continuous pain or incapacity for 20 or more days, it qualifies as grievous hurt under Sri Lankan law.

» **Medical Documentation:** Doctors must maintain follow-up records, pain assessments, and disability certificates to confirm the duration of incapacity.

» **Judicial Considerations:** Courts may consider whether the victim's prolonged suffering was caused intentionally or resulted from negligence. The medical reports play a critical role in establishing causation and severity.

However, pain is a subjective feeling which might vary from person to person. Therefore, the medical officer has to consider many facts related to the injury and its complications before deciding on this fact.

Key Considerations for Judges

Judicial Considerations in Classifying Injuries

In judicial proceedings, the classification of an injury is not solely a medical determination but requires careful legal interpretation. Judges must evaluate medical evidence, witness statements, and circumstantial factors to ascertain whether an injury qualifies as the following kinds of hurt designated as grievous under Section 311 of the Penal Code of Sri Lanka (Karmakar, 14th Edition; Niriella, 2020). Medical opinions play a crucial role, but courts must also consider the intent of the accused, the severity of the harm caused, and the impact on the victim.

Additionally, expert testimony from forensic pathologists or surgeons may be required in complex cases involving ambiguous injuries. The distinction between the following kinds of hurt designated as grievous under Section 311 of the Penal Code of Sri Lanka and lesser offenses often hinges on precise medical documentation and its interpretation in legal contexts (WHO guidelines on trauma classification; Thilakarathna, 2019).

1. Contextual Evidence:

» Evaluate medical reports in conjunction with witness statements and circumstantial evidence.

» Consider whether the injury's description aligns with the alleged cause.

2. Specialist Testimony:

» Seek opinions from medical experts, particularly for complex injuries like disfiguration or internal trauma.

3. Judicial Interpretation:

» Ambiguous terms like "disfiguration" require careful evaluation, factoring in social, cultural, and professional impacts on the victim.

4. Importance of Documentation:

» Ensure that medical reports include detailed descriptions of injuries, their mechanisms, and the prognosis.

Conclusion

Section 311 of the Penal Code provides a robust legal framework for categorizing grievous Hurt. By understanding the medical and legal nuances of each subsection and utilizing tools like the Health 1135 Form, judges can ensure fair and accurate adjudication of cases involving bodily harm. This guide aims to bridge the gap between legal and medical interpretations, fostering informed judicial decision-making.

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COMMON BEHAVIORAL PROBLEMS AMONG CHILDREN

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Behavioral problems among children refer to alterations in a child's behavior, thinking patterns or emotions that can be indicative of a psychological or psychiatric condition. These changes impact on child's development, relationships and overall wellbeing. Identifying and understanding these changes is crucial, as early diagnosis and intervention can help mitigate the long-term effects of psychiatric conditions. Psychiatric conditions can impact on the developmental tasks of childhood and potentially negatively impact on a child's developmental trajectory for the rest of the life. Below is an overview of several common childhood psychiatric disorders and their associated behavioral changes.

Autism Spectrum Disorder (ASD)

This is a neurodevelopmental disorder that arises from atypical brain development, so core features are often present in early childhood, although they may not always be apparent. It is characterized by persistent deficits in initiating and sustaining social communication and reciprocal social interactions, persistent restricted repetitive and inflexible patterns of behavior, interest or activities. The onset of the disorder occurs during the developmental period and symptoms result in significant impairment in personal, family, social, educational, occupational or other important areas of functioning.

Attention Deficit Hyperactivity disorder (ADHD)

ADHD is the second most common psychiatric disorder of childhood. The core features of ADHD are inattention, Hyperactivity and impulsivity. These features are pervasive, occurring across situations, although they can vary somewhat indifferent circumstances. These children are often reckless and prone to accidents. They may have learning difficulties, which result in part from poor attention and lack of persistence with tasks. They usually exhibit impulsive behaviors such as interrupting conversations, acting without considering consequences and having difficulty waiting their turn. Hyperactivity, such as difficulty sitting still, constant fidgeting, and excessive talking can also be prominent.

School Refusal

Some children may struggle to attend school due to emotional distress, often linked to anxiety, depression or trauma. It can impact academics and emotional development. First sign to the parents that something is wrong is the child's sudden and complete refusal to attend school. There are signs of unhappiness and anxiety when it is time to go. They often complain somatic symptoms of anxiety such as adnominal discomfort, diarrhea, headache. These complaints occur on school days but not at other times. Some children appear to want to go to school, but become increasingly distressed as they approach it. Almost 50% of school refusers referred to clinics have a diagnosable anxiety disorder, including septation anxiety disorder, specific phobias, social phobia generalized anxiety disorder and panic disorder with agoraphobia.

Screen Addiction

Screen addiction in children refers to excessive or compulsive use of electronic devices such as smartphones, tablets, computers, televisions to the point where it interferes with daily life. It is characterized by the child spending an unhealthy amount of time on screens, often neglecting social interactions, physical activity and academic responsibilities. Symptoms may include irritability, anxiety, distress when not using a device, as well as difficulty regulating screen time. The addiction can impact sleep emotional development and behavior. Symptoms are more or less resemble the symptoms of other substance addiction.

Nocturnal enuresis

Nocturnal enuresis, commonly known as bedwetting is the involuntary loss of urine during sleep in children who are beyond the age at which bladder control is typically expected. Most children achieve urinary continence by 3 or 4 years of age. Nocturnal enuresis can cause great unhappiness and distress. Nocturnal enuresis occasionally results from physical conditions, but more often appear to be caused by delay in the maturation of the nervous system, either alone or in combination with environmental stresses. There is some evidence for genetic contribution also. Some family influences include exposure to family adversity and stress in early childhood, parenting style, and difficulties in toilet training. Common behavioral changes occur in nocturnal enuresis are low self-esteem, social withdrawal, anxiety or stress, irritability or frustration, avoidance of nighttime routine, increased dependency.

Temper Tantrums and Disruptive Behaviors

This is a very common childhood behavior problem. They are extreme episodes of frustration or anger with mood and behavioral returning to normal between tantrums. Only persistent or very severe tantrums are abnormal. They often have temper tantrums to get parental attention to get something they want or avoid something they don't want.

How do we help these children?

Helping children who are having behavioural problems needs empathic understanding and often professional help. Educating the child, the parents, teachers, and others is the first step. Referring any child who is suspected to have a behavioural problem to a child and adolescent clinic in a general or a teaching hospital is going to be helpful. In these clinics the child is assessed, and his care needs are identified and managed by a multidisciplinary team.

Acknowledgement
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DEATH TOURISM: GLOBAL PRACTICES, LEGAL BARRIERS, AND ETHICAL DILEMMAS - A SRI LANKAN PERSPECTIVE

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Abstract

The practice of travelling to another country to terminate one's life when the home country does not legally allow it, is termed death tourism, suicide tourism, or legally assisted death tourism. This article examines the historical evaluation of death tourism, with a special emphasis on the legal frameworks of Switzerland, the Netherlands, Belgium, and selected states in the United States. It then focuses on Sri Lanka's current legal standards on assisted dying, along with its ethical and cultural backgrounds. Autonomy and the 'last human right' are two distinct dimensions that revolve around the concept of physician-assisted suicide (PAS). However, Sri Lanka is not currently prepared to accommodate such concepts in practice, and this article aims to raise awareness among legal authorities, to create a dialogue on legal principles, and discuss the ethical and religious backgrounds, as it is not that far from challenges in the context of end-of-life problems. The cornerstone concern here is whether the hastening of death is legally acceptable or not.

1. Introduction

If one suffers greatly due to an illness that is beyond treatment, he or she may decide to end his or her life or relieve the suffering with dignity using euthanasia, physician-assisted suicide (PAS), or assisted suicide.

Let's consider these terms in detail. The term suicide is obvious to anyone who means the ending of one's life by oneself. It is done with intense impulse, and here, there is no medical or legal oversight. However, when medical involvement is present, the nomenclature is different. Is there any difference between assisted suicide and euthanasia? In physician-assisted suicide (PAS), or assisted suicide, the final act is performed by the person themselves, when a physician intentionally gives the lethal medication. Whereas in euthanasia, the action is conducted by a doctor to "bring about an easy and painless death for persons suffering from an incurable or painful disease or condition" [1]. These actions should not be impulsive and should be medically and legally well-considered decisions. Obviously, in many jurisdictions, such actions are legally barred for obvious

reasons concerning legal, ethical, medical, and cultural issues. If one decides to end one's life due to the immense suffering from a terminal illness, is that a wrong idea? We must ask it from a sufferer with excruciating pain, but not from anyone else, as the pain of suffering is only perceived by the patient. However, this article aims to discuss basic aspects of international death tourism practices along with Sri Lanka's current legal context to enhance knowledge and also further initiate domestic discussion on this complex issue.

2. History of Voluntary and Assisted Deaths Around the World

The complex concept of assisted suicide is not new in history. The act of ending one's own life in a rational and controlled manner has been considered in some civilizations. Terminally ill patients in ancient Athens were said to be allowed to submit a petition to the magistrate requesting permission to end their lives. If granted authority, the person was permitted to ingest hemlock, a plant-based poison. The best example is Socrates, who chose to drink hemlock in 399 BCE following the death sentence he received from the state [2]. The literature provides another historical example from ancient Roman Stoic philosophy, where they also considered it a rational act, either in the context of an incurable disease or with the loss of personal honour [3]. The ritual seppuku allowed obtaining the assistance of a second person for voluntary deaths to preserve honour in Japan [4]. Since there is not much extended history of death tourism, here in this discussion, address assisted suicides.

Recent developments in death tourism are largely based on specific legal standards of countries. Switzerland is a country renowned for its recognition of death tourism because Article 115 of the Penal Code permits assisted suicide when it is not motivated by selfish reasons. The extraordinary acceptance of non-residents for death assistance, upon meticulous scrutiny of legal and medical parameters, makes Switzerland unique in this regard. The famous Swiss organizations Dignitas and Life Circle offer the chance even to non-residents as well [5]. In contrast, both the Netherlands and Belgium provide the facility of euthanasia and PAS only for residents, with strict medical criteria and procedural safeguards [6,7].

Several states in the USA are also recognized as legal for PAS, including Oregon, Washington, and Vermont, under the Death with Dignity Act [8]. However, proof of residency and multiple approvals by physicians are mandatory, often accompanied by a waiting period as well. The cross-jurisdiction phenomenon of death tourism is increasingly gaining awareness and interest due to the overwhelming ageing population and evolving societal attitudes favouring bodily autonomy and the right to a dignified death.

3. Legal Background varies greatly across countries

Though PAS or assisted suicide is a singular event, the surrounding issues are extremely complex. There is a complicated interplay between individual perspectives, especially autonomy, medical ethics, legal aspects, and cultural and religious issues. The law of the country is ultimately the decisive factor. However, the following basic aspects are discussed in this article.

Switzerland has decriminalized assisted suicide as long as it is not based on selfish motives as described earlier as well. Switzerland is exceptional because nationality is not a decisive factor, enabling private organizations to facilitate assisted death [5]. Swiss courts have repeatedly affirmed the constitutional right to self-determined death, including for individuals with psychiatric conditions, although regulations remain minimal [6,7].

In contrast to the above, Sri Lanka has no provisions whatsoever and criminalizes all forms of euthanasia and assisted suicide. As per the penal Code Section 294, intentionally causing the death of another person is defined as murder and the punishment for murder is described in Section 296 - "Although the death penalty remains legally in force, Sri Lanka has not executed since 1976. Courts often impose life imprisonment in practice". The consent is immaterial, and if one performs euthanasia in Sri Lanka, it becomes murder. On the other hand, if one attempted to end someone else's life, but the person survives for some reason, he will be charged under Section 300, attempted murder, and the punishment is up to 20 years imprisonment. In contrast to that, if a doctor assists for suicide, the act is classified as abetment of suicide, under Section 299. The punishment is by death or life imprisonment [9]. In Sri Lanka, no jurisdiction has been identified for the right to die, advanced directives, withholding life support, or euthanasia. However, India has recognized it for a certain extent, i.e. only the passive euthanasia in special situations through statutory initiatives under the case ' Common Cause vs. Union of India' in 2018 [10].

The above legal analysis prompts a deep dive into different jurisdictions. Countries like Switzerland consider the concept of autonomy as supreme while respecting human rights. However, in most countries, including Sri Lanka, assisted suicide and euthanasia are considered criminal offences primarily based on the law that was rooted in the cultural and religious values of the country. Sporadic public concerns about living wills, advance directives, assisted suicide, and passive euthanasia have been subjected to much discussion and debate in Sri Lanka from time to time. Due to the overwhelming number of senior citizens, Sri Lankan doctors encounter requests from terminally ill patients to consider end-of-life

decisions. There are no clear laws or directives, and hence, there is no legal protection for doctors even when the request is genuine. However, according to the NHS (National Health Service) in the UK, withdrawing life supporting care in the best interest of the patient and is only a part of good palliative care but not to kill a person [1].

The author believes that Buddhism, which is the predominant religion in Sri Lanka, discusses two sides of a coin at the same time. Intentional killing of one is considered a sin, and at the same time, it emphasizes compassion and the relief of one's suffering as well [11].

4. Ethical aspects

Debates surrounding the terms of death tourism, assisted suicide, and euthanasia are endless. Proponents in favour of such entities argue that a competent terminally ill person should have the privilege and legal coverage to end their suffering. Let us analyze this viewpoint within the framework of the ethical principles of beneficence and non-maleficence. Alleviating endless, unbearable physical and psychological pain through assisted suicide or euthanasia fulfils the duty of beneficence. Similarly, the principle of non-maleficence, or do no harm, can also be equally applicable [12]. Prolonging suffering does not enhance the well-being of a terminally ill person. The basic ethical pillars may be confronted or challenged when analyzed in the context of certain end-of-life decisions, not as acts of harm but as compassionate responses to individuals enduring relentless suffering [1].

Those who oppose end-of-life decisions to pursue euthanasia or assisted suicide may argue that this privilege could be misused and lead to slippery slope concerns. In Sri Lanka, there is yet no consensus due to the imposed law. Without proper recognition and legal acceptance, there is a risk involved in making such decisions.

5. Recommendations

There is no bar to using death tourism by a Sri Lankan citizen. Can anyone wishing for it acquire the wealth to accommodate it? Hence, the author feels it is high time to reconsider the laws surrounding end-of-life care options in our jurisdiction as well.

01. To develop policies guiding the withdrawal of life support in that context – The aging population is increasing as anywhere else in Sri Lanka and there should be clear guidelines for physicians.

02. Initiate public discourse to highlight end-of-life care options and reformulate opinions for and against them.

03. Appoint multi-disciplinary legal commissions to study the Sri Lankan context regarding euthanasia, autonomy, and assisted deaths in depth.

04. Collaborate with regional partners, such as India, where they have stepped forward to accept passive euthanasia when warranted.

05. Most importantly, island-wide empirical research should commence to gather public opinion about end-of-life options, prevalence, and suicide rates to reach an informed and objective decision.

Conclusion

Death tourism is not a new concept, but with the overwhelming elderly population, the necessity may be increasing in countries where end-of-life decision rights and autonomy are not respected but instead criminalized. Countries like Switzerland, Belgium, and the Netherlands have adopted such concepts into their systems, accommodating assisted dying with dignity. However, in Sri Lanka, the idea remains virtually untouched due to the strong legal restrictions rather than the restrictions imposed by cultural or religious values. Sri Lankan doctors face ethical and legal ambiguities when end-of-life decisions are to be taken in daily practice with the increasing number of senior citizens. A culturally respected dialogue with ethical and legal coverage is urgently required to address the challenging issues of the 21st century regarding assisted deaths and death tourism.

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"A CRITICAL ASSESSMENT OF SEXUAL HARASSMENT IN LABOUR LAW: HOW SRI LANKA'S LEGAL RESPONSES COMPARE TO INTERNATIONAL WORKPLACE PROTECTIONS AND REFORMS."

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Abstract

Sexual harassment in the workplace remains a significant challenge within Sri Lanka's labour law framework, disproportionately affecting women despite legal protections. Defined broadly as unwanted physical, verbal, or nonverbal conduct of a sexual nature, harassment can manifest as "Quid Pro Quo" or "Hostile Work Environment" forms, undermining employee dignity, mental well-being, and productivity. While Sri Lanka's Penal Code criminalizes sexual harassment and the Constitution guarantees the right to equality and freedom of occupation, gaps remain in legal coverage, particularly for domestic, probationary, and plantation workers, and in sectors such as security services. Key judicial decisions, including Sri Lankan Airlines Limited v P.R.S.E. Corea and Brandix Apparel Solutions Limited v Fernando, underscore employers' duty to maintain safe and respectful workplaces, yet enforcement remains inconsistent. Sri Lanka's obligations under international conventions, such as CEDAW and ILO Conventions, highlight the need for stronger alignment with global standards. This paper critically assesses these legal frameworks, identifying weaknesses in statutory provisions, procedural barriers, and insufficient employer accountability. Recommendations include enacting specialized legislation, imposing vicarious liability on employers, and amending existing labour laws to enhance preventive measures, reporting mechanisms, and remedies. Strengthened legal and institutional frameworks are essential to ensure equitable, safe, and dignified workplaces, fulfilling both national obligations and international labour standards.

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Introduction

Sexual harassment in the workplace includes ***"unwanted physical contact, sexually suggestive remarks, lewd or lewd gestures, requests for sexual favors, the exchange of sexually explicit or sexually suggestive e-mails and images, and any other form of unwanted physical, verbal, or nonverbal conduct of a sexual nature."***[1] Sexual harassment is difficult to define because of its psychological nature. It is not what the perpetrator intended, but what the victim feels. It can range from a single incident to a series of behaviors.

Although the victim can be either a woman or a man, in the Sri Lankan context, women are identified as the most vulnerable group. One of the main reasons why women are more likely to be sexually harassed in the workplace is that although 65% of the Sri Lankan workforce is male, the percentage of women is as low as 35%[2]. This exacerbates the problem by affecting the mental and emotional well-being of the victims. Sexual harassment in the workplace is a significant issue in the field of labor law globally as well as in Sri Lanka[3].

The current legal framework in Sri Lanka includes provisions under the Penal Code and the Sri Lanka Labor Law to address this issue. However, these provisions are often inadequate, and reforms are needed to effectively combat and prevent sexual harassment in the workplace. All human beings are born free and equal in dignity and rights[4]. Accordingly, it is emphasized that the right of all human beings to work with dignity in their workplace, without any gender discrimination, should be affirmed as an inherent right.

Forms and Applicable Laws

Sexual harassment in the workplace can take many forms. In this case, supervisors using their supervisory authority to obtain sexual favors from an employee is known as **"Quid Pro Quo Harassment"**. In this way, the victimized employee must endure sexual harassment from supervisors to maintain their current job, not only in terms of their job privileges such as salary increases, promotions, training opportunities, transfers, and new jobs[5].

[1] 'Sexual Harassments in the Worldwide' (Salry.lk) < https://salary.lk/labour-law/fair-treatment/sexual-harassment/workplace-sexual-harassment-sri-lanka > accessed 02 September 2025

[2] Sri Lanka Labour Force Statistics Quarterly Bulletin, Third Quarter 2023.

[3] 'Sexual Harassments in the Worldwide' (Salry.lk) < https://salary.lk/labour-law/fair-treatment/sexual-harassment/workplace-sexual-harassment-sri-lanka > accessed 02 September 2025

[4] The Universal Declaration of Human Rights 1948, art. 1.

[5] 'Sexual Harassments in the Worldwide' (Salry.lk) < https://salary.lk/labour-law/fair-treatment/sexual-harassment/workplace-sexual-harassment-sri-lanka > accessed 02 September 2025

For example, when considering the sexual harassment of an employee to approve a housing loan, it can be shown that he/she is prevented from seeking better prospects and is tied to the job. This is also known as **'This for that harassment'**. Because it takes a sexually threatening form. Such a situation extends to imposing a reciprocal liability on the employer in the legal context of the United States of America[6].

Another form is sexual harassment in a hostile work environment. This is known as **"Hostile working environment harassment"**. It is verbal, nonverbal, or physical conduct of a sexual nature that unreasonably interferes with or intimidates an employee's work performance. **"Quid Pro Quo Harassment"** discussed above can also be argued to be a form of sexual harassment in a hostile work environment. This includes behaviors that are not already committed but are threatening in nature to deny the victim tangible job benefits.

On the surface, this is a form of "Quid Pro Quo Harassment"[7]. Despite these brutal forms of sexual harassment in the workplace, one way some people justify this is by saying that women are inciting men to sexual harassment by the way they dress in the workplace. However, the fact that even women who adhere to the workplace dress code and wear the Islamic religious veil are subjected to sexual harassment in the workplace can be pointed out as practical situations that undermine this argument[8].

In ***Sri Lankan Airlines Limited v P.R.S.E. Corea***, [9] the Supreme Court of Sri Lanka upheld the employer's decision to take disciplinary action against a senior flight attendant accused of hugging, kissing, and making unwelcome sexual advances toward a colleague, ruling that such conduct constituted sexual harassment and could not be tolerated in any professional setting; the Court emphasized that both public and private sector employers bear a legal and moral obligation to maintain a safe, respectful, and dignified workplace environment for all employees, and that failure to address harassment would undermine employee rights and professional standards; this decision reinforced the principle that prompt, fair, and effective action against workplace misconduct is necessary to safeguard the integrity of the working environment, prevent future harassment, and uphold equality and respect within employment relationships, thereby setting a strong precedent for addressing sexual harassment cases in Sri Lanka's labour law context.

[6] Meritor Savings Bank, FSB v Vinson, 477 U.S. 57.

[7] Burlington Industries, Inc v Ellerth (1998) 97/569.

[8] 'Sexual Harassments in the Worldwide' (Salry.lk) <https://salary.lk/labour-law/fair-treatment/sexual-harassment/workplace-sexual-harassment-sri-lanka> accessed 02 September 2025

[9] Sri Lankan Airlines Limited v P.R.S.E. Corea (S.C. Appeal No. 91/2017).

Furthermore, in the case of ***Brandix Apparel Solutions Limited v Fernando***,[10] the court firmly held that sexual harassment in the workplace is unlawful under Sri Lankan labour law, recognizing it as a violation of employee dignity and equality, and stressing that such misconduct disrupts workplace harmony, lowers morale, reduces productivity, and causes legal as well as economic harm to employers, thereby reinforcing the legal duty of employers to provide a safe, respectful, and harassment-free environment for all employees regardless of gender; furthermore, the judgment made clear that employers who fail to take preventive and remedial measures against harassment risk not only legal liability but also reputational harm and operational inefficiency, thus emphasizing the dual importance of compliance with labour law obligations and fostering a positive organizational culture that protects employees' rights, ensures equality, and promotes a healthy and productive working environment, aligning with broader principles of fairness, justice, and non-discrimination.

Looking at the applicable law in this regard, Sri Lanka is the only South Asian country that explicitly punishes sexual harassment in the workplace in its penal code. The Sri Lankan Penal Code includes provisions that specifically address and criminalize various forms of sexual harassment and provides a legal framework to protect individuals from such misconduct in the workplace. The Sri Lankan Penal Code defines sexual harassment as ***"sexual harassment by means of consensual sexual advances made by a person in a position of authority at work or in any other place, whether by word or deed"***[11]. The victim can report it through a police complaint and the perpetrator can be further charged with the offence of **gross indecency** [12]or **aggravated sexual abuse**[13].

Furthermore, the "right to equality" enshrined in the Constitution, the supreme law of Sri Lanka, emphasizes that "no person shall be subjected to any discrimination on the basis of sex" [14]. Accordingly, since sexual harassment in the workplace is discrimination based on sex, it is argued that it is also a violation of a fundamental right of the victim. Furthermore, since women as well as men are subjected to sexual harassment in many areas of employment in Sri Lanka, it goes against the right to **"freedom to engage, alone or in association with others, in any lawful occupation, profession, industry, trade or enterprise"**[15] recognized by the Constitution.

[10] Brandix Apparel Solutions Limited v Fernando [S.C. Appeal 60/2018, S.C.M 05.05.2022].

[11] Penal Code of Sri Lanka 1883, s 345, explanation 1.

[12] ibid, s 365A.

[13] ibid, s 365B.

[14] The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 12(2).

[15] ibid, art. 14(1)(g).

Although the above two fundamental rights are subject to the limitations of **15(5), 15(7)** and **15(8)**[16], the lack of regulation or limitation of sexual harassment and discrimination at the workplace of women serving in the security forces is a gap in the law in this regard. Furthermore, the **"right to be free from torture and cruel, inhuman and degrading treatment"**[17] is not subject to any limitation and considering the serious impact of sexual harassment at the workplace on the physical and mental well-being of the victims, it can be argued that it is positive to subject it to the broad interpretation of this **Article 11**. Accordingly, the procedure for obtaining relief for such victims through a fundamental rights case will be more practical.

Further, sexual harassment, when considered as part of the offence of bribery, becomes a punishable offence[18]. In the case of ***Kathubdeen v Republic of Sri Lanka***,[19] the court clarified that corruption under the Bribery Act is not confined to monetary or material inducements but includes any form of gratification, holding that a state supervisor who demanded a sexual favour from a female employee as a precondition for approving her transfer from Colombo to Kalutara was guilty of soliciting a bribe, thereby affirming that public officials are legally and ethically obliged to perform their duties with integrity and impartiality, free from personal exploitation or abuse of authority, and that coercing or conditioning an employee's legitimate administrative request upon sexual compliance constitutes an abuse of power, a violation of public trust, and a punishable offence under anti-corruption laws, ultimately reinforcing the wider principle that the law seeks to protect individuals from exploitation while ensuring that public service is exercised solely in the public interest and not manipulated for private, immoral gain.

The Sri Lanka Chamber of Commerce and the Sri Lanka Employers' Association, in collaboration with the World Labour Organization (ILO), have urged all institutions in the country to create and maintain a "Code of Conduct" and to include relevant provisions to prevent sexual harassment in their workplaces. It is positive that the principles of natural justice are adhered to in the investigations conducted and that 50% representation of women and men is mandatory on the investigation panel. There is also the opportunity to seek relief from industrial associations in the context of labor laws against sexual harassment in the workplace.

[16] ibid, arts. 15(5) (7) (8).

[17] ibid, art.11.

[18] Bribery Act No.11 of 1954.

[19] Kathubdeen v Republic of Sri Lanka (H.C. COLOMBO B 839/93).

[20] 'Sexual Harassments in the Worldwide' (Salry.lk) < https://salary.lk/labour-law/fair-treatment/sexual-harassment/workplace-sexual-harassment-sri-lanka > accessed 02 September 2025

As a State Party to the International Labour Organization and the United Nations, Sri Lanka has ratified several conventions related to the elimination of sexual harassment in the workplace. Among them, **the Discrimination (Employment and Occupation) Convention, 1958 No.111 and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979** are prominent. Sri Lanka has a state responsibility to eliminate all forms of discrimination according to the **"ILO Decent Work Agenda"** introduced by the International Labour Organization. Furthermore[21], the commitment of a State Party to the **CEDAW Convention** to eliminate sexual harassment in the workplace is important here[22]. Further, legal remedies for sexual harassment in the workplace can be obtained indirectly through the ***Industrial Disputes Act*** [23]***, the Employment of Women, Minors and Children Act***[24]***, the Trade Unions Ordinance***[25] and the ***Workers' Compensation Ordinance***[26].

Weaknesses in the Existing Law

Although there are several legal provisions and remedies against sexual harassment in the workplace, it is apparent that the role of statutory law is not sufficient to successfully mitigate this, which is one of the most prominent problems identified in labor law.

Although sexual harassment in the workplace is recognized as a criminal offense in **Section 345 of the Penal Code**, unlike the burden of proof that is greater than the burden of proof in civil law, the fact that the victim-complainant has the burden of proving beyond reasonable doubt can be argued to complicate the victim's access to legal relief.

Under the fundamental rights granted by **Articles 12 and 14 of the Constitution**, a fundamental rights case can be filed against sexual harassment in the workplace only if it is committed by an executive or administrative authority. It is a problem that the basic rights of women workers, domestic workers, and migrant workers, especially those in the plantation sector who are most vulnerable to violence, are not addressed.

[21] Discrimination (Employment and Occupation) Convention, No.111, 1958, art. 12.

[22] Convention on the Elimination of All Forms of Discrimination against Women 1979, art. 11(1).

[23] Industrial Disputes Act No.43 of 1950.

[24] Employment of Women, Young Persons, and Children Act, No.47 of 1956.

[25] Trade Unions Ordinance No.14 of 1935.

[26] Workmen's Compensation Ordinance No.19 of 1934.

The Bribery Act provides limited remedies for ***'Quid Pro Quo Harassment'*** type of sexual harassment and thus does not cover ***'Hostile Working Environment Harassment'***.

The lack of proper compliance by employers with the decisions of the labour courts on such complaints and the lack of power after the relevant judgments are given, not only does the industrial councils have to file complaints with the Magistrate's Courts, but the excessive power of the Minister over the industrial councils creates unfair conditions for the victims[27].

The background of the fact that it is not mandatory to impose a set of professional ethics in many institutions also creates a negative situation here. Accordingly, it is a timely need to examine the proposals and recommendations that address such negative conditions of the existing laws against sexual harassment in the workplace.

Suggestions and Recommendations

Based on all the above, it can be concluded that sexual harassment in the workplace, which is one of the most serious problems identified in the Sri Lankan Labour Law, should be specifically identified by law and all possible steps should be taken to prevent it. This will create a safer and more respectful work environment and improve the productivity of women and men in employment.

- **Enact a specialized legislation that makes sexual harassment in the workplace illegal.**

The recommendation to enact specialized legislation making workplace sexual harassment illegal draws inspiration from the landmark Indian case ***Vishakha and others v State of Rajasthan*** [28], where the Supreme Court of India, for the first time, recognized sexual harassment at the workplace as a **violation of fundamental rights under Articles 14, 15, 19(1)(g), and 21 of the Constitution**, and laid down comprehensive guidelines mandating the creation of complaint committees, employer responsibility for prevention, and mechanisms for redressal, thereby highlighting the urgent need for a safe and dignified working environment for women and forming the foundation for India's subsequent 2013 legislation; similarly, Sri Lanka should adopt a dedicated statute to define sexual harassment, impose preventive obligations on employers, ensure effective complaint-handling procedures, and guarantee remedies for victims, thereby strengthening workplace equality, discouraging misconduct, protecting women's

[27] Discrimination (Employment and Occupation) Convention, No.111, 1958, art. 5.
Industrial Disputes Act No.43 of 1950, s 33(2).

constitutional and human rights, and aligning domestic law with international commitments on gender justice and labour rights.

Furthermore, examples of specific legislation addressing gender equality and protection against discrimination can be observed in various jurisdictions, such as **Australia's Sex Discrimination Act**[29], which bars discrimination based on sex, marital status, pregnancy, or potential pregnancy across employment, education, and other spheres, and **Switzerland's Federal Act on Gender Equality**[30] which seeks to ensure equal treatment of women and men in the workplace by prohibiting both direct and indirect discrimination, guaranteeing fairness in hiring, remuneration, working conditions, promotions, and terminations, thereby exemplifying how different jurisdictions adopt comprehensive legal frameworks to address systemic inequality, protect individuals from gender-based bias, and promote substantive equality, illustrating a global recognition that legal mechanisms are essential for enforcing equal rights, fostering inclusive workplaces, and advancing social justice, while also serving as models for countries aiming to strengthen their own gender equality and anti-discrimination legislation within broader human rights and labor law contexts.

This will provide an opportunity to address the identified negative aspects of the existing law. That is, although it is currently recognized as a criminal offense under the Penal Code, by eliminating the complexity of the burden of proof, the enactment of such a unique statute will enable victims to move to a civil law procedure where they can prove the guilt of the offenders based on more weighty evidence and receive compensation. Furthermore, victims will be able to show that the offender has established the offense through such a unique statute, not limited to constructive termination.

- **Imposing vicarious liability on employers for such offences.**

By enacting specific legislation that addresses sexual harassment in the workplace, employers are encouraged to actively foster a safe and respectful work environment, because such laws not only directly hold the employees who commit harassment accountable for their actions, but also impose vicarious liability on the employers themselves, meaning that organizations can be legally responsible for the misconduct of their staff if it occurs in the course of employment or within the scope of their work duties, which in turn incentivizes employers to implement robust preventive measures such as clear anti-harassment policies, employee

[28] Vishakha and others v State of Rajasthan AIR 1997 SC 3011.

[29] Sex Discrimination Act 1984.

[30] Federal Act on Gender Equality (Gender Equality Act, GEA) 1996.

training programs, reporting mechanisms, and effective disciplinary procedures, ensuring that management takes proactive steps to monitor workplace behavior, address complaints promptly, and cultivate a culture of zero tolerance toward sexual harassment, thereby creating an organizational atmosphere where all employees are protected, aware of their rights and responsibilities, and motivated to maintain professional conduct.

- **Bringing necessary amendments to existing effective acts.**

Bringing necessary amendments to existing labour law acts is a critical step toward creating safer and more equitable workplaces, as the current legal framework in Sri Lanka, while providing general protections for workers, does not adequately or explicitly address the pervasive issue of sexual harassment, and therefore, by amending key statutes such as the Industrial Disputes Act, the Trade Unions Ordinance, and the Workers' Compensation Ordinance, lawmakers can establish clear definitions of sexual harassment, outline preventive obligations for employers, provide accessible complaint mechanisms, mandate timely investigation and redressal procedures, ensure protection against victimization or retaliation for complainants, and introduce penalties or compensation measures for perpetrators, thereby filling existing legislative gaps, promoting awareness and accountability, and fostering a culture of respect and dignity at work, while simultaneously harmonizing domestic legislation with international labour standards and human rights principles, ultimately strengthening the legal safeguards available to employees and empowering workers to assert their rights confidently.

Conclusion

In conclusion, a detailed examination of the position of probationary and domestic workers under Sri Lanka's labour law, alongside the persistent issue of sexual harassment in the workplace, highlights significant deficiencies that impede the realization of dignified, safe, and equitable working environments. Probationary workers, often excluded from the full scope of labour protections, and domestic workers, frequently subjected to informal arrangements and inadequate safeguards, face vulnerabilities that demand urgent attention. Addressing these gaps is not only a legal necessity in line with Sri Lanka's obligations under national law and international labour standards, but also a profound moral and social responsibility. By instituting clear legislative regulations, enhancing protective measures, and ensuring robust enforcement mechanisms, Sri Lanka can align itself with the standards set by the International Labour Organization (ILO) and promote workplace environments where every worker—regardless of status, sector, or contract type—is treated with fairness, respect, and dignity. However,

legal reform alone is insufficient; the effective realization of these protections requires the collaborative engagement of policymakers, employers, trade unions, and civil society actors. Only through sustained, collective effort can Sri Lanka ensure the protection of fundamental rights, prevent workplace abuses, and foster a culture of equality, respect, and dignity for all workers.

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THE CRUCIAL ROLE OF THE GOVERNMENT ANALYST IN COMBATING DRUG RELATED CRIMES

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In the intricate web of criminal justice, where evidence speaks louder than words, government analysts serve as the unsung heroes who transform seized substances into irrefutable scientific testimony. Their laboratories represent the crucial bridge between law enforcement operations and courtroom convictions, where sophisticated analytical techniques meet the stringent demands of legal proceedings. The role of government analysts in drug-related crimes extends far beyond simple identification—they are the guardians of scientific integrity in the pursuit of justice, wielding advanced instrumentation and rigorous methodologies to ensure that every piece of evidence withstands the scrutiny of legal examination.

These scientific professionals operate in a world where precision meets justice, where the smallest analytical error could mean the difference between conviction and acquittal, between protecting society from dangerous substances and wrongfully prosecuting an innocent individual. Their work requires not only technical expertise but also an unwavering commitment to accuracy, reliability, and ethical practice. Every sample that enters their laboratory carries with it the weight of potential legal consequences, making their role both technically challenging and morally significant.

The Foundation of Forensic Drug Analysis

Government analysts operate within a carefully structured legal framework, primarily guided by the Poisons, Opium and Dangerous Drugs Ordinance. This legislative foundation provides the comprehensive blueprint for their analytical approach, defining which substances require investigation, establishing the parameters for their scientific examinations, and creating the legal basis for their findings to be admissible in court proceedings. The legislation serves as more than just a regulatory document—it represents the intersection of scientific capability and legal necessity.

The recent amendments, particularly the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022, have significantly refined these parameters, creating more precise thresholds for analysis and establishing clearer guidelines for quantification procedures. These amendments reflect the evolving understanding of both the scientific capabilities of modern analytical techniques and the practical

needs of the criminal justice system. The legislation recognizes that different analytical approaches are appropriate for different circumstances, balancing the need for thorough analysis with the practical limitations of laboratory resources and time constraints.

The scope of their work encompasses an extraordinarily broad spectrum of controlled substances, each presenting unique analytical challenges and requiring specialized knowledge. From traditional narcotics like heroin, morphine, and opium—substances that have been the focus of drug enforcement for decades—to modern synthetic drugs such as methamphetamine and amphetamine-type stimulants that represent the cutting edge of illicit drug manufacturing. The complexity extends to cannabis and its various preparations, cocaine in its multiple forms, and the vast array of controlled pharmaceutical drugs that are increasingly diverted from legitimate medical use.

The emergence of new psychoactive substances (NPS) has added another significant layer of complexity to the analyst's role. These synthetic compounds, often designed to mimic the effects of traditional controlled substances while technically falling outside existing legislation, require analysts to stay current with rapidly evolving drug trends and continuously adapt their methodologies. The challenge is compounded by the fact that these substances often appear faster than analytical standards can be developed, requiring analysts to employ innovative approaches to identification and quantification.

Cannabis, cocaine, and controlled pharmaceutical drugs round out the primary focus areas, each requiring specialized knowledge and analytical approaches. The diversity of these substances reflects the complex landscape of modern drug trafficking, where traditional narcotics coexist with synthetic alternatives and prescription drug abuse continues to rise. This expanding scope demands not only technical expertise but also continuous education and training to keep pace with the evolving nature of illicit substances and the sophisticated methods employed by those who manufacture and distribute them.

In addition to laboratory-based analysis, government analysts are increasingly called upon to conduct crime scene analysis of narcotic drugs in the field when circumstances require immediate assessment. This field analysis capability extends their expertise beyond the controlled laboratory environment, enabling rapid preliminary assessments at crime scenes, clandestine laboratory sites, or during large-scale drug seizures where immediate analytical guidance is crucial for operational decisions. Field analysis requires portable analytical equipment and modified procedures that maintain scientific rigor while accommodating the practical constraints of on-site investigation.

ISO 17025 Accreditation: The International Quality Standard

Quality assurance in forensic analysis reaches its pinnacle with ISO 17025 laboratory accreditation, an international standard that represents the highest level of technical competence and reliability in testing laboratories worldwide. For heroin and cocaine analysis, government analysts operate under this rigorous accreditation system, ensuring their results meet internationally recognized standards of accuracy, reliability, and legal defensibility.

ISO 17025:2017 encompasses far more than simple technical procedures; it establishes comprehensive management systems that govern every aspect of laboratory operation. These systems cover personnel qualifications and ongoing competency assessment, equipment calibration and maintenance protocols, environmental monitoring and control, sample handling and chain-of-custody procedures, detailed documentation requirements, and systematic proficiency testing programs. This standard ensures that every aspect of the analytical process is controlled, monitored, documented, and continuously improved through regular review and assessment.

The accreditation process itself is rigorous and ongoing, involving regular audits by external assessment bodies who evaluate not only technical competence but also adherence to quality management principles. Laboratories must demonstrate proficiency through inter-laboratory comparison programs, maintain detailed records of all analytical work, and implement corrective action procedures when deviations from established protocols are identified. This creates an environment where every decision is traceable, every result is verifiable, and every procedure is validated against established scientific principles.

The Weight Threshold System

Government analysts employ a sophisticated, systematic methodology that begins with precise gross weight determination—a critical process that serves as the gateway to more detailed and resource-intensive analysis. This approach recognizes the practical reality that analytical resources, while extensive, are not unlimited, and must be allocated efficiently while ensuring that cases with the most serious legal implications receive the most comprehensive and thorough scientific examination available.

The gross weight measurement process involves the use of calibrated analytical balances that are regularly verified for accuracy and precision under accredited standards. These instruments, capable of measurements to the milligram level, undergo regular calibration using certified reference weights, with

accuracy readings continuously monitored through quality control procedures. Environmental factors such as air currents, vibrations, and temperature fluctuations are carefully controlled to ensure measurement precision, as even small variations in gross weight can have significant implications for subsequent analytical decisions.

The two-gram threshold represents a pivotal point in the analytical process. When the gross weight of a substance equals or exceeds two grams, analysts proceed with full quantification procedures. This threshold is not arbitrary but is carefully calibrated to align with the penalty structures established in the 2022 amendment act. This connection between analytical thresholds and legal penalties demonstrates the careful integration of scientific methodology with judicial requirements.

For substances containing heroin, methamphetamine, cocaine, and morphine, this weight-based approach becomes particularly crucial. These substances often carry the most severe penalties under drug legislation, making accurate quantification essential for appropriate legal proceedings. The analyst's determination of gross weight can significantly impact the charges filed and the potential sentences imposed, highlighting the immense responsibility carried by these scientific professionals.

Qualitative Analysis: The Foundation of Drug Identification

Every seized sample undergoes initial identification to confirm whether a dangerous drug is present. This stage is crucial because the mere possession of a prohibited substance—even in small quantities—can carry legal consequences. This qualitative analysis phase serves as the first line of defense in distinguishing controlled substances from innocent materials.

A critical aspect of qualitative analysis involves the extraction of drugs from different matrices, particularly when substances are combined with food items such as chocolates, candies, and other edible products. This emerging trend in drug trafficking presents unique analytical challenges, as controlled substances are deliberately incorporated into seemingly innocent consumable products to evade detection. The extraction process requires specialized techniques to isolate the active compounds from complex food matrices while maintaining the integrity of the controlled substances for accurate identification and quantification.

Preliminary tests, Thin Layer Chromatography (TLC), Raman Spectroscopy, and advanced analytical techniques, such as Fourier Transform Infrared Spectroscopy (FTIR) and Gas Chromatography-Mass Spectrometry (GC-MS), are used to

confirm whether the seized substance is among those specified in the Ordinance or not. In cases where no controlled substances are detected, the Government Analyst confirms the absence of any controlled drugs, a finding that can be just as important as a positive identification in legal proceedings. This negative confirmation protects individuals from wrongful prosecution and ensures that law enforcement resources are directed toward genuine drug offenses.

Preliminary Tests: The First Line of Detection

The analytical journey begins with preliminary tests, rapid screening methods that provide initial indication of whether controlled substances may be present in seized materials. These tests, also known as presumptive tests, represent the first scientific examination that seized materials undergo and serve as crucial gatekeepers in the analytical process. While not definitive on their own, preliminary tests provide valuable information that guides subsequent analytical decisions and helps prioritize laboratory resources.

These tests are designed for simplicity and speed, often requiring only a few milligrams of sample and producing results within minutes. However, their simplicity should not be mistaken for lack of sophistication—each test has been carefully developed and validated to provide reliable presumptive identification while minimizing false positives and negatives. The interpretation of color test results requires experience and training, as factors such as the presence of adulterants, sample purity, and environmental conditions can influence color development.

Thin Layer Chromatography: Separation and Identification

Thin Layer Chromatography (TLC) represents a significant step forward in analytical sophistication, providing a cost-effective yet powerful separation technique that can distinguish between different compounds within complex mixtures. This technique has been a cornerstone of forensic drug analysis for decades, offering reliable identification capabilities with relatively simple equipment and procedures.

TLC provides several advantages in forensic analysis: it's relatively inexpensive, can analyze multiple samples simultaneously, requires minimal sample preparation, and provides visual results that can be easily documented and preserved. However, it also has limitations—it provides only qualitative information, cannot distinguish between very closely related compounds, and requires experienced interpretation of results. Despite these limitations, TLC remains a valuable tool in the analytical arsenal, particularly useful for screening purposes and as a confirmatory technique when combined with other analytical methods.

Gas Chromatography-Mass Spectrometry (GC-MS): Definitive Identification

Gas Chromatography-Mass Spectrometry (GC-MS) represents the gold standard for definitive compound identification in forensic drug analysis, combining the separation power of gas chromatography with the identification capabilities of mass spectrometry. This powerful combination provides unambiguous identification of unknown compounds through the generation of characteristic mass spectral fingerprints that serve as molecular signatures. The resulting mass spectrum serves as a unique fingerprint for each compound. These spectra can be compared against comprehensive databases containing spectra of known compounds, including controlled substances, common adulterants, and cutting agents.

GC-MS proves particularly valuable when analyzing mixtures where more than one drug is present, a common occurrence in contemporary drug trafficking where poly-drug combinations are increasingly prevalent. The technique's ability to separate and individually identify multiple compounds within a single sample makes it indispensable for comprehensive drug analysis, enabling analysts to detect and identify complex drug combinations that might include multiple controlled substances, adulterants, and cutting agents.

The power of GC-MS lies in its ability to provide both qualitative and quantitative information simultaneously. The chromatographic retention time provides one level of identification, while the mass spectrum provides definitive confirmation. This dual identification approach makes GC-MS results highly reliable and legally defensible, which is why this technique is often required for confirmatory analysis in forensic laboratories.

The interpretation of GC-MS data requires significant expertise and experience. While computerized library searching can provide initial compound identification, the final interpretation must be performed by trained analysts who understand the nuances of mass spectral interpretation, including the effects of background interferences, spectral artifacts, and unusual fragmentation patterns that may occur with certain types of samples.

Gas Chromatography with Flame Ionization Detection (GC-FID): Quantitative Precision

At the heart of drug quantification lies gas chromatography (GC), a sophisticated analytical technique that separates and measures the components of complex mixtures. For those unfamiliar with scientific instrumentation, gas chromatography can be understood as an extremely precise sorting system that can distinguish between different chemical substances with remarkable accuracy.

The process begins when a sample is heated until it becomes a gas, then carried through a specially designed column by an inert gas. Different substances travel through this column at different speeds, allowing them to be separated and identified. The flame ionization detector (FID) commonly used in these analyses acts like a highly sensitive scale, measuring the exact amount of each substance as it emerges from the column.

This technique is particularly well-suited to drug analysis because it can distinguish between the active drug compound and the various other substances typically found in seized materials. Street drugs rarely consist of pure active ingredients; instead, they contain complex mixtures of manufacturing impurities, byproducts, adulterants, and deliberate additives used to increase bulk or enhance effects.

The precision of gas chromatography allows analysts to determine not just the presence of controlled substances, but their exact concentrations. This quantitative capability is crucial because legal penalties often depend on the amount of pure drug present rather than the total weight of the seized material.

Understanding Detection and Quantification Limits: The Boundaries of Analytical Capability

The concepts of Limit of Detection (LoD) and Limit of Quantification (LoQ) represent fundamental parameters that define the boundaries of what any analytical method can reliably accomplish. These limits are not merely theoretical concepts but have practical implications that directly impact forensic casework and legal proceedings. Understanding these limitations is crucial for proper interpretation of analytical results and for communicating the significance of analytical findings to legal professionals and courts.

The Limit of Detection represents the smallest amount of a substance that can be reliably distinguished from background noise in the analytical system. This is the point at which an analyst can confidently state that a particular substance is present in a sample, even though the exact amount cannot be precisely determined. Below this level, the analytical signal becomes indistinguishable from the random fluctuations inherent in any measurement system, making it impossible to confidently distinguish between a true positive result and a false positive caused by instrumental noise.

The Limit of Quantification represents a higher threshold—the minimum amount of substance required for accurate and precise quantitative measurement. While detection below this level may be possible, quantitative measurements below the LoQ are considered unreliable due to excessive uncertainty.

These limits are not universal constants but are specific to each laboratory and analytical method. They depend on factors such as instrument sensitivity, environmental conditions, and the specific procedures employed. Regular validation studies ensure that these limits are accurately determined and consistently maintained.

When drug concentrations in seized samples fall below the LoQ but above the LoD, analysts face a particular analytical and reporting challenge. While they can confirm the presence of controlled substances—meeting the scientific threshold for positive identification—they cannot provide accurate quantitative measurements that would be suitable for legal proceedings requiring specific concentration data. In these cases, results must be reported as "detected" or "trace levels," indicating positive identification without specific numerical concentration values.

The Complexity of Drug Composition

Modern drug analysis must navigate the reality that seized substances rarely contain only the controlled drug of interest. Street drugs typically contain a complex array of components, each potentially affecting the analytical process and the interpretation of results. Manufacturing impurities arise from incomplete chemical reactions or contaminated starting materials. Byproducts result from side reactions during synthesis. Adulterants are substances deliberately added to mimic or enhance the effects of the primary drug. Additives include diluents used to increase bulk and profits.

Government analysts must distinguish between these various components and focus their reporting on the substances specifically controlled under relevant legislation. This selective reporting requires sophisticated analytical techniques and extensive knowledge of drug chemistry. The presence of these additional substances can complicate analysis, potentially interfering with detection methods or masking the presence of controlled substances.

The Future of Forensic Drug Analysis

As drug trafficking organizations become more sophisticated and new psychoactive substances continue to emerge, government analysts must continuously evolve their methods and capabilities. The challenge of staying ahead of synthetic drug development requires ongoing investment in new analytical techniques, continuous training, and close collaboration with international forensic communities.

The integration of advanced technologies such as high-resolution mass spectrometry and automated sample preparation systems promises to enhance both the speed and accuracy of drug analysis. These developments will enable analysts to handle increasing caseloads while maintaining the high standards of accuracy and reliability demanded by the justice system.

Communication with global authorities when new drug types are identified represents a critical component of international drug control efforts. Government analysts play a vital role in this global intelligence network, sharing analytical findings and methodological developments with international partners to enhance collective capabilities in combating emerging drug threats. This collaborative approach ensures that analytical innovations and new substance identifications are rapidly disseminated across the global forensic community, strengthening the worldwide response to evolving drug trafficking patterns.

Conclusion

Government analysts in drug-related crimes serve as the critical link between law enforcement activities and judicial proceedings. Their work transforms seized materials into scientifically valid evidence, supporting the fair and accurate application of justice. Through adherence to international standards, employment of sophisticated analytical techniques, and continuous professional development, these scientists ensure that the fight against drug trafficking is grounded in reliable, defensible evidence.

Their role extends beyond mere technical analysis to encompass quality assurance, legal compliance, and scientific integrity. As the landscape of drug trafficking continues to evolve, the expertise and dedication of government analysts remain essential pillars in the ongoing effort to protect society from the dangers of illicit drugs. Behind every successful drug prosecution lies the careful, methodical work of these scientific professionals, whose commitment to accuracy and reliability helps ensure that justice is both served and deserved.

JUSTICE NIMAL GAMINI AMARATHUNGA MEMORIAL AWARD

WINNING ARTICLE

Justice Nimal Gamini Amarathunga Memorial Award Winning Article

CONSTITUTIONAL CROSSROADS: REFORMING ANTI-LGBT LAWS IN SRI LANKA'S ECONOMIC CONTEXT

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1. Introduction: Penal Code and Pink Markets in Conflict

The existence of penal provisions that criminalize consensual same-sex intimacy within the legal system of Sri Lanka reveals a clear conflict between law, constitutional principles, and national economic goals. The continuing presence of Sections 365 and 365A of the Penal Code, despite their colonial origin and doubtful enforceability, has created a form of legal limbo that is neither fully dormant nor consistently applied. This uncertainty gains particular importance when viewed against the dependence of Sri Lanka on international tourism as a key sector of the economy, in which perceptions of safety and inclusivity are increasingly important to growth.

Tourism contributes significantly to the gross domestic product and foreign exchange earnings of Sri Lanka, and the state has identified it as essential to post-conflict and post-pandemic recovery[1]. Within this framework, niche markets such as LGBTQ tourism have become highly competitive among regional destinations. Studies show that LGBTQ travellers generally have higher disposable incomes, stay longer, and are more likely to revisit destinations that are visibly inclusive [2]. The paradox is clear: Sri Lanka promotes itself internationally as a welcoming and culturally rich destination, while its legal system still contains provisions that appear hostile to LGBTQ persons, including foreign visitors[3].

This contradiction is made more complex by the nature of enforcement. Although there have been no recorded convictions under Sections 365 and 365A for private, consensual same-sex conduct since independence[4] , these provisions are still used

1 Sri Lanka Tourism Development Authority, Annual Statistical Report 2022 (SLTDA 2023) 5.

2 World Tourism Organization, Global Report on LGBT Tourism (UNWTO 2017) 11–13.

3 International Bar Association, 'Proposed Decriminalization of LGBTQI+ Rights in Sri Lanka' (IBA, 2023) <https://www.ibanet.org/ sri-lanka-proposed-Decriminalization-lgbtqi-rights> accessed 2 October 2025.

4 Equal Ground, The Status of Lesbian, Gay, Bisexual and Transgender Rights in Sri Lanka (Shadow Report to the UN Human Rights Committee, 2017) 8.

by police as tools of harassment, intimidation, and extortion[5]. The continued existence of such offences in the Penal Code produces what scholars describe as a chilling effect, where even the remote threat of prosecution restricts liberty, visibility, and autonomy[6] . Human Rights Watch notes that these sections are often cited to arrest or detain individuals, particularly transgender persons, without trial, embedding systemic discrimination through fear rather than conviction[7]. Ex, producing them for JMO examinations.

The central doctrinal issue concerns how law on the books can still exercise coercive power even when it is rarely enforced. USA philosopher, Lon Fuller's analysis of law as a framework for guiding conduct suggests that even dormant provisions communicate disapproval and enable discretionary misuse8. The persistence of these sections therefore sustains stigma, legitimises arbitrary enforcement, and undermines the predictability that is essential to the rule of law. Comparative jurisprudence, most notably the Supreme Court of India in ***Navtej Singh Johar v Union of India***[9], confirms that retaining colonial-era sodomy laws, regardless of enforcement, violates constitutional rights to dignity, equality, and privacy.

This article proceeds on the view that the current legal limbo of Sri Lanka cannot be analysed solely as a domestic human rights problem; it must also be considered in terms of its wider economic and reputational effects. The discussion addresses four interrelated concerns: the present status of these colonial provisions and their evolution through statutory amendment and constitutional interpretation; the significance of the Special Determination of the Supreme Court No 13 of 2023, which held that a Bill to repeal these provisions was not inconsistent with the Constitution. The practical impact of enforcement patterns on both citizens and tourists within the tourism sector; and the influence of legal uncertainty on investment behaviour, risk perception, and the position of Sri Lanka in the global tourism market.

The article employs a doctrinal and socio-legal approach, combining statutory and constitutional analysis with evidence from human rights reports, academic studies, and policy documents.

5 Human Dignity Trust, 'Sri Lanka: Country Profile' (HDT, 2022) https://www.humandignitytrust.org/country-profile/sri-lanka/ accessed 2 October 2025.

6 Ryan Goodman, 'Beyond the Enforcement Principle: Sodomy Laws, Social Stigma, and the Production of Silence' (2001) 1 Duke J Gender L & Policy 17, 21.

7 Human Rights Watch, All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka (HRW 2016) 22–24.

8 Lon Fuller, The Morality of Law (Yale University Press 1969) 106–110.

9 Navtej Singh Johar v Union of India (2018) 10 SCC 1 [253] (Per Chandrachud J).

Part I outlines the origins and evolution of Sections 365 and 365A within the wider context of colonial legal inheritance.

Part II analyses the Special Determination No 13 of 2023 of the Supreme Court, with emphasis on its reasoning and institutional constraints.

Part III examines how these provisions function in practice as instruments of coercion for locals and as potential risks for visitors.

Part IV assesses the economic implications of legal ambiguity for LGBTQ tourism, drawing on regional comparisons.

Part V argues that the determination of the Supreme Court provides a constitutionally sanctioned path for reform, framing decriminalisation as both a legal and economic necessity.

Part VI concludes by calling for urgent legislative repeal to resolve the contradiction between constitutional principle, social reality, and economic ambition.

2. Colonial Echoes: The Legacy and Language of Sections 365 and 365A

The Penal Code of Sri Lanka, enacted as Ordinance No. 2 of 1883, was a direct adoption of the Indian Penal Code of 1860, which had been drafted under the supervision of Lord Macaulay and reflected the moral standards of the Victorian period[10]. The decision of the governments of Sri Lanka to retain these provisions after independence in 1948, with only limited revision, entrenched a criminal-law framework that is colonial in origin and outdated in substance.

The Human Dignity Trust(A prominent NGO), in its global survey of sexual-offence laws, identifies Sri Lanka as one of the few post-colonial states in Asia that continues to maintain nineteenth-century prohibitions on consensual same-sex intimacy[11].

Section 365 of the Penal Code provides that whoever voluntarily has carnal intercourse "against the order of nature" with any man, woman or animal shall be punished with imprisonment of up to ten years and may also be liable to a fine[12].

The provision contains colonial drafting: it prohibits conduct not through definition but by reference to a moral category: **"against the order of nature",**

10 Penal Code Ordinance No 2 of 1883

11 Human Dignity Trust (n 5).12 Penal Code, s 365.

which is undefined in the Code. Section 365A criminalizes "acts of gross indecency between persons," punishable by imprisonment of up to two years or a fine, or both[13]. As for Section 365, the term "gross indecency" lacks statutory meaning, leaving its interpretation basically to the Police and courts[14].

Both provisions are marked by indeterminacy, a feature noted by international and domestic commentators. The International Bar Association has observed that such undefined language grants a wide scope for discretion to the judiciary and to law-enforcement officers, producing uncertainty and selective application[15]. This ambiguity makes the provisions open to abuse, since individuals cannot know in advance the scope of criminal liability, which undermines the principle of legality.

The Penal Code (Amendment) Act No. 22 of 1995 further expanded the reach of Section 365A by replacing the phrase **"any male person" with "any person," extending criminal liability to women as well**[16]. Although this was presented as promoting gender neutrality, it in effect broadened the offence to include lesbian relationships and thereby deepened discrimination furthermore.

The restrictive effect of Sections 365 and 365A has been strengthened by the application of other statutory provisions. Section 399 of the Penal Code, which penalizes "cheating by impersonation," has been used against transgender and gender-non-conforming individuals, treating expressions of gender identity as acts of misrepresentation[17].Likewise, the Vagrants Ordinance, a colonial-era statute originally designed to regulate public order, has been used to penalize solicitation and "indecent behaviour" in public spaces, often directed at sex workers and LGBTQ persons[18]. Even where private consensual intimacy remains beyond prosecution, public expression of identity remains vulnerable.

Modern case law directly interpreting Sections 365 and 365A is scarce, but available records show that these provisions are still invoked to justify arrests. **In Galabada Payalage Sanath Wimalasiri v Officer in Charge, Police Station Maradana**[19], In this case the petitioner was arrested under Section 365A for allegedly engaging in an indecent act in a public place. Although the case did not result in a reported judgment, it illustrates the use of Section 365A by the police to arrest people for public morality rather than to protect victims of coercion.

[13] Penal Code, s 365A.

[14] International Bar Association (n 3).

[15] ibid.

[16] Penal Code (Amendment) Act No 22 of 1995.

[17] Equal Ground (n 4) 10.

[18] Human Rights Watch (n 7) 16–17.

[19] Galabada Payalage Sanath Wimalasiri v Officer in Charge, Police Station SC Appeal No.32/11

Civil society organizations confirm that, despite the absence of clear judicial interpretation, arrests under Sections 365 and 365A occur with some frequency, often followed by release without charge.[20] The shadow report submitted by Equal Ground to the UN Human Rights Committee records repeated instances of detention under these provisions, largely as a means of intimidation rather than prosecution[21].

The vagueness and breadth of these sections have been widely criticized. iProbono (Prominent rights NGO) argues that the indeterminate phrases "order of nature" and "gross indecency" act as catch-all mechanisms, allowing selective targeting of vulnerable groups without legal certainty[22]. In Sri Lanka Journal of Social Sciences, Damitha Melegoda and Nadeeka Gamage the provisions reinforce dominant sexual norms in Sri Lanka, operating as a legal codification of stigma and thereby linking law with prejudice[23].

R. Wijewardene and C. Jayewardene, in their analysis of legal discourse(Law and LGBT people in Sri Lanka), describe the dominance of "literalist" and "reform-fixated" approaches in legal debate, the first holding to textual readings of the Penal Code, the second assuming that mere statutory reform will resolve social stigma[24]. Their analysis shows that legal ambiguity is sustained by discourse that resists interpretive development and overstates the power of legislative change.

The consequences of criminalization extend beyond formal criminal justice. Research indicates that the existence of Sections 365 and 365A perpetuates barriers in health care, housing, and employment. A working paper published on SSRN notes that many LGBTQ persons avoid seeking medical assistance for fear that revealing their identity could expose them to prosecution or discrimination[25]. Even when unenforced, the criminal provisions foster discrimination in private-law contexts, as employers, landlords, and service providers cite "illegality" to justify exclusion.

The combined effect is to construct LGBTQ identity as presumptively illicit within the legal imagination. The provisions serve both as symbolic markers of

[20] Human Dignity Trust (n 11)

[21] Equal Ground (n 17) 11.

[22] iProbono, 'LGBT Equality: Demystifying Decriminalization in Sri Lanka' (iProbono, 2020) <https://i-probono.com/case-study/lgbt-equality-demystifying-Decriminalization-in-sri-lanka/> accessed 3 October 2025.

[23] Damitha Melegoda and Nadeesha Gamage, 'Law, Stigma and Sexuality in Sri Lanka' (2020) Sri Lanka Journal of Social Sciences 28, 35 <https://flex.flinders.edu.au/file/ba973420-b53d-4a01-b507-579e9f640c7a/1/MelegodaGamage2020%20Librarycopy.pdf.pdf> accessed 3 October 2025.

[24] R Wijewardene and C Jayewardene, 'Law and LGBTIQ People in Sri Lanka: Developments in Legal Discourse' (2021) Colombo Law Journal 42, 47.

[25] Thilini Perera, 'Legal Silences and LGBTIQ Exclusion in Sri Lanka' (2021)) SSRN Working Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4995341> accessed 3 October 2025.

deviance and as functional instruments of coercion. The continued presence of these colonial echoes within the Penal Code of Sri Lanka therefore represents not only a historical anomaly but an active obstacle to equality, constitutional consistency, and economic progress.

3. Judicial Boundaries and Constitutional Openings: The Supreme Court Special Determination 13 of 2023

The Supreme Court Special Determination 13 of 2023[26] marks the most significant constitutional ruling on criminalisation based on sexual orientation in the post-independence period of Sri Lanka. Delivered on 9 May 2023, the determination on the Penal Code (Amendment) Bill repositioned the role of the judiciary from a passive guardian of inherited morality to a constitutional body supervising the legislative path towards equality. Although the ruling does not itself repeal the contested provisions, its doctrinal and symbolic impact is clear: the Supreme Court has confirmed that legislative decriminalisation of consensual same-sex intimacy is fully compatible with the Constitution.

The Penal Code (Amendment) Bill, a Private Member Bill presented by Hon. Premanath C. Dolawaththa MP, was gazetted on 17 March 2023 and placed on the Order Paper of Parliament on 4 April 2023[27]. Three petitioners then invoked Article 121(1) of the Constitution to challenge its constitutionality, arguing that the Bill would breach the duty of the State to protect Buddhism, undermine public morality, and threaten the welfare of minors[28].The Bill proposed the complete repeal of Section 365A and the replacement of Section 365 so that criminal liability would apply only to non-consensual acts and bestiality, removing all references to sexual orientation.[29] Clause 2 of the Bill expressly stated the legislative purpose as amending provisions that make sexual orientation a punishable offence.[30]

The introduction of the Bill indicated a wider recognition that colonial morality offences were incompatible with the constitutional structure of 1978 and with the international commitments of Sri Lanka under the ICCPR[31]. Public and professional commentary described the initiative as the first substantial parliamentary effort to align the Penal Code with modern principles of equality. [32]

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[26] Supreme CourtSpecial Determination 13 of 2023 In re Penal Code (Amendment) Bill (9 May 2023)27ibid 7

[28] ibid 7–8.

[29] ibid. See also The Indian Express, 'Sri Lanka Supreme Court Gives Green Light to Decriminalise Homosexuality' (17 May 2023).

[30] ibid.

The Supreme Court, sitting under Article 120 for pre-enactment review, limited its inquiry to whether the Bill, as a whole or in part, conflicted with the Constitution,[33] and concluded clearly that it did not.[34] When reasoning this finding, the Court reaffirmed the limits of its jurisdiction: the Court could assess constitutional consistency but not the wisdom or morality of legislation, which "lie entirely at the doorstep of the legislature".[35]

The Court rejected each of the petitioners' claims. First, the Court held that decriminalisation would not breach the duty of the State under Article 9 to protect Buddhism, because the Bill addressed only consensual private conduct and did not restrict the practice of religion.[36] Secondly, the Court found that concerns about HIV transmission, harm to minors, or moral decay were "specious," "speculative," and unsupported by factual evidence [37]. The Court reaffirmed that only "plausible and real-world possibilities" of constitutional conflict warrant judicial consideration, not conjecture or moral panic[38].

Having dismissed the challenges, the Supreme Court accepted the submissions of counsel supporting the Bill and noted that its passage would strengthen the guarantee of equality and allow individuals "to live with dignity".39 In doing so, the Court placed itself within the broader global trend recognising privacy and autonomy as constitutional values. Although the determination does not directly cite comparative precedents, reporting and commentary confirm that references to *Navtej Singh Johar v Union of India*[40] *and Lawrence v Texas* [41] were made during argument, and their influence is visible in the emphasis on equality, dignity, and privacy.

[31] Human Rights Commission of Sri Lanka, Observations on the Penal Code (Amendment) Bill (2023) para 12.

[32] Manthri.lk, 'Decriminalising Homosexuality' (9 May 2023) <https://manthri.lk/en/blog/posts/decriminalising-homosexuality> accessed 3 October 2025.

[33] Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Art 120.

[34] Supreme CourtSpecial Determination 13 of 2023(n 26) 43

[35] ibid 19–21. 36ibid 15.

[36] ibid 15.

[37] ibid 16–17.

[38] ibid 18.

[39] ibid 43.

[40] Navtej Singh Johar v Union of India (n 9)

[41] Lawrence v Texas (2003) 539 US 558.

The determination illustrates the institutional limits of pre-enactment judicial review under Articles 120–123 of the Constitution. The jurisdiction of the Supreme Court in such proceedings is confined to advisory scrutiny before enactment, and the Court lacks power to invalidate existing laws [42]. Consequently, Sections 365 and 365A remain operative until Parliament enacts reform. The effect of the determination is therefore to provide a constitutional green light rather than a direct repeal, an invitation to Parliament to legislate consistently with constitutional principles[43].

By declining to engage with arguments based on morality while affirming that decriminalisation is constitutionally permissible, the Court demonstrated a form of incremental constitutionalism. This approach, common in jurisdictions with limited judicial review, allows courts to advance rights discourse within institutional boundaries.[44]

Comparable approaches can be seen in India before Navtej and in early South African cases on sodomy laws prior to *National Coalition for Gay and Lesbian Equality,* where courts provided normative direction without immediate invalidation.[45] In this sense, S*upreme Court Special Determination 13 of 2023* positions Sri Lanka within a South Asian model of dialogic constitutionalism, where courts articulate constitutional values to inform legislative debate.[46]

The doctrinal importance of the determination lies in its articulation of constitutional standards for future criminal law. The Court stressed that penal provisions must comply with Article 13(6), which embodies the principle of legality (*nullum crimen sine lege),* and Article 12(1), which ensures equality before the law warning that vagueness and overbreadth in defining offences could themselves occasion unconstitutionality.[47] This reasoning effectively narrows the space for future criminalisation of consensual adult intimacy and establishes a constitutional basis for privacy and autonomy.

Furthermore, the Supreme Court invoked dignity and equal protection as legitimate legislative aims, thereby implicitly recognising sexual orientation as a protected attribute under constitutional equality.48 This interpretive approach

[42] Constitution of the Democratic Socialist Republic of Sri Lanka, Arts 82–83, 120–123.

[43] Supreme Court Special Determination 13 of 2023(n 26) 43; International Commission of Jurists, 'ICJ Welcomes Supreme Court Determination on Decriminalization' (11 May 2023).

[44] Channa Herath, 'Incremental Constitutionalism and Judicial Minimalism in Sri Lanka' (2021) Colombo L Rev 33, 41.

[45] National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) 28-32.

[46] Asanga Welikala, 'Dialogic Constitutionalism in Post-Authoritarian Sri Lanka' (2022) Asian J Comp L 17 1, 24.

[47] Supreme Court Special Determination 13 of 2023(n 26) 22.

[48] ibid 43.

parallels that of *Navtej Singh Johar v Union of India*, in which the Supreme Court of India interpreted Articles 14, 15, and 21 as encompassing sexual orientation within the idea of personhood.[49]The language of the Supreme Court of Sri Lanka, particularly the affirmation that citizens must be able "to live with dignity," reflects a similar evolutive understanding of fundamental rights.

The determination also reshapes the constitutional balance between Parliament and judiciary. By confirming that policymaking rests with the legislature while affirming the constitutionality of reform, the Supreme Court has reduced the political cost of decriminalisation.[50] Legislators now possess an authoritative judicial confirmation that reform aligns with the Constitution, lowering the likelihood of later constitutional challenge. Thus, the determination performs both legal and symbolic functions, transforming constitutional silence into legislative opportunity.

From a comparative perspective, *Supreme Court Special Determination 13 of 2023* represents a careful balance of judicial restraint and rights-affirming language. Its vocabulary: phrases such as "specious," "fanciful," and "doorstep of the legislature", recalls the restrained tone of earlier constitutional determinations such as *SGST Bill and Nation Building Tax*. Yet the substantive outcome is progressive, shifting the debate from moral legitimacy to constitutional conformity.[51]International legal bodies have welcomed this determination as aligning the legal framework of Sri Lanka with modern human rights standards.[52]

However, the limited jurisdiction of the Supreme Court means that genuine reform still depends on parliamentary action. The significance of the decision is therefore normative rather than operative: it provides a constitutional foundation for Parliament to bring the Penal Code into harmony with the guarantees of equality and dignity. Until that reform occurs, Sri Lanka remains in a constitutional interregnum in which the judiciary has pointed the direction, but the legislature must complete the path.

[49] Navtej Singh Johar v Union of India (n 9) 253

[50] Supreme Court Special Determination 13 of 2023(n 26) 19–21.

[51] ibid 20–21; Shaw v DPP [1962] AC 220 (HL).

[52] International Bar Association (n 3); International Commission of Jurists (n 43).

4. Law on Paper, Fear in Practice, How Legal Uncertainty Affects Locals and Tourists

Although no conviction has been recorded since independence, the provisions of the Penal Code continue to exercise coercive influence. Civil society reports document repeated instances of intimidation, arrest without charge and harassing by the police producing to Judicial Medical officers with "A" reports based on perceived sexuality of the LGBTQ persons.[53]

The NGO Human Dignity Trust characterises these provisions as dormant yet dangerous, sustaining fear even when not actively applied.[54]

Empirical studies show that exposure to such practices differs across geography, gender identity, and socio-economic position. Urban areas provide some protection for LGBTQ people through anonymity, while rural communities marked by conservatism and limited legal awareness heighten the risk of abuse and public torture.[55] Transgender persons, particularly those from economically marginalised or minority groups, face disproportionate targeting and harassment.[56] Policing behaviour often depends more on individual moral judgments than on legal thresholds, creating what scholars describe as a "roulette of enforcement". [57]

Foreign visitors are not exempt from this uncertainty. While there are no recorded convictions of tourists for consensual same-sex activity, incidents of questioning and extortion have been reported, especially in coastal regions.[58]

Since the Penal Code of Sri Lanka applies to all persons within its territory, tourists remain legally exposed.[59] The result is a chilling effect, leading many LGBTQ travellers to self-censor, avoid nightlife venues, and depend on informal safe-space networks rather than official tourism services.[60]

The Sri Lankan context highlights the gap between de jure criminalisation and de facto dormancy. In jurisprudential terms, this difference reflects the contrast between living law and dead-letter law: the first responsive to social conduct, the second persisting in text but detached from social legitimacy.[61] As author

[53] Equal Ground (n 4) 8; Human Dignity Trust (n 11) 7.

[54] Human Dignity Trust (n 11) 9

[55] Equité Sri Lanka, Community Perceptions Towards Sections 365 and 365A (2025) 12.

[56] Human Rights Watch (n 7) 22–23.

[57] Thilini Perera (n 25) 10.

[58] Michael Lavers, 'LGBTQ Travelers in Sri Lanka Face Legal Ambiguity' Washington Blade (5 May 2021).

[59] Penal Code of Sri Lanka s 2.

[60] World Tourism Organization (n 2) 12.

[61] Eugen Ehrlich, Fundamental Principles of the Sociology of Law (Harvard UP 1936) 493–495.

Roderick Macdonald explains, a statute may endure in written form while deriving obedience only from the residual fear it creates.[62] Sections 365 and 365A illustrate this phenomenon precisely, legally inert in enforcement yet symbolically coercive, maintaining their disciplinary influence through continued existence.

5. Invisible Markets, LGBTQ Tourism Under Legal Ambiguity

Globally, LGBTQ tourism is recognised as one of the most resilient and high-spending segments of the international travel industry. The World Tourism Organization (UNWTO) identifies LGBTQ travellers as a demographic with expenditure patterns above the average and a strong preference for destinations that provide legal safety and social acceptance, while the World Travel and Tourism Council (WTTC) regards inclusive marketing as a key factor in building reputational advantage in post-pandemic recovery.[63] Thailand and Taiwan demonstrate how legal certainty and policy support can stimulate tourism growth; following legislative reform, both countries recorded notable increases in arrivals and related investment.[64] The capacity of Sri Lanka to achieve comparable progress is restricted by continuing legal ambiguity. Domestic tourism operators often avoid promoting LGBTQ-friendly services due to the risk of backlash or regulatory attention.[65] The lack of explicit non-discrimination policies discourages infrastructure investment, including the introduction of gender-neutral facilities.[66] Comparable trends are visible in Malaysia and the Maldives, where moral conservatism limits the development of inclusive tourism.[67]

Reputationally, Sri Lanka faces disadvantage through its classification on global equality indices such as the ILGA "Purple Map" and the Spartacus Travel Index.[68] These rankings discourage travel intermediaries and investors who depend on legal-safety indicators when selecting destinations. Government communication adds to the inconsistency. While tourism authorities promote inclusivity for marketing purposes, the Penal Code still contains provisions that contradict this message.[69]

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[62] Roderick Macdonald, 'Dead-Letter Law and the Art of Legislation' (2001) 44 McGill LJ 1, 3; Colin Clarke, Symbolic Criminality in the Caribbean (UWI Press 2018) 49.

[63] World Tourism Organization (n 2) 12; World Travel & Tourism Council (WTTC), Diversity and Inclusion in Travel (2022) 9.

[64] Tourism Authority of Thailand, Gender Equality in Tourism Strategy (2022) 3–4; Taiwan Tourism Bureau, Post-Legalization Tourism Impact Report (2020) 9.

[65] Equal Ground, Position Paper on Tourism Inclusion (2023) 5.

[66] Human Dignity Trust (n 5) 9.

[67] ASEAN Tourism Research Centre, Moral Regulation and Tourism Development (2021) 33.

[68] ILGA-World, State-Sponsored Homophobia Report (2024) 26; Spartacus, Gay Travel Index 2024 (2024).

[69] Sri Lanka Tourism Development Authority, Press Statement on Market Diversification (2023).

The International Bar Association notes that, without legislative certainty, tourism stakeholders depend largely on conjecture regarding enforcement .[70] Consequently, international networks and investors increasingly favour jurisdictions with clearer equality protections, such as Nepal and India.[71] The economic cost of this uncertainty is considerable loss of tourism revenue, erosion of investor confidence, and decline in market competitiveness.[72]

Nevertheless, practical short-term measures can be adopted. Tourism authorities could introduce voluntary non-discrimination guidelines, and private-sector certification could identify establishments committed to safe and inclusive practices.[73] Transparent communication of the existing legal framework: acknowledging ongoing reform efforts while clarifying current risks, can reduce uncertainty without breaching domestic law. Collaboration with the International LGBTQ+ Travel Association could enhance both transparency and risk communication[74]. Yet long-term stability requires legislative certainty through statutory reform.

6. Judicially Sanctioned Reform, A Legal and Economic Imperative

The *Supreme Court Special Determination No 13 of 2023* performs a constitutional role that extends beyond adjudication, and it constitutes a judicial invitation to Parliament to legislate in accordance with constitutional morality. The conclusion of the Supreme Court that decriminalisation of consensual same-sex intimacy "is not inconsistent with the Constitution" provides an authoritative foundation for legislative action and a normative endorsement that protects reform advocates from accusations of constitutional impropriety.[75] Parliament now possesses explicit constitutional authority to repeal the discriminatory provisions without risk of contradiction.

Reform must commence with the repeal or replacement of Sections 365 and 365A, introducing gender-neutral offences confined to non-consensual acts and those involving minors.[76] Supporting measures should include the enactment of anti-discrimination legislation covering sexual orientation and gender identity[77], in

[70] International Bar Association (n 3).

[71] Nepal Tourism Board, Diversity and Inclusion in Tourism Policy (2020) 14; Indian Ministry of Tourism, Inclusive Tourism Report (2021) 17.

[72] World Bank, The Economic Case for LGBT Inclusion (2020) 14.

[73] Sri Lanka Tourism Development Authority (n 69)

[74] International LGBTQ+ Travel Association (IGLTA), Code of Conduct for Partner Destinations (2023) 9.

[75] Supreme Court Special Determination 13 of 2023(n 26) 43; International Commission of Jurists (n 43)

[76] Human Dignity Trust (n 5) 17.

[77] Equal Ground, Policy Brief on Non-Discrimination Legislation (2023) 4.

addition to police training, complaint mechanisms, and revision of the Vagrants Ordinance to prevent misus[78]. Related legislation on privacy, harassment, and gender recognition would further strengthen the legal architecture.[79]

At the constitutional level, these reforms would give effect to the guarantees of dignity, equality, and freedom enshrined in Articles 10, 12, and 14 of the Constitution.[80] They would also bring domestic law into harmony with the international commitments of Sri Lanka under the International Covenant on Civil and Political Rights and the Universal Periodic Review recommendations.[81] Comparative jurisprudence from India and South Africa provides persuasive guidance while emphasising that reform should be grounded in domestic constitutional principles.[82]

From a policy standpoint, reform should be implemented in stages: first decriminalisation, followed by broader equality measures and institutional restructuring.[83] Public awareness and stakeholder participation will be essential to reduce resistance and foster acceptance.[84]

Legislative drafting must be precise and supported by monitoring and evaluation mechanisms to ensure the reform achieves genuine impact rather than symbolic compliance.[85] Through such coherence, Sri Lanka can move from judicial validation to meaningful inclusion.

7. Conclusion

From Penal Code to Policy Coherence

Sri Lanka stands at a constitutional crossroads. The Penal Code continues to criminalise same-sex intimacy, even as the Supreme Court has affirmed the legitimacy of its repeal[86]. This coexistence of constitutional approval and legislative inaction sustains uncertainty that causes real harm to individuals and constrains the potential of national development[87]. Legal certainty is as vital as legal reform. Prolonged ambiguity converts rights into privileges and undermines

[78] United Nations Development Programme (UNDP), Police Reform and Human Rights Toolkit (2021) 12.

[79] Yogyakarta Principles plus 10 (2017) Principles 30–33.

[80] Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Arts 10, 12, 14, 15.

[81] UN Human Rights Committee, Communication No 2425/2014 Rosanna Flamer-Caldera v Sri Lanka (2022) para 7.3.

[82] Navtej Singh Johar v Union of India (n 9); National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) 28-32.

[83] Equal Ground, Community Engagement Strategy on Legal Reform (2024) 6.

[84] ibid.

[85] OECD, Policy Toolkit for Inclusive Legislation (2022) 27.

[86] Supreme Court Special Determination 13 of 2023(n 26) 43.

[87] Human Dignity Trust (n 5) 5; Equal Ground (n 4) 8.

the predictability that forms the foundation of the rule of law[88]. Repeal would therefore mark not only moral advancement but also restoration of constitutional consistency. The economic argument reinforces the same conclusion. Persistent ambiguity discourages foreign investment, weakens tourism competitiveness, and deprives Sri Lanka of the reputational benefits linked to inclusivity[89]. Abrogating outdated prohibitions would allow the state to present itself credibly as a jurisdiction committed to both rights and development.

Decriminalisation, however, must be regarded as the beginning of a longer process rather than its culmination. Sustainable progress requires comprehensive anti-discrimination legislation, institutional accountability, and sustained civic educatio[90]. Parliament must act decisively to give legislative effect to the Special Determination of the Supreme Court, aligning domestic law with constitutional and international standards[91].

Legal clarity would not only reaffirm the principles of equality and dignity but would also generate tangible economic and developmental advantages. It would position Sri Lanka within the global tourism sector as a jurisdiction where constitutional morality and economic modernity converge [92].

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[88] Lon Fuller (n 8) 106.

[89] World Tourism Organization (n 2) 12; World Bank (n 72).

[90] UN OHCHR, Born Free and Equal – 2nd Edition (2019) 56; Harsha Thelis, Legal Recognition and LGBTQI Community Rights in Sri Lanka (2023) 32, 38.

[91] Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Arts 10, 12, 14, 15; Supreme Court Special Determination 13 of 2023(n 26) 15.

[92] OECD (n 86); World Bank (n 72).

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BAIL OR JAIL; AN ANALYSIS OF THE BAIL ACT NO. 30 OF 1997 WITH SPECIAL EMPHASIS ON BAIL AND ANTICIPATORY BAIL.

ASANGA BODARAGAMA

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Introduction

The concept of bail in criminal law represents a fundamental strain between two cardinal principles of justice: the liberty of the individual and the necessity of ensuring the smooth administration of justice. In essence, bail is a mechanism by which a person accused of a crime is temporarily released from the custody of law enforcement, promising to return to court for their trial or inquiry on specified terms and conditions. It is a conditional liberty designed to prevent the presumption of innocence, which is considered as a cornerstone of criminal justice system of this country from being undermined by pre-trial detention.

Prior to 1997, the law relating to bail in Sri Lanka was governed primarily by the Code of Criminal Procedure Act No. 15 of 1979 (CCPA), which often placed a significant burden on the accused to prove their entitlement to be released on bail, particularly in non-bailable offences. This led to a pervasive culture of judicial discretion that frequently resulted in prolonged pre-trial detention, thereby depriving individual his personal liberty; a situation often criticised as being detrimental to human rights and the core principles enshrined in the Chapter III of the Constitution.

Under the CCPA, the rule of releasing on bail was of twofold. Under section 402 of the Criminal Procedure Code, the rule in relation to the bailable offences, is to[1] release on bail and the exception is to remand. It has been held in the case of **Pathirana and Another v. O.I.C. Nittambuwa Police** [2] that the accused is entitled as of right to be released on bail at any stage of the proceedings. An order of remand in such circumstances is an illegal order[3]. On the contrary section 403 of the CCPA provides that the court can grant bail on its discretion to a person accused of any non-bailable offence. The rule in such cases is to remand and the bail is the exception. In such cases the accused had to establish strong and special reasons to obtain bail[4].

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Section 402 of CCPA

[2] Pathirana and Another v. O.I.C. Nittambuwa Police [1988] 1 Sri Lanka Law reports 84

[3] Sicille Priya Carmini Kothalawala Vs Hon. Attorney General (CA(PHC)APN27/2016.

[4] The Queen vs Liyanage and others (65 New Law Reports 292)

The Bail Act No. 30 of 1997

The legislative landscape of criminal law underwent a transformative change with the enactment of the Bail Act No. 30 of 1997. This Act was a landmark piece of legislation designed to modernise the law, align it with international human rights norms and obligations, and it also signals a strong legislative intent to promote liberty.

Section 2 of the Act gives the guiding principle in respect of the implementation of the provisions of the Act. It is specifically stated that **"the granting of bail shall be regarded as the rule and the refusal to grant bail as the exception."** [5]

> "Subject to the exceptions as hereinafter provided for in this Act, the guiding principle in the implementation of the provisions of this Act shall be, that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception.[6]"

This statutory mandate shifted the burden of proof. It means that the court must now actively seek reasons not to grant bail, rather than waiting for the accused to demonstrate strong and special reasons to release him on bail. The judiciary's interpretation of this guiding principle is crucial, shaping the practical application of law relating to bail across the country.

Under section 4 of the Act, a person suspected or accused of being concerned in committing, or having committed a bailable offence was made entitle to bail subject to the provisions of the Act. Section 5 provided that a person suspected or accused of being concerned in committing, or having committed a nonbailable offence may at any time be released on bail at the discretion of the court. By section 7, the Court is empowered to release on bail any person suspected or accused of, being concerned in committing or having committed, a non- bailable or bailable offence that appears, brought before, or surrenders, to the court having jurisdiction. Therefore, it is very clear that the intention of the Legislature is to change the rule relating to bail[7].

By the enactment of the Bail Act the policy in granting bail has undergone a major change. The rule is the grant of bail. The Rule upholds the values endorsed in human freedom. The exception is the refusal of bail and reasons should be given when refusing bail[8].

[5]Anuruddha Ratwatte and others vs The Attorney General, (2003(2) Sri Lanka Law Reports 39

[6]Section 02 of the Bail Act No. 30 of 1997.

[7] Sicille Priya Carmini Kothalawala Vs Hon. Attorney General (CA(PHC)APN27/2016.

[8] Dachchaini Vs The Attorney-General (2005 (2) Sri Lanka Law Reports 152

The Statutory Framework and Applicability of the Act

The Bail Act provides a comprehensive statutory framework for the release on bail of persons suspected, accused, or convicted of an offence, and also introduced the concept of anticipatory bail. The intent of the Legislature in enacting the Bail Act is clearly demonstrated in the speech made by the then Hon. Minister of Justice Prof. G. L. Peiris while presenting the Bill to the Parliament.

> *"Mr. Speaker, there have been various judicial decisions on this subject, but I think the time has come for Parliament to lay down clearly the principles that should govern the grant of bail. It is not a matter which can be left any longer entirely in the hands of the courts. This is because there are conflicting stands of decisions and there is a great deal of confusion which has to be rectified by the intervention of Parliament. Parliament laying down very clear guidelines which will be binding on the courts in the future; Now that, Mr. Speaker, is exactly what we have done by means of this legislation."* [9]

Section 2 of the Bail Act saw a clean departure from the earlier provisions in granting bail which stated that subject to the exceptions that has been provided for in the Act, the guiding principle in the implementation of the provisions shall be that the grant of bail be regarded as the rule and the refusal to grant bail as the exception. Section 2 of the Act therefore not only provides for the guiding principle in the implementation of the act but also clearly states that there would be exceptions to the said guiding principle[10].

Section 3(1) of the Act states that its provisions of the Act shall not apply to any person suspected or accused of having committed an offence under:

1. The Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (PTA).

2. Regulations made under the Public Security Ordinance.

3. Any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed or convicted of offences under such other written law.

[9] Parliamentary Debates (Hansard) Volume 113 No. 5 Tuesday, 7th October, 1997)

[10] Shiyam Vs OIC, Narcotic Bureau and another (2006(2) Sri Lanka Law Reports 156)

These exceptions explicitly exclude certain offences from its purview, allowing special statutes to govern bail in those specific contexts. This means that for individuals arrested under the PTA or similar specific legislation, the restrictive bail provisions contained within those special laws take precedence, often requiring the accused to demonstrate either exceptional circumstances or even requiring the consent of the Attorney General in order to be released on bail. This dual regime in bail law creates a situation, where the standard of liberty differs significantly based on the nature of the alleged offence.

Applicability of section 3(1) of the Act initially discussed in the case of **Thilanga Sumathipala Vs Inspector General of Police and other** [11] by His Lordship Justice Gamini Abeyaratne in his dissent. He concluded that there was a conflict between Sinhala version and the English version of Section 3(1) of the Bail Act and the correct interpretation would be to exclude only the specific statutes mentioned in the said section[12] from the application of the provisions of the Bail Act. However, this view was not fortified and rooted amongst the legal fraternity as it was only a dissenting judgment.

Later in **Gunasekara and another vs Ravi Karunanayake** [13] Court of Appeal had the opportunity to examine the applicability of Section 3(1) of the Act while considering inter alia the dissent of His Lordship Justice Abeyaratne in Sumathipala case (supra). His Lordship Justice Sri Skandarajah after analyzing several precedents from Sri Lanka and United Kingdom resorted to the Parliamentary Hansard in order to find the intention of the Legislature in bringing the Bail Act in to operation.

> "In the Minister's speech he has clearly stated that Section 3 of the Bail Act excludes the applicability of the Bail Act to the Prevention of Terrorism Act, Regulation under the Public Security Ordinance nor will this legislation apply to other written laws which contain express provision in respect of bail for persons accused or suspected of having committed or convicted of offences under such law. Therefore, the said ambiguity Sinhala text of the Bail Act could be resolved by considering the intention of the legislature which contemplates other written laws in addition to Prevention of Terrorism Act and Regulation made under Public Security Ordinance.

[11] Thilanga Sumathipala Vs Inspector General of Police and other (2004(1) Sri Lanka Law Reports 210 (Court of Appeal Judgment)

[12] Prevention of Terrorism (special Provisions) Act No. 48 of 1979 and Public Security Ordinance.

[13] Gunasekara and another vs Ravi Karunanayake – (2005(1) Sri Lanka Law Reports 18)

It is also manifest from the Minister's speech that the intention of the legislature is to exclude certain statutory regimes which have special consideration applicable to the safety of the State from the ambit of the application of the Bail Act. Therefore, any other written law mentioned in Section 3 of the Bail Act has to be read in ejusdem generis to the Acts mentioned in that section. The Offences against Public Property Act cannot be considered as an act which has concerns applicable to the safety of the State. Therefore, this act cannot be considered as an Act which was intended by the Legislature to exclude from the applicability of the Bail Act[14]"

His Lordship Justice Sri Skandarajah further fortified his reasoning to reach the aforesaid conclusion citing the Full Bench Judgment of the Supreme Court in **Anuruddha Ratwatte and others vs Attorney General**[15]. In the said judgment Supreme Court has held that as clearly reflected in the long title of the Act the provisions of the Bail Act would apply in respect of all stages of criminal investigations and the trial. Likewise, Prevention of Terrorism Act and the Regulation under the Public Security Ordinance also provided for the procedure, forum and the conditions for the release of a person at the time of trial and after conviction. Thus, the court further held that by necessary implication the written law mentioned in section 3(1) of the Bail Act should also provide for the procedure, forum and the conditions for the release of a person at the time of investigation, at the time of trial and after conviction.

However, in March 2006 Supreme Court brought this issue in to a finality in the case of **Shiyam vs OIC, Narcotic Bureau and another** (supra) where court held that exclusion meant by section 3(1) of the Bail Act includes any other written laws which contained provisions in respect of bail for persons accused, or suspected of having committed or convicted of offenses under those laws.

"Therefore, framers of the Bail Act, while considering the individual liberty of any accused person had also given their mind to the need for the collective security of the community. Accordingly, the exception to the rule had been stated and by section 3(1), such expectation had been laid down, which includes not only the prevention of terrorism act, and the public Security Ordinance, but also the other written laws which contained provisions in respect of bail for persons accused, or suspected of having

[14] Gunasekara and another vs Ravi Karunanayake (2005(1) Sri Lanka Law Reports 18)

[15] Anuruddha Ratwatte and other vs Attorney General (2003(2) Sri Lanka Law Reports 40)

committed or convicted of offenses under those laws. Thus, the Poisons, Opium and Dangerous Drugs Act also would come with in the purview of "any other written law" stated in section 3(1) of the Bail Act and therefore the provisions of the Bail Act would have no applications to the said Poisons, Opium and Dangerous Drugs Act."

Therefore, section 3(1) is thus can be considered as the garrison of the Act, outline the four corners of its liberal application and ensuring that special legislation addressing exceptional threats are still in effect.

Classification of Offences: Bailable vs. Non-Bailable

The Bail Act maintains the fundamental distinction between offences inherited from the CCPA, which dictates the nature of the right to bail. This classification is primarily determined by reference to the First Schedule of the CCPA or specific provisions within other written laws.

For a person suspected or accused of a bailable offence, the law grants a right to be released on bail, subject only to the provisions provided in the Act[16]. If the offence being investigated by the police is bailable, the officer in charge (OIC) of the police station is empowered to release the suspect on a written undertaking to appear before the Magistrate on a given date. This streamlines the process and prevents unnecessary remand for minor offences, thereby giving practical effect to the core principles of the Bail Act and liberty. The police are only required to forward the suspect to a Magistrate if the OIC believes public reaction to the alleged offence is likely to cause a breach of peace, in which case the Magistrate takes over the bail considerations.

For non-bailable offences, the right to bail is not automatic but is instead a matter of judicial discretion. Section 5 of the Act provides that a person suspected or accused of committing a non-bailable offence may at any time be released on bail at the discretion of the court.

Judicial Discretion and the Grounds for Refusal - (Section 14)

The heart of the Bail Act, and the section most frequently engaged in judicial proceedings, is section 14, which enumerates the specific and limited grounds upon which a court may deviate from the fundamental principle of granting bail and instead refuse to release the suspect or cancel a subsisting order of bail.

[16] Section 14 of the Bail Act No 30 of 1997

A court may either refuse to release a person on bail or cancel a subsisting order releasing such person on bail if it is satisfied that there are reasonable grounds to believe that the suspect or accused would:

i. not appear to stand his inquiry or trial,

ii. interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice; or

iii. commit an offence while on bail; or

that the particular gravity of, and the public reaction to, the alleged offence may give rise to public disquiet.

Thus, the court should have reasons to believe that such person would act in the manner specified in Section 14(1) (a), (i), (ii) or (iii) or that there would be public disquiet as provided in (b) and follow up by stating in writing the reasons for the refusal or cancellation of bail[17].

(i) Non-Appearance to Stand Trial (Section 14(1)(a)(i))

The primary object of bail is to ensure the presence of the accused at trial. If the court finds reasonable grounds to believe that the accused would abscond and not appear to stand his inquiry or trial, bail may be refused. Factors considered here would include the severity of the penalty prescribed for the offence (a higher penalty is a greater incentive to flee), the character, antecedents, and community ties of the accused, the accused's financial means and potential to travel internationally and any previous history of non-attendance or evasion of arrest.

In the case of Sicille Priya Carmini Kothalawala Vs Hon. Attorney General (supra) court held inter alia that when a suspect purposely keeping away from court it can be considered against such suspect as a probability that he would not stand trial if released on bail.

In **Wikramasinghe vs Attorney General and another**[18] a three judge bench of the Court of Appeal held that the maximum period a suspect to whom

[17] Anuruddha Ratwatte and other vs Attorney General (2003(2) Sri Lanka Law Reports 40)

[18] Wikramasinghe vs Attorney General and another (2010(1) Sri Lanka Law Reports 141

the Bail Act applies can be kept in remand is two years and the period of two years is considered only if the Attorney General acts under section 17 of the Bail Act.

(ii) Interference with Witnesses or Evidence (Section 14(1)(a)(ii))

This ground addresses the integrity of the investigation and trial process. If the court is satisfied that the accused may interfere with witnesses (by intimidation, inducement, threat or otherwise) or tamper with evidence, bail must be refused. The burden is on the prosecution to adduce material that goes beyond mere speculation, demonstrating a credible risk of interference. The court must look at the relationship between the accused and the potential witnesses.

(iii) Commission of Further Offences (Section 14(1)(a)(iii))

This public safety consideration allows for refusal if there are reasonable grounds to believe the accused would commit an offence while on bail. This requires an assessment of the accused's criminal history, the nature of the alleged offence (e.g., if it is part of an ongoing criminal enterprise), and their general propensity for violence or recidivism.

Gravity and Public Disquiet (Section 14(1)(b))

This is the most subjective of the grounds and is often invoked in cases involving heinous or highly publicized crimes. It allows the court to refuse bail if it is satisfied that **"the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet."** This ground is the most discretionary and has been heavily debated. It is not sufficient for the prosecution merely to state that the offence is serious granting bail may give rise to public disquiet they must demonstrate that the gravity and public reaction are likely to cause public disorder or unrest if the accused is released. The gravity of the offence is a factor to be considered while deciding the issue of bail, but must be paired with evidence of likely public disquiet. Thus, gravity of the offence alone would not suffice to refuse bail.

Thus, judicial interpretation of this clause has been cautious, acknowledging that public opinion alone cannot override the constitutional right to liberty, but that the court must consider the effect of the release on the community's perception of justice and maintenance of public order. It must be a case where the offence is ***exceptionally*** grave and the reaction threatens the stability of public peace.

The judiciary is increasingly demanding that the prosecution provides tangible, specific, and objective evidence to support the grounds contained in section 14, moving away from mere generalized fears or assertions. Courts refuse to allow the police or prosecution to use "investigations are incomplete" as a blanket excuse for continued detention without establishing a specific Section 14(1) risk[19].

A crucial check on judicial power is contained in section 15, which mandates that the court ***must*** record its reasons for refusing, cancelling, rescinding, or varying an order relating to the granting of bail. This ensures transparency, aids in appellate review, and serves as a vital safeguard against arbitrary denial of liberty, reinforcing the principle that refusal is the exception.

Anticipatory Bail (Sections 21-24)

One of the most innovative and important features introduced by the Bail Act No. 30 of 1997 was the provision for Anticipatory Bail, codified in sections 21 to 26 of the Act. This provision is designed to protect an individual's liberty from potential harassment, political victimisation, or wrongful arrest in connection with a non-bailable offence. Anticipatory bail is essentially an order passed by Magistrate's court directing that in the event of an arrest on suspicion of a non-bailable offence, the person shall be released on bail immediately upon arrest.

The application for anticipatory bail requires the applicant to demonstrate that he has reason to believe he may be arrested. This belief must be reasonable and based on specific facts, not vague apprehension. In **Balapuwaduge Rukshan Sampath Mendis vs Soft Logic Private Limited and others** court held that a suspect is not entitled to demand an anticipatory bail as a matter of rule, stating that his arrest would not make any difference[20].

Thus, one can conclude the object of anticipatory bail is to relieve a person from unnecessary apprehension or disgrace. It is an extraordinary remedy and should be resorted to only in special cases. Anticipatory bail is not to be granted as a matter of rule; it is to be granted only when the court is convinced that the person is of such a status that he would not misuse his liberty[21].

[19] Kamani Sriyantha Abeysekara vs Officer in Charge, CCD (CA (Rev.) Application No. CA/CPA/18 /2021) and Sicille Priya Carmini Kothalawala Vs Hon. Attorney General (CA(PHC)APN27/2016

[20] Balapuwaduge Rukshan Sampath Mendis vs Soft Logic Private Limited and others (CA(PHC)APN 130/2018

[21] Lilaram L. Revani vs R.D.Gandhi and others (1998 Cri LJ 14) and Srikant Upadhyay vs State of Bihar (2024SCCOnline SC282)

It is the routine duty of the police to investigate the crime and the charges brought before them and it is their duty to treat all the criminals in an equal manner, irrespective of the charges and the complainant who brought the case before them. But, sometimes there can be scenario where the provisions of the regular procedural law can be misused to such an extent by those in power to whom they favour, that the police or law enforcement agencies is hesitant to act freely, as they are expected to by the common public, and which may lead to great amount of inconvenience and harassment to a particular person in the society, which can be unjust and unfair to that person, which may lead to humiliation in front of the society and expose that person to social ridicule, and to prevent all this, the provision of 'anticipatory bail' or Section 438 *(of Indian Criminal Procedure Code)* was introduced in the country[22].

The procedure of anticipatory bail application is initiated by filing an application, supported by an affidavit of the applicant in the Magistrate's Court, accompanied by a notice to the Officer-in-Charge (OIC) of the police station in the area where the offence is alleged to have occurred. The court is required to fix a date for inquiry into the application, which should not be later than seven days from the date of the application. The court, after hearing the applicant and the OIC, shall forthwith make an order, recording reasons. When considering applications for anticipatory bail, court should consider factors such as the nature and gravity of the offence, the role attributed to the applicant, and the specific facts of the case[23]. The order of anticipatory bail should not in any way effect or interfere the investigation of the police from any angle[24].

When granting anticipatory bail, the court may impose conditions it deems fit, which may include: restricting travel outside Sri Lanka, requiring the surrender of the passport. prohibiting contact with potential witnesses etc.

According to section 23 of the Act once anticipatory bail is granted, if the person is subsequently arrested by a police officer on the specified grounds, the police officer must release the person on bail, subject to the conditions specified in the court order. This provision acts as a powerful shield against arbitrary police detention, ensuring that the court's earlier determination of the balance of risks prevails.

[22] Gurbaksh Singh Sibbia and others vs State of Punjab (1980 SCC(cri)465)

[23] Sushila Agraval vs State (NTC of Delhi3, (2018) 7SCC731)

[24] Gurbaksh Singh Sibbia and others vs State of Punjab (1980 SCC(cri)465)

Conclusion and Recommendations

The Bail Act No. 30 of 1997 represents a monumental shift in Sri Lankan criminal justice system, enshrining the principle that liberty is the norm and detention is the exception. It has streamlined the process for bailable offences, introduced the crucial safeguard of anticipatory bail, and imposed definite limits on the duration of pre-trial detention.

However, the efficacy of the Act remains perpetually challenged by the existence of special laws like the PTA, Public Security Ordinance and Any other written lawas defined in section 3(1) of the Act. Such laws, which retain the strict **'exceptional circumstances'** test for certain grave offences creates a legal contrast where the principle of liberty is applied unevenly, prioritizing public safety and national security concerns in specific spheres.

The core challenge for the Sri Lankan judiciary is to continuously apply the provisions of the Bail Act rigorously, ensuring that the discretionary grounds for refusal under Section 14 are not misused to punish the accused or bypass the statutory preference for conditional release. The law of bail in Sri Lanka is thus a dynamic field, constantly evolving through judicial interpretation to maintain the delicate equilibrium between individual freedom and the integrity of the criminal justice system. Continued legislative review and a commitment to constitutional principles remain essential to ensuring that the Act's intended protection of pre-trial liberty is fully realised.

PSYCHOLOGICAL, PSYCHIATRIC, PSYCHOSOCIAL DIMENSIONS OF THE LEGAL NORM 'BEST INTEREST OF THE CHILD' IN PREVENTING JUVENILE DELINQUENCY AND IDEAL PRECAUTION AGAINST CRIME

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The child is a dynamic reflection of the future, who needs to be treated with special care and attention to achieve ideal future where humanity and development are sustained. However, drastically increasing rates of child abuse, juvenile delinquency and recidivism[1] along with the alarming overall growth of general crime rate[2] in Sri Lanka demonstrably question the effectiveness and efficacy of our child protection legal framework. Moreover, this tragic scenario reflects signs of a recurring socio-economic catastrophe, which must be remedied at all possible costs. Therefore, in relation to both children in conflict with the law and children in need of care and protection an imperative necessity has arisen to identify factors adverse to healthy psychiatric, psychological and psychosocial development from the first point of contact with the justice system. In the process, identifying possibilities of growing criminality tendencies in juveniles from early days and ensuring required steps for remedying the same could be observed as an integral element of the concept of "best interests of the child". In this regard, modern psychological and criminological theories taking metamorphosis from psychodynamic theory of Sigmund Freud, Erickson's theories of psychosocial development, cognitive or behavioral theories, childhood disorders like ADHD (attention deficit hyperactivity disorder) to even modern neuroscience discoveries of Adrain Raine covey tools that could be resorted by courts from said analytical dimension. Similarly, coarser realities concerning said theories where victimized child are being transformed to persons with impulsive criminal inclinations etc. provide fertile insights in ascertaining how cautiously the courts should operate in the best interests of the child in a given context. Thus, a pressing social necessity has arisen to develop a legal mechanism utilizing existing child protection law regime and thereby practically exploit said psychological, psychosocial and psychiatric theories in accordance with the law. For the full and harmonious development of child personality, he or she should grow up in an atmosphere of

[1] Statistics | National Child Protection Authority, childprotection.gov.lk

[2] Nishella Perera, Increase in Overall Crime in Sri Lanka amid Worst Currency Crisis Decades, Economy Next dated 5th November 2022

happiness, love and understanding[3] , which necessarily convey that psychological, psychiatric and psychosocial criterion being satisfied is an indispensable element in child protection law regime. Moreover, recent United States Supreme Court judgements such as *Miller Vs. Alabama*[4] and *Jones vs. Mississippi*[5], which analyses the Miller factors like transient immaturity, immaturity, impetuosity, risk taking, family home environment, peer influence etc. in sentencing adolescents portrays worldwide inclinations to resort to psychology and psychiatry in the best interests of juveniles. This trend seems to have culminated with neuropsychological trends based on research direction of renowned psychiatrics or criminologists like Adrain Raine to apply neuroscientific findings in foreseeing criminal traits from childhood and apply neuroscience to judicial decision making. Despite UNICEF observing the absence baseline indicators as to children receiving medical, psychological or social assistance, Department of Child Care and Probation and National child protection Authority (NCPA) provide support to children irrespective whether they are in need of care and protection or in conflict with law [6]. However, the most formidable barriers impeding judicial reasoning from ascertaining said required psychosocial and psychological facets in the juvenile justice system is the obscurity and repetitions in the definitions of currently existing child protection laws like Children's and Young Persons Ordinance[7] ('CYPL') as amended by Children's Ordinance (Amendment) Act No. 39 of

2022, dualist nature of international Law application in Sri Lanka and the urgent need to apply International Law conventions like UN Convention on the Rights of Child ('UNCRC') in conjunction with domestic statutes in pursuance of the best interests of children. Nevertheless, progressive steps like Children (Judicial Protection) Bill, where best interests of the child are to be a predominant consideration[8] in all matters concerning child never seeing light as an act of parliament and recent CYPL (Amendment) Act No. 39 of 2022 only covering limited aspects such as courts being empowered to call a psychological assessment only when child is unruly of character to be kept in remand homes [9] etc. necessitate resorting to international law Conventions such as UNCRC is an inevitable requirement. Furthermore, this dilemma points out

3 Preamble to the UN Convention on the Rights of Child dated 20th November 1989 ratified by Sri Lanka in July 1991
4 Miller v Alabama 567 US 460 (2012)
5 141 S Ct. 1307, 1322 (2021)
6 Pg. 62 & 63, UNICEF, An Assessment for Routine Data Collection Gaps in the Justice for Children Sector in Sri Lanka & Recommendation on Improving System (October 2023)
7 CYPL Act No. 48 of 1939, 13 of 1944, 42 of 1944, Act No. 12 of 1945 last amended by
8 Pg. IX, UNICEF (Verite Research 2017), A Legal and Institutional Assessment of Sri Lanka's Justice System for Children
9 Section 23, Children & Young Persons ordinance as amended by CYPL (Amendment) 39 of 2022

a lacuna as to criteria to be used in exercising said contextually bound discretion of courts. The Sri Lankan Supreme Court cases in the fundamental rights applications challenging corporeal punishment like SCFR 139/2012 *Mahapitiya Gedara Shanuka Gihan and Amila Dilshan vs. Lory Koswatta, Deputy Principal, Secretary Ministry of Education et al*[10] , which demonstrate judicial incorporation of international law conventions like UNCRC, convey avenues of resorting International Law conventions in pursuance of securing child rights. Although this research effort seems an infancy attempt it is a worthwhile endeavor to clearly analyze how to pragmatically apply psychological, psychiatric and psychosocial principles through exploiting existing domestic law provisions in conjunction with the international law conventions like UNCRC in pursuance of persistent social need of protecting children and aspirations of brighter future. Thus, objectives of this paper are as follows:

A. Ascertaining existing Child Protection Law Regime from CYPL to International Conventions like UNCRC, where multiplicity of factors in relation to wide discretion vested in court in determining the 'Best Interests of Child'

B. Comprehend the significance of early psychological and criminological theories like Psychodynamic theory of Freud, Erik Erickson's Psychosocial Development, Psychiatric Discoveries Neuropsychiatric discoveries of renowned criminologists like Adrian Raine etc. to both children in conflict with the law and children in need of care and protection

C. Analyzing criminological, psychological, psychiatric and psychosocial theories, which could be utilized in the 'Best Interests of the Child' and whether the judiciary in any country could operate in isolation said developments

D. Evaluating realistic or pragmatic nature of said approach with reference to tendencies in other jurisdictions like United States and unique Sri Lankan situations including institutional frame work

[10] SC FR 139/2012 SC Minutes dated 13th October 2022 Mahapitiya Gedara Shanuka Giha & Amila Dilshan vs. Lory Koswatta, Deputy Principal, H.M Gunesekera, Secretary Ministry of Education, Chief Inspector of Police et al

E. Identifying the most effective, practical and lawful means and instances when these psychological and psychosocial principles could be used to remedy dilemma in the child protection law regime and developing a pragmatic check list

Basic Instances: Orders Affecting Children

There are four basic categories children in respect of whom the courts are required to make orders. They are a) the children in conflict of the law (Juvenile Offenders) b) the children in need of care and protection c) children who are victims of crime and witnesses d) children whose custody and maintenance are in question. Simultaneously, said orders by court invariably affect the notion of ideal child in a society since the same process provide not only source of information but also a fertile basis for psychological, psychosocial and psychiatric research.

Although various statutes including Children and Young Persons Ordinance (CYPL), Children's Ordinance ('CYPL (Amendment) Act No. 39 of 2022'), Probation of Offenders Act No. 42 of 1944[11] and Youthful Offenders (Training School) Act[12] No. 28 of 1939 the specify instances and guidelines under which courts are required to make orders in the best interests of children. However, the most formidable task confronted by court in said process is ascertaining what constitute best interests of child in a given instance as the same inevitably involves consideration of legal, psychiatric, psychological and psychosocial elements. Therefore, a priority check list defining psychosocial, psychiatric and psychological facets applicable to any given instance need to be developed with the assistance of multiple expertise. Thus, primary analytical dimensions involving said check list of 'Best Interests' are basically four-fold. They are 1) The Precautionary approach from a Crime Elimination Perspective where consequences of orders are foreseen from a Criminological point of view 2)

Psychological and psychosocial dimension where healthy development and removal of adverse childhood experiences are assessed 3) Psychiatric considerations for healthy development of child. 4) Legal perspective where both domestic statutes and International Law Conventions are utilized in justifying aforesaid theories and principles.

[11] Act No. 42 of 1944, 21 of 1947 & 10 of 1948

[12] Act No. 28 of 1939, 8 of 1943, 41 of 1944 & 42 of 1944

The Existing Legal Frame Work in the Child Protection Law Regime

The primary legislation governing the children's rights in Sri Lanka are

a) Children and Young Persons Ordinance No. 48 of 1939 (CYPL) as currently stands amended by the Children and Young Persons (Amendment) Act No. 39 of 2022 (title of the legislation have been substituted as 'Children's Ordinance')

b) Probation of Offenders Act No. 10 of 1948 (POA)

c) Youthful Offenders Training Schools Act No. 42 of 1939

CYPL was in 1939 with the legislative intentions of establishing juvenile courts, supervision of juvenile offenders and protection of children and young persons. The most recent amendment Act No. 39 of 2022 attempted to develop a uniform definition of child by converting the name of the ordinance in pursuance with international law obligations. The amendment to Section 23 of the CYPL, which permitted court to obtain a psychological assessment of a child, who in the opinion of probation officers is so unruly of character that such child cannot be detained in a remand home or certified school [13] is a limited instance where court can seek the assistance of medical assistance. The Probation of Offenders Ordinance was enacted in 1944 based on the legislative objective of amending the law relating to probation prevalent at that time, supervision of offenders under probation and provide for the establishment and administration of probation service[14]. This permits court to release offenders including children on probation considering nature of the offence, age and sex as well as circumstances such as character, antecedents, environment and mental or physical condition of the offender[15] .

In the addition, although not specifically focused on the protection of children e) International Covenant on Civil and Political Rights Act no. 56 of 2007, Prevention of Domestic Violence Act No. 34 of 2005, Assistance to Protection of Victims of Crimes Act No. 04 of 2015 cover important aspects of child protection law regime. It is observed that the Sri Lankas domestic legal frame work falls short of best practices including stipulating uniform definition of a child and internationally accepted minimum age of criminal responsibility, considering the deprivation

[13] Section 7 of the Children and Young Persons Amendment Act No. 39 of 2022

[14] Long title to the Probation of Offenders Act No. 42 of 1944 as amended by Act No. 21 & Act No. 10 of 1948

[15] Ibid, Section 3 and 4

of child's liberty being a matter of last resort, prioritizing diversion of children away from the formal justice system and distinguishing children in conflict of law and children in need of care and protection[16]. The proposed bill required best interests of the child to be given predominant consideration in relation to all matters concerning child and the same provides for the appointment of a judicial guardian to assist the child during legal proceedings. However, said proposed bill have not yet been passed by parliament despite the expiry of more than eight. The concept of best interest of the child is domestically imputed with legal validity in terms of section 5(2) International Covenant on Civil and Political Rights Act No. 56 of 2007. The purpose of said ICCPR Act is to provide adequate legislative validity to remaining portions of International Covenant on Civil and Political Rights, which had not been given legislative validity during that time[17]. In terms of said Section 5(2) of the ICCPR Act the definition of the best interests of the child is so broad that the same shall be of paramount consideration in all matters concerning child whether undertaken by public or private or social welfare institutions, courts and administrative and legislative bodies.

CYPL Provisions Relating to Children in Conflict with the Law

In Children and Young Persons Ordinance currently standing as Children's Ordinance pursuant to CYPL Amendment Act No. 39 of 2022 where the provisions relating bail and custody of child in remand homes and in charge of a fit and proper persons have been amended with reference to definition of child in connection with age, where child is defined as a person under 18 years of age. The power of court under Section 18 of CYPL to ensure the presence of parent or guardian in court as much as practicable is a vital provision focusing both on protection and welfare. In term of Section 17 of CYPL whenever a child suspect is produced to courts, police is obliged to notify probation officers and the required to make necessary investigations and render information to court that include surrounding circumstances, school record, character of the child and any other circumstances appearing to the probation officer as likely to assist court. Discretion vested on probation officers in determining any other circumstances that could be material to probation officer reflect opportunity to provide issues concerning, psychological psychosocial psychiatric development of child. This preliminary report by probation officer is the most material information that could be relied upon by court in determining bails orders, temporary custodial orders, bonds to even sentencing orders.

[16] Pg. ix. United Nations Children's Fund, A Legal and Institutional Assessment of Sir Lanka's Justice System for Children

The paramount consideration in respect of Section 21 of the CYPL is the welfare of the child, where priority being placed on removing child from undesirable surroundings and securing proper provision for his education. Starting from the prohibition against child being present in court during trials where any other persons charged with offenses, power of court to clear court when a child is giving evidence etc. demonstrate provisions as to child friendly court procedures.

Children in Need of Care and Protection:

A juvenile Magistrate being satisfied to the effect that child brought before courts by police or local authority is in need of care and protection, in terms of Section 35(1)(a) of the CYPL court is empowered to commit him to a certified school if he has attained the age of twelve years. Moreover, court is also entrusted with the power to commit such child to the custody of any other person who is fit and proper irrespective whether such person is a relative or not. This is dynamic power vested in Juvenile Magistrates, which must be exercised with extreme caution in the best interests of the child. This is because courts are required to foresee consequences of any order made not only from a legal perspective but also from a psychological, psychiatric and psychosocial perspective based on skilled and valuable assistance of police and probation officers. However, one of the major draw backs of the domestic law being the failure of the justice system to distinguish children in need of care and protection from children in conflict with the law and ensure required differential treatment from a protectionist perspective.

Especially in relation to children requiring care and protection, in pursuance of the findings of probation officers and in consultation psychiatric medical officers through probation officers the courts must cautiously strive to eliminate adverse childhood experiences consequent to the trauma of losing proper care or custody. In the process, courts are entitled to placing them in stimulating environment as much as practicable.

International Law Conventions in the Child Protection Law Regime and Abridging the Divergence between Domestic Law and International Standards

UN Convention on the Rights of Child('UNCRC'), which is the primary international instrument setting out civil, political, economic, social and cultural rights of children was ratified by Sri Lanka on 12th July 1991. Thus, CRC lays down principles and standards augmented by UN Rules and guidelines for development of polices for juvenile system[18].

[17] Preamble ICCPR Act No. 56 of 2007

[18] Thiranagama, Kalyananda, International Instruments on Juvenile Justice

Article 3 of the CRC provides that in all actions concerning children whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration. However, in Sri Lankan domestic legislation with similar broad terminology in terms of Section 5(2) International Covenant on Civil and Political Rights Act No. 56 of 2007 as foresaid declares that the best interests of the child shall be the paramount consideration although the same is not enacted as a part of UNCRC but as an attempt to provide adequate effect to ICCPR, which is a significant international law convention. Article 6 of UNCRC declares the right to life, survival and development of child and obligation of state for ensuring to the maximum extent possible the survival and development of the child impose broad obligations on state parties to develop national policies and goals. Article 39 of UNCRC declares state obligation to take appropriate measure to promote physical and psychological recovery and social integration of child victim from any form of neglect, exploration or abuse and the convention mandates that such recovery and reintegration take place in an environment that fosters health self-respect and dignity of the child[19]. Other international instrument for the justice system for the children includes UN Minimum Rules for Administration of Juvenile Justice (Beijing Rules 1985), UN Guidelines for Prevention of Juvenile Delinquency, UN Rules for Protection of Juveniles Deprived of their Liberty (Riyadh Guidelines) 1990, UN Rules for Protection of Juveniles Deprived of their Liberty (Havana Rules) 1990. Moreover, the United Nations Guidelines on Justice Matters involving Children 2005 reflect four guiding principles as dignity, nondiscrimination, best interests of the child and right to participation. These principles demonstrate vital elements that could be utilized in ensuring child friendly court process.

In the efforts of the Supreme Court of Sri Lanka apply international principles through judicial incorporation His Lordship S Thurairakah PCJ discerned in the fundamental rights application SC FR 97/2017 *Hewa Maddumage Karunapala, Dona Kumuduni vs. Jayantha Premakumara, Teacher of Puhuwela Central College et al* [20] challenging corporeal punishment as follows:

Corporeal punishment as a method of discipline is ineffective for multiple reasons. ……..*encouraging corporeal violence normalizes violence, undermines the dignity, of a child, and inflicts trauma in which is reflected in unhealthy and disruptive behavior as adults. Corporeal punishment disregards integrity, autonomy*

[19] Pg. 5 & 6, UNICEF, Legal and Institutional Assessment of Sri Lanka's Justice System for Children & Articles 3, 6 & 39 of the Convention on the Rights of the Child 1989

[20] SC FR97/2017 SC Minutes dated 12th February 2021

and dignity of each child. The General Comment No. 08 to the United Nations' Convention on the Rights of Child in paragraph 47 recognizes that "The Convention asserts the status of the child as an individual person and child is not a possession of parents nor state nor simply the object concern "

Similarly in the recent Supreme Court fundamental rights application SC/FR 139/2012 *Mahapitiyagedera Shanuka Gihan vs, Lory Koswatta, Deputy Principle, H.M Gunesekera and others* in relation to issue whether corporeal punishment of canning amounted to violation Article 11 of the Constitution concerning cruel, inhuman and degrading treatment or punishment, his lordship Aluwihare discerned article 28 of the UNCRC, which decares that school administration should be administered in a manner consistent with child's human dignity in conjunction with Article 19, which imposes state obligation to take all appropriate legislative, administrative, social and educational measures to protect child from all forms of physical or mental violence, injury or abuse or neglect negligent treatment, maltreatment, or exploitation including sexual abuse as follows:

"The infliction of corporeal punishment has been condemned by numerous international instruments, in particular the UNCRC as being violative of the rights of the child to human dignity and physical integrity. In 2006, the United Nations' Committee on the rights of the child, the international body charged with monitoring compliance with the UNCRC issued general comment 8, discussing the right of the child to protection from corporeal punishment. The committee drew conclusion on Article 19 of the UNCRC does not leave for room any level of legalized violence against children. "

Said superior court cases demonstrate the doctrine of judicial incorporation of international law where international law[21]conventions are absorbed into domestic law as soft laws through continuous adoption by superior courts.

Articles 2,3 and 6 of Children's Chater enshrines the best interests of the child concept while Article 27(13) of the Constitution under Directive Principles of State Policy and Fundamental Duties, which stipulates that state shall promote special care towards interests of children so as to ensure full development, physical, mental, moral, religious and social development of youth and children and protect them from exploitation and discrimination[22]. Article 157 of the Constitution stipulates that duly ratified international law agreements may have

[21] This notion was formulated by His Lordship ARB Amarasinghe in famous Bulankulama vs. Secretary, Ministry of Industrial Development 2000 (3) Sri LR 243

[22] Pg. 355, Niriella MADSIS (Jeewa Niriella), Children in Criminal Justice: A Critical Review on Contemporary Penal Laws

force of law in country and no rule /law may be enacted contrary to international agreements.

Precautionary Approach from a Crime Prevention Perspective

In terms of the precautionary approach both the child in conflict with law and a child in need of care and protection are equally important that the rationale for many crimes is traceable to a vicious cycle of abuse and violence against children. In other words, a child victim is intensely vulnerable for transformation as abusers and perpetrators on account of adverse childhood experience in connection with victimization. The reasons for violence against children comprise of their traits like immaturity, low level mental and physical capacity, inability to understand reality of situations and being unable to obtain legal advice when they are subjected to violence. Moreover, the socioeconomic contributory factors for growing violence against children include family beak down, peer pressure, poor attention of parents, urbanization and migration of families from rural areas to urban areas and migration of women with children for foreign employment[23]. Professor Jeewa Niriella, further with reference to Jim Hopper's research on Child Abuse: Statistics confirms that the ill consequences of child abuse depend on variety of factors such as intensity and frequency of abuse, the gravity of violent activity, age of the child, the relationship between the perpetrator and the child and response of the person who knows of the crime.

The harmful consequences of crime on juvenile are short term as well as long term. The short terms effects include abused children becoming quiet, reserved., poor school performance and with a tendency of avoiding contact with social settings. The long-term adverse consequences encompass of permanent physical, mental and intellectual impairment, educational and emotional failure and the possibility of abused children in turn becoming abusers. These children may try to deal with stress and anxiety thorough substance abuse, deliberate self-harm or other harmful types of behavior [24]or developing high potential of developing criminal inclinations. Thus, depression, fear, anxiety, low self-esteem, obsessive compulsive disorder, post-traumatic stress disorder and alcohol and substance addict are the mental and psychological ill effects[25]. It was further discerned by professor Jeewa Niriella in the afore-quoted research that although it is difficult to prioritize the causes of juvenile delinquency disintegration of family, rapid changing patterns in modern living, associational impact, modern technology,

[23] Pg. 353, Niriella, MADSjS,(Jeewa Niriella) Children in Criminal Justice: A Critical Review of the Contemporary Penal Law in Sri Lanka

[24] P 354, Niriella, MADSjS, Children in Criminal Justice: A Critical Review of the Contemporary Penal Law in Sri Lanka

[25] ibid

failure in school life/truancy, poverty, cultural conflicts among various ethnicities, illiteracy, child labour, squalor, disobedience and as confirmed by NCPA parents' overseas employment. These factors also contain biological factors such as early physiological maturity, low intelligence and irresistible impulses.

There are many theories of sentencing that are focused on purposes of deterrence, retribution and rehabilitation to be resorted by courts at the conclusion of a case. Simultaneously, multiplicity of psychosocial theories or psychological explanations for criminal behavior such as impulsivity, psychodynamic theories, cognitive behavioral theories, temperament or personality traits to even details on childhood disorders like ADHD (Attention Deficit Hyperactive Disorder) are so vital in courts pronouncing orders from a crime prevention perspective. Section 21 of the CYPL in the chapter on the principles to be observed by all Courts in Dealing with Children and Young Persons declares that every court in dealing with a child or young person who is brought before it either in need of care and protection or as an offender or otherwise shall have regard to the welfare of the child or young person. The very section further emphasizes that the court shall in proper case take steps for removing him from undesirable surroundings and secure that proper provisions are made for his education and training. Thus, all children are so precious that irrespective of whether they are convicted, accused, victimized or in need of care and protection consequent to unfortunate circumstances all must be treated with special care and attention. Therefore, protectionist approach commences from the first point contact of a child with the court system.

The preliminary report prepared by probation officer in term of Section 17(2) of the CYPL where information as to home surrounding of child concerned, school record, health and other factors permit court to observe either aforesaid criminological causes of crime or reasons for being accused in such manner. While being cautiously mindful of presumption of innocence court is well positioned operate as dynamic guardian of children's future from early instance by discussing with probation officers in order to remove harmful criminality causes, adverse childhood factors and establish conducive circumstances for healthy psychosocial development of children.

In terms of Section 21 of the CYPL, which declares principles to be observed by all courts in dealing with children and young persons, emphatically asserts that every court in dealing with a child or young person who is brought before it either in need of care and protection or as an offender or otherwise shall have regard to the A) welfare of the child or young person. The very section further emphasizes that the court shall in proper case take steps B) for removing him

from undesirable surroundings and C) ensure that proper provisions are made for his education and training. Demonstrably, these major considerations reflect mandatory guidelines in exercising courts' s discretion concerning best interests of the child.

In relation to children in conflict of the law, when a child or young person is brought before courts for first time for bail order, priority consideration is preventing such child from associating with an adult accused. This principle takes shape in view of Section 13 and 14 of CYPO where during police custody children must be strictly separated from adult accused in a manner preventing any association.

Psychological, Psychosocial and Psychiatry Dimension

Fundamental aspects of crime prevention perspective include psychological explanations for crime as well as psychosocial theories since the same constitutes an integral facet of the concept of best interests of child. psychological explanation for crime ranging from psychodynamic theories (Sigmund Freud), impulsive theory, cognitive theories, behavioral theories to even ADHD (attention deficit hyperactivity disorder) provide a rational basis for developing a check list for courts from a crime elimination perspective. Moreover, psychosocial theories that are used to identify individual traits that reflect potential criminal behavior including intelligence theory and personality traits positively and negatively associated with criminal behavior.

The most elementary but major concern that must be ascertained by a judge in juvenile courts is the psychodynamic theory by Sigmund Freud. This is because many influential theories of criminal behavior appear to have developed metamorphosis from said psychodynamic theory. Psychodynamic theory of Freud supposed that our conscious mind is determined by unconscious influences that involve complicated structure built through stages. Firstly, there is *id*, Freud saw as basic instincts that drive our behavior. Secondly, the *ego* controls the said basic urges by operating according to reality principle. Thirdly, the *Super-ego* is a form of internalization of the standards of a society[26]. Freud argued that everyone has instinctual drives called id that demands gratification. Moral and ethical codes called *super ego* regulate these drives and adults later develops a rational personality called ego that mediates between id and super ego[27] . The

[26] P 68, Ian Marsh, Theories of Crime, Psychological Explanations

[27] ADV Hemanth More, Psychodynamic Theory of Criminal Behavior dated 26th September 2023, https://thelegalquotient.com/criminal-laws/criminology/psychodynamic-theory-of-criminal-behaviour/2695/

psychodynamic theory observes that criminal behavior as a conflict among id, ego and *super ego*[28] . Freud further explains that an abnormal personality results when either id or super ego overwhelms the ego, resulting in psychic energy being drained from the weaker component to strengthen the stronger component. Therefore, if the id is in command of personality the results is conscienceless and impulsive individual who seeks to satisfy personal needs regardless of the expense to others[29].

Impulsiveness and Impulsivity is psychological theory as well as a personal trait associated with criminal behavior. This is the process of acting rashly without realizing the consequences of their act. The nexus between crime and impulsivity is diversely interpreted in view of different theirs. One example could be that in psychodynamic theory impulsivity is a result of poor ego control that impulses of id are not adequately suppressed. Consequently, such person seeks to satisfy irresistible impulses of the id uncontrollably in violation of law. Simultaneously, in social learning theories impulsiveness is observed as being determined by situational forces as well as individuals' own inner narratives[30].

ADHD Attention Deficit Hyperactivity Disorder

This is a personality disorder proposed in the American Psychological Society's Diagnostic and Statistical Manual[31]. Symptoms of ADHD include inattention, missing important work details, not listening, symptoms of hyperactivity, frequent fidgeting, expressive talking, inability to remain seated etc. Moreover, symptoms of impulsivity, inability to wait for their turn, constant interruption of others also include multiple traits of ADHD. The link between impulsivity and crime is a compelling one that the frontal lobes of the brain are implicated in explaining ADHD[32]. The persons suffering from ADHD are increased risk of becoming chronic alcohol and drug users[33] .

Moreover, lack of empathy, sensation seeking, altruism, conscientiousness, agreeableness etc. are some other traits positively and negatively associated with criminal behavior. Empathy is the emotional and cognitive ability to understand

[28] p. 172, Criminology, the Essentials, Psychological Theories, Chapter 9, https://us.sagepub.com/sites/default/files/upm-binaries/79516_Chapter_9.pdf

[29] p. 172 ibid

[30] P. 61, Ian Marsh, Theories of Crime, Psychological Explanations

[31] Ibid p. 62

[32] Ibid p 62

[33] Ibid p 62

the feeling and distress of others, which allows people to understand and feel the pain of others[34] Altruism is an important trait highly connected with empathy that is emphatic motivations to take positive action to alleviate distress of others if possible. Conscientiousness is a primary trait composed of several secondary traits such as well organized, disciplined, scrupulous and reliable at one hand and disorganized, careless, unreliable, irresponsible and unscrupulous at the other.

Cognitive Theory

Although cognitive psychology is not particularly connected with criminal behavior the same involves erroneous thinking patterns like lack of empathy, poor perspective of time, perception of themselves as victims and general concreteness of beliefs[35]. The origins of these cognition errors are believed to be in the childhood, and as with Eysencnck, the relationship with parents -both -genetic and environmental – were important antecedents to acquiring these flaws thinking styles.

Psychosocial Development

Psychosocial development is a crucial criterion that could be ascertained in maintaining judicial discretion involving the best interests of the child. In this regard, social report by probation officers' valuable information.

Psychosocial wellbeing is one part of general wellbeing of an individual, which encompasses mental and emotional wellbeing as well as ecology or social relations[36]. Psychosocial theory of Erick Erickson concerning the eight stages of psychosocial development from infancy, early childhood, play age, school ages adolescence, early adulthood to old age proclaims that successful completion of each stage results in healthy personality and the acquisition of basic virtues. These virtues are the characteristic strengths used to resolve crises that the failure to successfully complete these stages results in more unhealthy personality and sense of self [37]. In pronouncing orders like bail orders, intuitional custody orders to parental custody orders the courts must be mindful not only of factors promoting psychosocial development but also adverse childhood experiences (ACE Factors), which are detrimental to psychosocial wellbeing. The factors promoting psychosocial development includes the needs of love security and responsive relationship, healthy mind and healthy body as well as self-esteem[38].

[34] Pg. 172, 173, Psychological Theories, Criminology; The Essentials Chapter 9, https://us.sagepub.com/sites/default/files/upm-binaries/79516_Chapter_9.pdf

[35] P. 75, Ian Marsh quoting, (Hollin 1989), Theories of Crime. Psychological Explanation

[36] P. 24, Exploring the Psychosocial Wellbeing of Adolescents at Children's Homes in Sri Lanka, Danesh Karunanayake, MGHBD Ratnayake, NDU Vimukthi (University of Peradeniya)

[37] Saul McLeod, Simple Psychology. org

[38] Dr. Neil Fernando, Consultant Psychiatrist, Presentation on 15th to 17th March 2024 organized by Sri Lanka Judges Institute

Adverse Childhood Experiences (ACE Factors):

Adverse childhood factors could be defined as potentially traumatic events, which occur at any stages of childhood from birth through to young adult life, which can have negative lasting effect on health and wellbeing[39]. The three types of ACEs are a) abuse b) neglect c) household violence. While abuse can be mental, physical or sexual neglect can be physical as well as emotional. Simultaneously, major ACE type concerning household disfunction involve disorganized home, parental discord, alcohol or substance abuse by farther/parent, poor parental supervision, parental separation, parental mental illness, parent in prison, death of a parent, mother being treated violently to child abuse etc.[40]. As much as practicable courts must strive to limit exposure of juvenile to ACE factors in relation to every order. This is because there is growing evidence of how repeated adverse experiences can lead to toxic stress, cause damage to developing brain and also alter the functioning of immune, neurological and endocrine systems in an individual.[41] The way in which ACEs can result in negative effect on mental and physical health and wellbeing can be considered in two levels, which is physiological and behavioral. Thus, ACEs cause disruption in neurodevelopment, which may lead to impaired cognition and social factors that may lead to health risk factors[42]. The same O' Neil et al research derives findings in relation to community and family resilience that resilience could be promoted by finding ways for the children at risk to be socially integrated have more opportunities. Moreover, in the economic argument of O'Neil et al ACE research ascertains that investment in removing ACEs during early childhood produces greater economic returns than later investments[43].

Neuroscience and Neuropsychological Perspective

Recent criminological tendency of ascertaining neurobiological basis of criminal behavior in the light of research findings of renowned professor of criminology and psychiatric, Adrian Raine and intensified judicial interest in the potential applications of neuroscience to criminal law worldwide demonstrate reasons as to why our child protection law regime should focus on this field of novel area of research. However, it well discerned in neuro-criminological research that while the study on complex genetical variants is so vital, environment plays an equally important part. This is because some genetic variants confer risk of antisocial behavior only in the presence of particular environmental risk factors such as

[39] Riognach S O Neil, Mary Boullier & Mitch Blair, Adverse Childhood Experiences (O' Neil RS et al, Adverse Childhood Experiences, INT CAR https: //doi.org/10. 1016/j intear.2021.100062)

[40] Dr. Neil Fernando, Presentation organized by Sri Lanka Judges Institute dated 15th to 17th March 2024

[41] P. 1, Riognach S O Neil, Mary Boullier & Mitch Blair, Adverse Childhood Experiences

[42] Ibid p. 4

[43] P. 6 & 5, Riognach S O Neil, Mary Boullier & Mitch Blair, Adverse Childhood Experiences

abuse in early childhood that even the research on epigenetics demonstrate how environment influences gene function[44]. Epigenetics is the study of how environment can change gene expression that genes are switched on and off[45] . These epigenetic research supports theory of renowned criminologist and psychiatric Adrain Raine that genetics in your biology is not your destiny that stimulating environment can change what your genes might predict. In author interview titled Criminologist believes Violent Behavior is Biological dated 30th April 2013 on the book Anatomy of Violence, The Biological Roots of Crime, on the question on brain scan of serial killer Randy Kraft, Raine referred to his own antisocial past during ages 9 to 11 to teenage life. Adrain Raine revealed that during ages 9-11 he was antisocial in a gang with smoking cigarettes, setting fire to mail, letting car tires down. Thus, Raine by examples from his own life elaborated protective factors that prevented him from becoming an offender. This is because his parents loved him and he felt loved with other simulating factors like secure environment that he got on with his brothers and sisters. Raine emphasized that may be the critical ingredient of love that changed his fate.

These neuroscience and epigenetic theories suggest that in terms of orders in relation to children, courts must be mindful that whatever juvenile antisocial behavior or criminal tendencies may suggest constant rehabilitation focus with stimulating environment as far as practicable is an integral element pertaining to every judicial order concerning children.

Institutional Factors/ Assessment of Sri Lankan Institutional Structure

In making custodial orders, courts must be cautious as to the nature and the practical operation of Sri Lankan institutional frame work concerning child protection law regime. Said Institutional setting comprises of Sri Lanka Police, Attorney General's Department, judicial medical officer, the Courts, Department of Probation and Child Care Services and National Child Protection Authority (NCPA). In this regard, Police and Probation and Child care Departments have direct exposure to Courts. Most importantly, custodial institutions and remand homes for children are regulated and supervised mostly by the probation and child care departments. However, the institutional assessment of UNICEF on Sri Lanka's justice system on Children observed series of weaknesses including a) failure to prioritize the diversion of children away from children away from the formal justice system, weak implementation of child specific processes, lack of

[44] Pg. 54, Andrea L Glen & Adrian Raine, Neuro-criminology: Implications for the Punishment, Prediction and Prevention of Criminal Behavior (Reference to Capsi, A, et al, Role of Genotype in the Circle of Violence in Maltreated Children & Trembly, R, E, Understanding Development & Prevention of Chronic Physical Aggression towards Experimental Epigenetic Studies)

[45] O'Neil et al, Adverse Childhood Experiences, INTCAR, https:// doi.org/10/ 10116/j intcar.2021.100062

differential treatment afforded to children who are victims and in conflict with the law, human resource constraints (attitudinal and capacity, weak technical training and awareness of the best interests of the child[46]. Said institutional Assessment of the UNICEF recommends that a Magistrate or judge should be required to consider the option of placing a child under a parent or guardian in the first instance b) probation officers c) fit and proper person d) the imposition of community correction orders prior to sending a child to a child care institution. As institutionalization can impede child's rehabilitation and reintegration into society a circular is recommended in order to ensure that the Magistrates and judges are required to prioritize diversion of children away from the formal justice system[47]. In spite of existence of considerably explicit legal provisions in the Child Protection Law Regime, far back in 2002 it was discerned that there is a wide gap between the Law and actual practice. Therefore, CYPO does not embody many modern concepts as expounded by UN Standard minimum rules standard and guidelines relating to juvenile justice. The most important thing for psychological development of child is the love and care of parents that the same cannot be replaced with institutional care. Therefore, when courts decide contrary to the wishes of children and parents and place them in institutions all these rights are violated. Consequently, such institutionalization is often not in the best interests of childre[48].

Conclusion:

On account of drastically growing juvenile delinquency, recidivism and overall increase of general crime rate in Sri Lanka, which calls into question the efficacy and effectiveness of our existing juvenile system, a pressing social need has arisen to take urgent remedial measures. Prevalent child protection law regime encompasses Children and Young Persons Ordinance (CYPL) No. 48 of 1939 as amended by Children's Ordinance Act No. 39 of 2022, Probation of Offenders Act, Youthful Offenders (Training Schools) Act to International Law Conventions such UN Convention on the Rights of Child (UNCRC). Simultaneously, definitions and important concerns with multiple terminology like welfare of child being a general consideration under CYPL, best interests of child being termed as paramount consideration under Section 5(2) of International Covenant on Civil and Political Rights Act (ICCPR Act) and progressive steps like Children (Judicial Protection) Bill never seeing validity as a legislation raises the question how to exercise the extensive discretion of court in the best interests of the child,

[46] Pg. x, UNICEF, A legal and Institutional Assessment of Sri Lanka's Justice System for Children

[47] Pg. 40, UNICEF, A Legal and Institutional Assessment of Sri Lanka's Justice System for Children

[48] Pg. 12 & 13, Kalyananda Thiranagama (Children's Desk, Lawyers for Human Rights and Development), International Instruments on Juvenile Justice

which is the golden thread running through out the child protection law regime. Today with modern day social complexities and complications psychological, psychosocial and psychiatric concerns are integral and indispensable elements of the legal concept of best interests of the child. However, as a consequence of said obscurity and inexplicitness in terms of the definition of best interests of the child a criteria or guidelines focusing on psychological, psychosocial and psychiatric concerns of child is heavily demanded. In the circumstances, courts are required to resort to International Law Conventions like Convention on the Rights of Child in confronting said confusion. This is because Sri Lanka adopts a dualist approach to International Law. Article 157 of the Constitution as well as recent Supreme Court judgments in the fundamental rights jurisdiction like *SC FR 139/2012 Shanuka Gihan & Amila Dilshan vs. Lory Koswatte, Deputy Principle, Gunesekera, Secretary, Ministry of Education and Hewa Maddumage Karunapala, Dona Kumari vs. Jayantha Premakumara Siriwardene SC/FR 97/2017* demonstrate the legal approach where persuasive effect of some articles of Convention on the Rights of Child and UN Comments on UNCRC are adopted by judicial incorporation of international law judgments or as soft laws. From a precautionary dimension of preventing crimes and juvenile delinquency, basic criminological causes of juvenile delinquency or adverse childhood experiences (ACEs) like parental divorce, disintegration of family, associational impact, failure in school life, disobedience, low intelligence to irresistible impulses provide a basis for analyzing probationary reports under CYPL. In view of psychological and psychosocial perspective metamorphosis of theories like psychodynamic theory of Sigmund Freud, Erickson's theory on psychosocial development to various criminological theories such as impulsive theory, cognitive theory, traits like lack of empathy, to even child disorders like like ADHD (attention deficit hyperactivity disorder). could be utilized to identify and remedy criminal inclinations in both children in conflict with law and victimized children in need of care and protection from the early point of contact with the juvenile justice system. US Supreme court cases such as *Miller vs. Alabama or Miller* factors demonstrate that resorting to psychology and psychiatry is a worldwide trend in which pragmatically and lawfully juvenile interests are ensured. This mechanism focusing on psychological, psychiatric and psychosocial dimensions is inevitably needed to prevent tragic scenarios like the vicious cycle of unremedied juvenile victims of abuse ultimately transforming to abusers, drug addicts and personal with high criminal inclinations. Simultaneously, neuroscientific or neuropsychiatric research of renowned criminologists like Adrian Raine is so vital because irrespective of biological design or persons' genetical reflection of criminal tendencies could be changed with stimulating environment with love, care and unconditionally loving environment. Therefore, however grave

or formidable the juvenile criminal situation may be, urgent remedial measures must be implemented in view of this approach and in pursuance of the pressing social demand.

AN ANALYSIS OF THE LAW RELATING TO MAINTENANCE IN SRI LANKA

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1. Introduction

Ample number of matters relating to the subject of Maintenance are witnessed daily in the Magistrates Courts. Hence, a discussion, particularly analyzing the statutory provisions and decided cases are noteworthy. However, this article is not a comprehensive analysis of Maintenance Law of the Country. It purely attends to do a doctrinal analysis to highlight key aspects of the Maintenance Law in Sri Lanka.

2. Who can claim Maintenance?

The Law relating to Maintenance in Sri Lanka is governed by the Maintenance Act, No 37 of 1999. By virtue of Section 02 thereof, a spouse, a child, an adult offspring or a disabled offspring who is unable to maintain himself or herself are permitted to make an application for maintenance.

However, the Section itself provides several exceptions to the above rule as follows.

2.1. Claim made by a Spouse

In the event of a spouse, no order for Maintenance shall be made if the applicant spouse is living in adultery or both the spouses are living separately by mutual consent[1].

In **Jayasinghe V Jayasinghe**[2], Gratiaen J discussed the standard of proof (to be observed by a court in a proceeding for the dissolution of marriage on the ground) of adultery. Thus, it was held, after guided by several authoritative pronouncements of the English courts, that the same strictness of proof is required to establish a charge of adultery as in the case of a criminal charge. A similar Additional District Judge- Walasmulla, B.A. (Honors) (Psychology) (Peradeniya), Diploma

[1] Section 2 (1) of the Act
[2] 55 NLR 410

in Forensic Medicine (Peradeniya) 1Section 2 (1) of the Act 255 NLR 410 dictum was adopted in **Dharmasena V Nawarathna**[3] and **Ebert V Ebert**[4] that adultery must be proved beyond reasonable doubt.

In the matter of **Selliah V Sinnammah**[5], it was discussed who has the burden in proving the adulterous conduct. Accordingly, it was held that it was not the duty of the applicant to prove that she/ he was not living in adultery and that the burden is on the Respondent to prove that fact.

Discussing further, there are a number of decided cases on the words "living in adultery", which are worth stating here. In **Arumugam V Athai**[6], it was held that, a person who asserts that his wife is disentitled to receive an allowance under the Maintenance Act by reason of the fact that she is living in adultery must establish that she is leading a life of continuous adulterous conduct. Furthermore, in **Balasingham V Kalaiwani**[7]Atukorale J decided that if the marital tie subsists, the maintenance order made in favor of the wife will be cancelled only if the wife is guilty of a continuous course of adulterous conduct, and not merely due to isolated acts of adultery. Additionally, by referring to Section 05 of the Maintenance Ordinance (which was repealed by now), it was stated that there is a clear distinction between 'committing' adultery and 'living in adultery'. Accordingly, an order for maintenance can be cancelled if the wife was living in adultery at or about the time of the application.

Besides, in **Pushpawathy V Santhirasegarampillai**[8], Basnayaka J decided "Living in Adultery" is continued adulterous conduct by quoting Arumugam v. Athai (Supra) and **Ma Thein v. Maung Mya Khir**[9] that the word "live" conveys the idea of continuance and consequently and the phrase "living in adultery" refers to a course of guilty conduct and not a single lapse of virtue. The same principle was enumerated in **Wijesingha V Josi Nona**[10], and **Reginahamy V Johna**[11] where it was held at the latter case that, in the case of an application for maintenance (under the Maintenance Ordinance 1889), the fact that the wife had at one time anterior to the application adulterous conduct of the applicant and the respondent should prove that the alleged adulterous conduct was present at the time of the

[3] 72 NLR
[4] 19 422 NLR 310
[5] 48 NLR 261
[6] 50 NLR 310
[7] 1986 (2) SLR 378
[8] 75 NLR 353
[9] (1937) A. I. R. Rangoon 67
[10] 38 NLR 375
[11] 17 NLR 376

application for maintenance.

2.2. Claim made by or on behalf of a child, an adult offspring or a disabled offspring

Proviso to Subsections (2), (3) and (4) of the Section 2 specifies that in the event of a non-marital child, adult offspring or a disabled offspring, no such orders for maintenance shall be made unless the parentage is established by cogent evidence to the satisfaction of the Magistrate.

When considering the parentage, it is important to discuss the presumption of legitimacy set out in Section 112 of the Evidence Ordinance. Accordingly, it reads as, a person born within a valid marriage or within 280 days after the dissolution of the marriage mother remained unmarried, shall be a conclusive proof that such person is the illegitimate child of such father unless it can be shown that the father had no access to mother or that the father was impotent. In **Selliah V Sinnammah** (Supra), held that the word "access" in Section 112 of the Evidence Ordinance meant no more than opportunity of intercourse and therefore the Defendant is liable to maintain the child. Furthermore, Dias J by citing **Ranasinghe V Sirimanne** [12] and **Karapaya Servai V Mayandi** [13] states that the decision in **Jane Nona v. Leo**[14] which stated that the access in terms of Section 112 of the Evidence Ordinance means "actual intercourse" and not "possibility of intercourse" is no longer regarded as binding authority. A similar conclusion was reached in **Andiris Fonseka V Alice Perera**[15] where it was decided that the opportunity of intercourse is the access and it does not mean the actual intercourse.

There are a number of binding authorities as to the standard of proof under Section 112 of the Evidence Ordinance. Accordingly, in **Pesona V Babanchi Bass**[16] Presumption of legitimacy created by Section 112 of the Evidence Ordinance can be rebutted only by clear and cogent evidence and the standard of proof is beyond the reasonable doubt. This was accepted in **Samarapala V Mery**[17] and **Amina Umma V Nuhu Lebbe**[18] where proof beyond the reasonable doubt is necessary in order to rebut the presumption of legitimacy while strong and satisfactory evidence is needed to prove the access. Furthermore, according to **Clarice Fonseka V Winifred Perera**[19] the burden of proving the access is relying

[12] (1946) 47 NLR 112
[13] AIR (1934) PC 49
[14] (1923) 25 NLR 241
[15] 57 NLR 498
[16] 49 NLR 442
[17] 74 NLR 203
[18] 30 NLR 220
[19] 59 NLR 364

on the respondent.

In this background, it is important to look at Proviso to Section 2 (2), 2 (3) and 2 (4) of the Maintenance Act which states that the parentage should be established by cogent evidence to the satisfaction of the Magistrate. Accordingly, it is important to behold what can be considered as cogent evidence to the satisfaction of the Magistrate. Thus, in **Weerasinghe V Jayasinghe**[20] it was held that, in a case where the parentage is an issue, the most cogent evidence is DNA Test and such test could either rebut the presumption of paternity or establish the marriage.

In addition, regarding the quantum of the Maintenance, it was held by Wijayatilake J in **Dhanapala V Baby Nona**[21] that in an application for maintenance for a child, the Magistrate has no jurisdiction to award any sum in excess of the quantum claimed by the Applicant.

Accordingly, it is clear that if a maintenance application is made by a child, an adult offspring or by a disabled offspring, the parentage of the respondent should be proved by cogent evidence. It is also clear, by referring to above decided cases, that the burden of proving is beyond the reasonable doubt and the responsibility of proving the access is on the Respondent.

2.2.1. Corroboration of mother's evidence for maintenance application of an illegitimate child

In this regard, it is worth discussing the law relating to maintenance applications made by a mother of an illegitimate child. In such matters, it is important to see whether previous statements made by the mother of the illegitimate child to third parties as to the paternity of the child are sufficient corroboration. It is a well settled law that in order to justify an order for maintenance of a child, the evidence of the mother should be corroborated in some material particulars by other evidence is satisfied by any kind of corroboration which is recognized by law at the time of giving evidence, as held in **Ponnammah V Seenithambi**[22]. It was further held that corroboration under maintenance cases is corroboration under Section 157 of the Evidence Ordinance (any former statement made by a witness) and not independent corroboration.

In **Seetha Kumari Thennakoon V R. B. Thennakoon**[23], it was decided that, there must be evidence that implicates the defendant or connects the defendant

[20] (2007) 2 SLR 50

[21] 77 NLR 95

[22] 22 NLR 395

[23] 78 NLR 13

[24] 1981 1 SLR 391

with the birth of the child. In **Thavanayaki V Mahalingam**[24] while confirming the above decision, further decided that, corroborative evidence must be to satisfy the Magistrate that the evidence of the mother that the child begotten has been the result of her intimacy with the respondent is the truth. Moreover, the corroborative evidence of opportunity, the evidence of previous statements and the evidence of the conduct of the respondent should be to the satisfaction of the Magistrate.

In **Dingiriya Karunawathi V Nimal Wickramasingha**[25] it was held that, if the mother's evidence does not convince the judge, the question of corroboration does not arise. This was further discussed in **Turin V Liyanora**[26] where it stated that, no order for maintenance of an illegitimate child should be made unless a mother who has given convincing evidence is corroborated in some material particular. To arrive at that conclusion, Basnayake J referred to the concepts of RomanDutch Law where it states that the applicant who seeks to fix the paternity of an illegitimate child on a man must clearly prove it and must be corroborated in some material particular. As set out in **Solaman Fernando V Chandralatha Abeysekara**[27] the Magistrate must analyze the evidence very carefully and arrive at a firm finding as to whether he believed the applicant or the defendant, before looking for independent corroboration of the applicant's evidence. If the Magistrate is of the view that the applicant's evidence is unreliable, the need for corroboration does not arise.

3. What are the ingredients to prove?

As per Section 2 of the Maintenance Act there are three elements to be proved by the Applicant in order to claim maintenance. Those are 1) Responded has sufficient means of income, 2) the In **Rasamani V Subramaniam**[28] it was held that the word "means" in Section 2 should be given a wide meaning and includes the capacity to earn money. Furthermore, it emphasized that if such person (respondent) offers to maintain his wife on the condition of living with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order under Section 2, notwithstanding such offer. In **Sivapakian V Sivapakian**[29] it was held that "having sufficient means" denotes a person who has a source of income or who has willfully abstained from earning an income. Further, it was held that in determining whether the appellant has willfully abstained from earning, the Magistrate should consider whether he is in health and strength and

[25] BASL Law Journal 1995 volume 6 part I
[26] 53 NLR 310
[27] 78 NLR 119
[28] 50 NLR 84
[29] 36 NLR 295

able to earn by work suitable to his past and present condition in life and whether such work is readily attainable.

The yardsticks should be used by the Magistrate when considering an application before him for maintenance was discussed in the recent Supreme Court the case of **Hewa Walimunige Gamini Vs Kudaanthonige Rasika Damayanthi & Other**[30]. There, his Lordship Justice Malalgoda held that, when going through the provisions set out in Section 2 of the Maintenance Act, it is clear that the legislature had expected the Magistrate when considering an application before him for maintenance of a spouse and/ or a child, to satisfy himself;

a) With regard to the spouse whether he or she is unable to maintain him or herself, proof of such neglect or unreasonable refusal, such monthly rate as the Magistrate thinks fit having regard to the income of such person, and means and circumstances of such spouse,

b) With regard to the child whether the child is unable to maintain him or herself, such monthly rate the Magistrate thinks fit having regard to the income of the parents and the means and circumstances of the child when ordering maintenance against the errant spouse or the parent.

Furthermore, it recognized that, in addition to the above requirement, there is a general requirement under section 2 viz; such person against whom the maintenance order is made should have from her husband even under the said Ordinance". Accordingly, it was decided that, all the requirements set out in Section 2, that is, a person who is having sufficient income, neglects or unreasonably refuses to maintain the spouse, whether the spouse is unable to maintain her/ himself, having regard to the income of that person and means and circumstance of the spouse and all these requirements are necessary ingredients in making a maintenance order under the provisions of the Maintenance Act.

4. Period of validity of order

In terms of Section 3 of a maintenance order considering a child the order shall be valid until the child, adult offspring, disabled offspring cease to be so.

Discussing further, when considering a spouse, there are situations where the

[30] SC Appeal 151/2017, decided on 11/03/2020
[31] 73 NLR 428
[32] 39 CLW 75

application for maintenance is made by a party during the pendency of an action for divorce. In **Rayappan V Monicamma**[31] De Krester J by citing Wimalawathi **Kumarihamy V Imbuldeniya**[32] stated that, an application for maintenance is not affected by the institution of an action for divorce. A similar dictum was pronounced in **Perera V Rodrigo**[33]. Accordingly, it was stated that, there is no bar to a divorced woman to receive maintenance for a period anterior to her divorce. Thus, a maintenance order considering a spouse shall be ceased after the decree nisi is entered in a divorce matter.

5. Burden of proof

In maintenance matters the proceedings are civil in nature and the matter should be decided in balance of probabilities. This was held in **Eina V Galaneris**[34] and **Carlina Nona V de Silva**[35].In the latter it was held further that, Maintenance proceedings are in civil nature though the forum which determines the rights of the parties is a criminal court. Therefore, a maintenance matter

6. Enforcement of Orders

Section 05 of the Act states that where any Respondent neglects to comply with an order for Maintenance, the Magistrate may, for every breach of the Order, sentence such respondent for the whole or any part of each month's allowance in default, to simple or rigorous imprisonment for a term which may extend to one month. Subsection 02 thereof further states that, if an application is made by a person who is entitled to receive any payment, before passing a sentence of imprisonment, issue a warrant directing the amount in default to be levied in the manner provided by law for levying fines imposed by Magistrate.

Section 6 deals with an 'attachment of salary of the Respondent'. In summary this Section gives the Magistrate the power to direct the employer of the Respondent to deduct an ordered amount from the salary and/or earnings of the Respondent and pay it to the Applicant. Furthermore, in **Jayasingham V Jayasingham**[36] it was held that warrants can be issued on the respondent in Maintenance matters.

7. Inquiry

Section 11 of the Maintenance Act provides that every application for maintenance

[33] 1994 2 SLR 332
[34] 4 NLR 4
[35] 49 NLR 163
[36] 1981 2 SLR 132

shall be supported by an affidavit and if the Magistrate satisfied the facts, issue a summon together with a copy of the affidavit to the Respondent to appear and show cause why the application should not be granted. However, the section itself provides the power to the Magistrate for the making of an interim order at his discretion. Such monthly allowance shall remain operative until an order on the application is made and such order shall have effect from the date of the application. Subsection 2 thereof, states that the Magistrate cannot dismiss the maintenance application on any technical grounds. This view was taken by G. P. S. De Silva J in **Senevirathna Banda V Chandrawathie**[37].

Accordingly, Section 11 induces the Respondent to show cause as to why the application of the Applicant should not be granted. Accordingly, it is upon the Respondent to prove that, 1) he/ she applicant and the child, if the respondent admitted the marriage, but denies the paternity, the burden is on the respondent to establish his defense first, as held in **Velenis V Emmie**[38].

In **Hewa Kankanamage Pushpa Ranjani V Ruhunuge Sirisena**[39] reflex that, in a maintenance case overall burden is lying on the applicant to prove that the respondent had sufficient means, refused to maintain the wife and that the applicant is unable to maintain herself. Besides, the burden of proof that respondent has no sufficient means relies on the respondent.

Moreover, Section 12 of the Maintenance Act emphasize the power of the Magistrate to proceed in the manner set out in the Code of Criminal Procedure Act, to compel the attendance of the person against whom the application is made and of any person required by the applicant or the person against whom the application is made to give evidence, and the production of any document necessary, for the purposes of the inquiry.

Discussing further on maintenance inquiry, the procedure to be followed if the respondent is of unsound mind was discussed in **Wijerathna V Chandrawathi Perera**[40]. Accordingly, if such an application was made on behalf of the Respondent, steps should be taken to appoint a suitable person as a guardian of the person, to manage his state and to proceed with the inquiry. It was also stated that the procedure set out in Chapter 33 of the Code of Criminal Procedure Act and procedure set out in Chapter 25 of the Civil Procedure Code has no direct application in maintenance actions.

[37] 1997 1 SLR 12

[38] 55 NLR 95

[39] SC APP 117/ 2010 Decided on 08-05-2013

[40] 79 (1 NLR) 44

Furthermore, in a situation where the application is dismissed by the reason of Applicant being absent on the date of the inquiry, the Applicant can subsequently show that she has a valid ground for her absence. In that situation, the Magistrate can vacate his earlier order and re-opened the proceedings on the grounds of natural justice. However, there are no specific provisions in this regard in the Maintenance Law. This was discussed by Wijethilake J in **Seneviratne V Podi Manike**[41].

As per Section 2 (5) of the Act, an allowance shall be payable from the date of the application unless the Magistrate orders payment from any other date, upon good reasons recorded. As set out in Section 8 of the Act, upon the proof of changing the circumstance of any person benefited from the order or against whom an order was made, the Magistrate may cancel or alter the number of allowances already made. However, such cancellation or alteration shall be taken effect from the date of such application for alteration or cancellation, unless ordered otherwise upon good reasons to be recorded.

It is also important to state that, according to the Section 26 (5) of the Judicature Act, as Amended by Act No 34 of 2022, it is mandatory to refer family matters including Maintenance matters to the Family Counsellor, unless any party to the action expressly in writing desire to the contrary.

8. Concluding remarks

This paper endeavors to do a brief narrative of the law germane to Maintenance in Sri Lanka viz; application of Maintenance orders, period of validity, enforcement orders and maintenance inquiry. The author will be content if this article proves to be of some benefit on the day today Magistrate Court work.

[41] 73 NLR 91

THE LAW RELATING TO MARINE POLLUTION CAUSED BY CARGO SHIPS

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1. Introduction

The geo-positioning of Sri Lanka between the East-West shipping routes has naturally contributed to emerge Sri Lanka as a significant maritime hub in the Indian Ocean.Moreover, Sri Lanka is located where ships experience a low deviation from major sea routes and located between major oil transit points namely; Suez Canal and Strait of Malacca. Marine pollution caused by cargo ships is one of the negative outcomes of the globalization and advancement of international trade. The impact of the pollution is extremely hazardous and it may exceeds the assimilative capacity of the sea and degregate the marine eco system causing harm to the marine environment , health and the economy.

A 'cargo ship' is any ship, which is not a passenger ship . In simple terms, a cargo ship is a ship which carries cargoes from one port to another .There are different types of cargo ships depending on the cargoes they carry ; namely general cargo, multipurpose ships, dry bulk carriers, reefer vessels[3], barge vessels[4] ,tanker vessels and livestock vessels. Each type of cargo requires special conditions and specified modes of transportation. Main sources of pollution caused by cargo ships are ballast water,oil transportation,Portable tanks , Chemical substances, noxious wastes and biological agents , Dumping of pollutants from cargo ships and Atmospheric pollution.

After Torrey Canyon incident took place in the United Kingdom in 1967, the global attention drawn towards regulating shipping activities to mitigate marine pollution. There are major ship sourced pollution incidents took place in different oceans of the world such as; Amoco Cadiz (1987) , exoti Valdez C 1989.) Erika (1999) and Prestige (2002). Sri Lanka has experienced similar pollution incidents from cargo ships. In 1999 the ship 'Meliksha' caused a massive damage to the

[1] S 138, Merchant Shipping Act of Sri Lanka .

[2] Hiteshk, 'What are cargo ships?', <https://www.marineinsight.com/types-of-ships/what-are-cargo-ships/> , accessed on 28/09/2020

[3] Ships which have specifically designed to transport goods that have to be temperature controlled or frozen during their shipment

[4] In this kind of cargo ship cargoes are stored within large floating pontoon.

coastal environment around Bundala due to an oil spill. The most recent incident is X-Press Pearl incident , the maritime disaster caused in May 2021 where the Singapore flagged cargo vessel caught fire and later sank off the western coast in Sri Lanka causing extensive and lasting environmental damage.The Supreme Court delivered a Judgment directing X Pearl Company to pay USD 1 Billion Dollars as interim compensation to the Sri Lanka treasury.

1.1 The Maritime Law in Sri Lanka

The maritime law in Sri Lanka originally derived from English common law. The English law relating to certain subjects were selectively incorporated by statute and judicial activism[5]. This English maritime law became a part of Sri Lankan law by 'Introduction of England Ordinance No.5 of 1852 by which the Roman Dutch Law became obsolete[6]. The introduction of the Laws of England Ordinance 1852 enacts the law of England is to be observed in maritime matters[7]. The legal provisions in relation to ship generated pollution are found in various enactments such as Merchant Shipping Act, Carriage of Good by the Sea Act and Marine Pollution Prevention Act. . .In 1952 Merchant Shipping Act was enacted incorporating limited provisions in respect of ship sourced pollution. However, the Merchant shipping Act did not contain specific provision with regard to the marine pollution. Thereafter, in 1981 the Carriage of Goods by the Sea Act in 1981 was enacted introducing general aspects of transportation of goods. but it does not. contain specifically identified..measures to prevent ship generated pollution. The most recent piece of legislation in order to regulate ship sourced pollution in Sri Lanka is the 'Marine Pollution Prevention Act (MPPA) 2008. This Act established significant institutional framework; the marine environment protection authority and the environmental council and their respective functions.. . . .

1.2 The existing law in Sri Lanka relating to ship sourced pollution

The Article 27 (14) of the Constitution of Sri Lanka states that the State shall protect, preserve and improve the environment for the benefit of the community. Thus, the government is obliged to take precautionary and necessary measures in order to preserve the environment for future generations. Emphasizing this importance of protecting the environment through the constitution which is the supreme law of the country is a progressive approach which creates positive guidance for other laws.

[5] L.J.M. Cooray, An Introduction to the Legal System of Sri Lanka, 'The influence of the common law tradition' Stampford Lake Publication, pg 31

[6] "The English law relating to certain subjects was selectively incorporated by statute and judicial activism and gradually became the common law of the country, L.J.M.Cooray, An introduction to the legal system of Sri Lanka, (7th, A Stamford Lake Publication, Sri Lanka 2003) pg 31

[7] bid pg 32

1.3 Marine Pollution Prevention Act No. 35 of 2008

The recent piece of legislature was enacted in 2008 to provide legal provisions for prevention, control and reduction of pollution. The Marine pollution Prevention Act No 35 of 2008 is the major piece of legislature in relation to the regulation of ship based activities in the sea. The Marine Environment Protection Authority and Marine Environment Council are the primary authorities established by this Act. Certain functions have been allocated to MEPA and MEC ;MEPA functions as the main authority to administer and implement the provisions of marine pollution prevention act whereas MEC functions as the main advisor of MEPA. The Act has conferred the power to authority to safeguard and preserve the territorial waters of Sri Lanka from pollution arising out from ship based activity[8] .

Specifically, the Act set out provisions bestowing the officers of MEPA the power to inspect ships. Accordingly the owner, master, operator or agent of the ship is required to provide information in respect of the condition of the ship, the quality and nature of cargo and the manner in which the cargo and fuel are stored[9]. The shipper should maintain a record book reporting the operational activities of the ship. It requires including details including tanks, storage of cargo and other operational aspects of the ship. The failure to maintain this book is an offence under the said Act.

In terms of Section 11 of the Act an authorized officer of the Authority can detain a ship in the presence of reasonable cause to believe that a harmful substance has been discharged by the ship to the marine environment[10].Here, the authority has the discretion to detain any ship until the owner, operator, master or the agent of the deposits a sum of money as the security[11] .

Under the existing law of Sri Lanka a civil or criminal liability can be imposed for the damages caused to the marine eco system and other associated damages. The law imposes civil liability associating the polluter pays principal and accordingly the ship owner or the agent should bear the cost incurred to clean and replenish the environment. Moreover, upon the circumstance the Court may order to compensate for the damages caused to tourism value, health and replacement value. In the most recent case of X- Press Pearl[12], the Supreme Court

[8] S 7 (a), Marine Pollution Prevention Act No 35 of 2008

[9] ibid, S 5 (a)

[10] ibid, S 11

[11] ibid

[12] SC/FR Application No: 168/ 2021, 176/ 2021, 184/ 2021, & 277 / 2021

of Sri Lanka considered 'polluter pays principle', the liability of ship owners and state authoritie's failures. Primarily, the consequences of the X-Press Pearl disaster were broadly classified under two headings namely,unprecedented and widespread environmental damage; and Economic losses caused to the nation and to the fishing sector in particular. The vessel X-Press Pearl carried approximately 78 Metric Tonnes (78,000 Kg) of micro plastics, spherical in shape, referred to as nurdles. These 75 to 100 billion nurdles are used to manufacture plastic products[13] which were extremely hazardous to the marine eco system.In the aforesaid Judgement, the Supreme Court held that *"we have no hesitation to hold that the pollution (whether it be marine, plastic ,chemical, oil or air) caused by the X-Press Pearl catastrophe is immeasurable, unfathomable and infinite [14].* The Judgment not only granted compensation for the environmental damage caused but further directed the Attorney General to review gaps in Sri Lanka's maritime laws and align them with international standards to prevent future disasters.

A party can make an application seeking compensation for other damages such as emotional distress; however the granting of such reliefs subject to the discretion of the judge depending on the circumstance of the case. The application of maritime tort law in Sri Lanka is very rare and there are only a handful number of cases. Damages are also available under nuisance and trespass if the Plaintiff losses use and enjoyment of a natural resource. *The People of Welroys ex relPon v. MV Ace* [15] the Plaintiffs instituted the action alleging six causes of actions namely; maritime negligence, trespass, nuisance, unseaworthiness of the vessel and emotional distress. However the Court did not consider the cause emotional distress as the Plaintiff did not allege that there was a physical injury.

Furthermore, even though there is a law in Sri Lanka in relation to the ship sourced pollution the MMPA is not specifically designed to prevent ship sourced pollution but it is a general piece of legislation which covers overall marine pollution. In addition to that there are issues pertaining to the practical implementation of these laws due to lack of financial facilities, infrastructure and technological expertise which make the existing law more ineffective.

[13] ibid pg 186

[14] ibid, pg 187

[15] The People of Welroys ex relPon v. MV Ace [2007] FMSC 28; 15 FSM Intrm 151 (Yap.) 2007 (29 June 2007)

[16] www. imo.org, IMO brochure 2011

2. International Legal Instruments

2.1 The Law of the Sea Convention (LOSC)

The LOSC is known as the 'constitution of oceans' as it deals with many aspects of maritime transportation, ships and the environment. Specifically the Convention provides legal regime for prevention of ship generated pollution in the part XII under the title 'protection and preserving the marine environment'.

2.2 MARPOL Convention 1973

The first international initiative regarding marine pollution was the 1954 convention for the prevention of pollution of the sea by oil. However this convention was superseded by 1973/78 MARPOL Convention.

The vision of IMO is to eliminate all forms of disastrous environmental impacts generated by ship by enhancing universal regulatory framework[16]. The IMO convention is a main part of regulatory international law. Basically, it contains preventive measures, technical standards and mitigation of pollution.The role of IMO in prevention of ship sourced pollution is significant. The IMO established the MARPLOT Convention[17] to provide an international legal framework for the prevention of ship generated pollution. This convention is with six annexures and contains provisions in order to address fundamental environmental issues causing due to the maritime shipping.

The MARPOL Convention set out provisions in respect of proper handling and monitoring of oily water, crude oil washing systems and segregation of ballast tanks. In1993 the first annexure was amended so as to include the requirement of double hulls for tankers. A modern measure was brought in 2005 so as to prohibit the carriage of heavy grade oil by single hull tankers[18]. Moreover, the Annex III of the MARPOL requires the identification of hazardous substances and they are safely packed when they are carried.

In order to regulate the discharge of ballast water from ships the IMO has formulated 'the International Convention for the Control and Management of Ships' Ballast Water and Sediments'. According to this convention ships are required to have a ballast water management plan, maintain a ballast water record book and ballast water management certificate on board and have a ballast water treatment system in line with D-2 IMO standards[19].

[17] MARPOL Convention 1973

[18] ibid page 55

[19] Matthew Dow abd Baptiste Weijburg, 'Shipping and the environment', chapter 8 , page 60

In respect of carriage of hazardous substances; the 'International Maritime Dangerous Goods Code' specifies the substances which are dangerous in nature and likely to pollute the environment. The MARPOL uses the same definition in the aforementioned code to define a dangerous good[20]. MARPOL emphasises that depending on the hazardous of the cargo the owners have to take appropriate measures to regulate the carriage of those hazardous cargo[21]. This conventions set out regulatory framework for garbage disposal and ship garbage management plan.It is an offence to dispose operational and other wastes to marine water and ship owners are responsible for irregular discharge of garbage to the sea[22].

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

According to the international legal instruments relating to ship sourced pollution states which are signatories to the convention are under an obligation to protect the marine environment. The Section 6 of Part III established three fundamental principles ; namely , flag state control , port state control and coastal state control which has empowered the signatories to enforce the laws and regulations for the purpose of preventing ship sourced pollution in the international level.

Article 217 of UNCLOS states that flag states shall guarantee its compliance to the international standard to prevent ship sourced pollution. The flag states are under an obligation to conduct immediate vessel investigations and if it is found that any vessel has violated rules initiate legal proceedings in that respect.

In examining how these international legal instruments are incorporated to the domestic legal system in Sri Lanka it could be identified that prevention of polluting marine environment by cargo ships is much concentrated on the port state control and coastal state control rather than flag state control . The reason behind this is that there are only a handful number of ships are registered under Sri Lanka which sails flying Sri Lankan flag[23].

2.4 International Convention for the Control and Management of Ship's Ballast Water and Sediments 2004.

The IMO assembly adopted a resolution A.868 (20) in 1997 revising the earlier guidelines of the IMO adopted in 1993.The purpose of this IMO guidelines on Ballast Water Discharge was to encourage States to work on internationally

[20] Regulation 1 MARPOL Annex III

[21] Regulation 6 and 7 MARPOL Annex III.

[23] S Thalakiriyawa, Analysis Of International Instruments In Relation To Vessel Source Marine Pollution With Special Reference To Marine Pollution Prevention Act Of Sri Lanka, 11th International Research Conference General Sir John Kotelawala Defence University , pg 113

accepted practices in order to protect the environment and human safety until a proper regime is established by the IMO[24].Accordingly, a specific convention was introduced in 2004 providing legal framework control and manage ship's ballast water and sediments.

The IMO Assembly adopted a Resolution in A. 868(20) in 1997 revising the previous guidelines of the IMO in 1993.The sole purpose behind this resolution was to encourage States to comply with internationally recognized practises in order to safeguard the marine environment until a proper regime of established by IMO[25].

2.5 The Bunker Convention

This international instrument provides provisions in respect of compensation for those who suffered from oil spills. This convention incorporates 'polluter pays principle'. Bunker Convention ensures the sufficient compensation for victims of oil spills from bunker tanks. More importantly, this convention imposes strict liability for bunker oil pollution. NZ has incorporated the provisions of this Bunker Convention to their domestic legislation in 2014.

2.6 International regime for compensation for oil pollution damage caused by spills from oil tankers (1992 CLC)

CLC provides legal framework for recovery of pollution costs from owners of oil tankers which carries persistent oil. The specific provisions of CLC 1992 has been incorporated to NZ law by part 25 of MTA 1992.Section 347 of MTA specifies limits of liability of CLC ship owners.

3. The UK legal framework relating to ship sourced pollution

Shipping contributes for 95% trade activities in the UK making the total economic contribution of £ 12.5 annually[26].The UK legal framework exist as a mixture of case law and legislation. The UK is a party to MARPOL and other major international conventions.

The annexes IV and V of MARPOL are incorporated to the UK law through Merchant Shipping (Prevention of Pollution by Sewage and Garbage from ships) regulations 2008 (as amended). This regulation provides necessary framework to regulate disposal of sewage and garbage from ships.

[24] Guideline 4, The IMO Guidelines on Ballast Water Discharge

[25] Guideline 4, IMO Resolution A. 868(20), 1997

[26] Maritime and Coastguard Agency business plan 2017-2018, www.gov.uk/government/uploads/system/upload/attachment_data/file/609584/MCA_business_plan_2017=18-pdf

The Merchant shipping (Prevention of Air Pollution from Ships) Amendment Regulations 2008 includes provisions in relation to the prevention of air pollution from ships.

The provisions of CLC Conventions are incorporated to the UK law by the Merchant Shipping (Oil Pollution) Act 1971.The significance of this convention is that it imposes strict liability on owners for their breach of duty for damages caused by oil spills.

In the UK main legal instruments in respect of this vessel sourced pollution are Merchant Shipping Act 1995 and Marine and Coastal Access Act 2009. The environmental Protection (micro beads) regulation 2017 banned the manufacturing and selling of rinse off personal care products containing micro beads to prevent plastic micro beads entering the marine environment.

The Marine and Coastal Access Act 2009 established Marine Management Organization (MMO) in order to administer a licensing system to prevent pollution. Under this Act specific licensing system has been introduced to carryout activities including depositing any substance within the UK marine licensing area, carrying out incineration activities on any vessel. It is noteworthy that the activities require a marine license also need wildlife license if the particular activity affects protected species of habitat .Furthermore, the Act specifies Marine Conservation Zones to confront the practical challenges faced in the implementation of the Act.

Persuant to the Merchant Shipping Act 1995 it is an offence to discharge any oil or oil mixture in to the marine waters. However, an exception is provided to bring the defence that the discharging of oil was necessary to safeguard the vessel or life.In oil spillage owners, masters of the ship can be made criminally liable.

The Merchant Shipping (Oil Pollution Preparedness, response and cooperation Convention) in 1998 implements the obligations of the international convention in the UK legal framework. Particularly, it is required that the harbour authorities, ports an oil handling facilities to prepare plans in order to clear oil spills. As well as the above plans should be compatible with National Contingency Plan (NCP).

3.1 The Merchant Shipping Act 1995

The regulations set out in the Merchant Shipping Act apply to the all UK ships irrespective of the place of voyage and also to the foreign ships on the UK waters. Under this Act the transfer of cargo or ballast between ships in the UK is regulated in order to prevent ship sourced pollution. Discharging of oil from to the UK waters is a criminal Act under this Act.

It should be noted that the Merchant Shipping Act of the UK embody provisions imposing strict liability on polluters who damages the marine territory of UK or of a country signatory to the International Convention of Civil Liability for Oil Pollution Damage 1969. More importantly, this Act contains provisions in respect of payments of contributions to the International Fund for Compensation for Oil Pollution Damage.

Moreover, all the UK oil tanks should be surveyed in a regular basis and issue an international oil pollution prevention certificate when they travel to the other countries which are party to the convention for the prevention of pollution from ships 1973.

The UK legal framework in respect of air pollution from is also of significant importance. The directives of MARPOL annex VI relating to the emissions from ships is incorporated to the UK law through Merchant Shipping (Prevention of Air Pollution from Ships) (Amendment) Regulations 2010.Particularly, ships should not use fuel oil less than 0.5% of sulphur content reduced to 0.1% content in sulphur. As well as new regulations contains provisions limiting NOx emissions from new ships which were built after 2021.

4. Newzealand Legal Framework in relation to ship sourced pollution

Marine Transport Act of 1994 is the key regulatory framework which incorporate legal basis for prevention, mitigation and control of ship sourced pollution in NZ.Most of the NZ'a marine protection laws and rules are provided by this MTA. Specific guidelines of International Convention pertaining to ship sourced pollution such as MARPOL, UNCLOS are incorporated to the NZ domestic legislation through this Marine Transport Act 1994.The Marine Transport Act 1994 established Oil Pollution Advisory /committee (OPAC) in order to provide adversarial support and assistance .Furthermore, the Act has established an Oil Pollution Fund which can be identified as a distinct feature in NZ legislation[27] in order to provide necessary financial support for purchase of equipments required in the implementation of regional and national plan pertaining to sudden oil spillage. The design of NZ Marine Transport Act of 1994 is comprehensive as aforesaid and includes specific particulars pertaining to marine pollution. Section 18 of the NZ Act contains preliminary provisions relating to marine pollution and the Section 19 specifies about the protection of marine environment from hazardous substances. Moreover, the Section 226 states that harmful substances

[27] S 330, The Marine Transport Act of NewZeland 1994

not to be released to the EEZ or Continental Shelf. The purposes of the MTA also covers a wide range of aspects including continuing maritime NZ , consolidate and amend the maritime transport law in NZ, protecting the marine environment ,regulating marine and shipping activities in NZ and its waters and regulate the maritime and shipping activities as permitted by internationally accepted laws and regulations[28] .

4.1 Newzealand Marine Oil Spill Readiness and Response Strategy

Under Maritime Transport Act 1994 NZ introduced Marine Oil Spill Readiness and Response Strategy 2018-2022[29]. The purpose behind this strategy is to create efficient, effective and resilient oil spill system. This system outlines targeting of overall readiness to a sudden incident in large scale.NZ usually experience oil spills which are small in volume. Even though they are easily managed by the government still there is a readiness and response system to confront to a significant spill with a high impact to the environment

4.2 NRT (National Response Team)

This is a team who received specialized training to establish them to perform necessary functions during sudden marine pollution incident. Apart, from this well trained team there is another team who has received basic training. In the event of sudden oil spill or any other marine pollution incident the both teams coordinate and perform functions accordingly to remedy and recover the damage. This can be identified as one of the advanced preparation of the government to confront this ship sourced pollution.

4.3 Maritime New Zealand

Maritime NZ is an authority established by Maritime Safety Authority under Maritime Transport Act 1994.This authority is responsible for providing marine oil pollution response system with high technological expertise. There are 11 regional councils which form a part of local government performing functions relating to prevention of ship sourced pollution and other sources of marine pollution. A distinguish feature observable in the NZ legal framework in respect of these agencies and regional councils is the proper coordination among them. Maritime Newzealand has agencies to perform functions during oil spill or any other marine pollution incident. This government departments and regional

[28] Maritime Transport Act 1994, <https://www.maritimenz.govt.nz/public/environment/responding-to-spills/documents/Oil-spill-response-strategy.pdf> accessed on 24/09/2020

[29] Keith Manch, Director, Maritime Nz, Maritime New Zealand New Zealand Marine Oil Spill Readiness And Response Strategy 2018–22 << https://www.maritimenz.govt.nz/public/environment/responding-to-spills/documents/Oil-spill-response-strategy.pdf>>

councils are formalised in a memorandum of Understanding and that those agencies are obliged to maintain the corporation among other agencies and perform necessary functions in a shared manner.

5. Liabilities attached to owners resulting from marine pollution referring to domestic and international law

The negligence of the ship owner was the primary consideration in certain cases which applied the maritime tort law to impose the liability. People of *Rull ex relRuepong* v. MV Kyowa Violet [2006] FMSC 53, 14 FSM Intrm.403 (Yap. 2006) (21 September 2006) where a reef was damaged when navigating the vessel and caused damages to water due to spilling of oil. The Plaintiffs instituted an action and seeking compensation for damage caused to the reef and effects of the oil spill. In this case 'causation' taken to consideration to impose the liability. It was held that the maritime causation is also quite similar to the typical causation principal which is using in tort law and awarded compensation for damage to reef and marine resources but denied to compensate for mental anguish. In *Fornier V. Petrolium Helicopters*[30] it was contended that generally in maritime tort law 'proximate cause' is used in determining the liability and compensation. Therefore there is a duty with all ship owners to navigate safely with due care and responsibility.

Generally, the Court may concern various circumstances extending to the seriousness of the damage, forseability and the decree of negligence. In the case *Tupa V. Ravuso and Tupa V. Taoi Shipping services Ltd* [1997] CKHC 1; Cr 288. 1997 the Court considered the type of discharge and the extent of negligence in determining the liability. In Sri Lanka ,in the most recent and remarkable case SC/FR Application No: 168/ 2021,all the above facts were considered in determining the compensation for the environment damages caused by the X-Press Pearl Vessel.

6. The concept of seaworthiness

Irrespective of the type of the vessel, the protection of the vessel and the cargoes depends on the seaworthiness of the vessel. Traditionally, the concept of seaworthiness was confined to the fitness of the vessel to meet the ordinary perils of the voyage and deliver the cargoes in a safe manner. Therefore, this traditional understanding of seaworthiness did not include the ability of the ship to avoid marine pollution. In comparing the traditional common law definition

[30] Fornier V. Petrolium Helicopters, Inc, 665 F, supp. 483, 486 (E.D La 1987)

of seaworthiness with ISM code the objectives are prima facie similar was they include general insight of enhancement of safety at sea. However, the ISM code further concentrates on preventing marine pollution which would cause due to the lack of seaworthiness[31]. Therefore, the incorporation of marine pollution to the concept of seaworthiness could be argued as a progressive development in the concept of seaworthiness.The UNCLOS stipulates that the state control mechanism should concentrate on formulating laws and regulation in respect of the seaworthiness of the ship. Article 219 of UNCLOS set out specific provisions in relation to the seaworthiness of vessel as a prime concern to prevent ship sourced pollution which expresses as follows;

" ensure the seaworthiness of a ship to avoid pollution marine environment, states shall take administrative measures to prevent the vessels from sailing when a vessel within one of their ports and violates the applicable rules and standards relating to seaworthiness of vessel and thereby threatens damage to the marine environment[32]".

Accordingly, it is evident that the international law has shaped the traditional understanding of concepts such as 'seaworthiness' to encounter sudden hazardous events that may cause consequent to the unseaworthiness of the sea. . . . . .

7. Concept of sustainable maritime transportation system

The sustainable development is defined 'enhancing the quality of life and allowing human kind to survive in a healthy environment and improve economic, social and environmental conditions for future generations[33]. Green building is considered as a part of promoting sustainability concept. It is interesting to note that the concept of green has recently become a key consideration in Sri Lanka which attracts the attention towards concept of green ships. The IMO Secretariat's introduced 10 imperatives under the concept of sustainable maritime transportation system[34]. The two goals are described in this concept namely; operational streamlining and technology and facility development.

8. Conclusion and Suggestions

In order to address this contemporary issue of ship sourced pollution the law should embody both preventive measures and mitigatory and remedial dimensions.

[31] Section 1.2.1, ISM code,

[32] Article 219, UNCLOS

[33] IMO, Study of Emissions Control and energy efficiency measures for ships in the port area, Starcrest Consulting Group,

[34] LLC , micro press Printers, Suffolk

There should be legal mechanism to prevent occurring of ship sourced pollution, measures to mitigate and control pollution and to remedy the loss aftermath of ship generated pollution incident. Hence, the legal regime should cover all these possible phases of ship sourced pollution.

Introducing new technological solutions such as an identification system and tracking system to identify and monitor the hazardous goods using satellite remote sensing technology can be adopted as modern ways of addressing this issue. Furthermore, Sri Lanka should formulate necessary policies to implement those modern mechanisms. This system is for the easy detection of vessels which carry hazardous substances by the sea. The legal framework should associate the aforementioned technological expertise to address the issue in a positive and modern way. Moreover, common guidelines can be introduced for the early identification of vessels engaged in unlawful discharges.

The importance of a trained taskforce to encounter sudden pollution incident is evident from the NZ experience and establishing well trained task force which is capable of encountering sudden pollution incident is required to the domestic regulation of ship sourced pollution in Sri Lanka.The recent Judgement SC/FR Application No: 168/ 2021, 176/ 2021, 184/ 2021, & 277 / 2021 given by the Supreme Court in Sri Lanka is a historic decision on the catastrophic environmental disaster caused by the sinking of the MV X-Press Pearl in 2021, which led to turn a new chapter in the maritime protection law.

PRACTICAL USE OF SECTION 81 OF CRIMINAL PROCEDURE CODE IN MAGISTRATE COURTS

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Section 81 of Sri Lanka's Code of Criminal Procedure Act, No. 15 of 1979 allows a Magistrate to order a person to show cause why they should not be required to execute a bond to keep the peace for up to two years. When the Magistrate has received information (often from a peace officer) that the person is likely to commit a breach of the peace or commit a wrongful act that could lead to a breach of the peace. It means Section 81 deals with **"Security for keeping the peace in other cases"** (preventive orders). Magistrates can require individuals likely to commit a breach of the peace to execute a bond to prevent future incidents.

A person is summoned to show cause why they shouldn't be ordered to sign a bond (with or without sureties) for up to two years. It can be observed that institution of actions under Section 81 of the Code of Criminal Procedure Act (CPCA) operates as an order to prevent crimes. Although a sentence is awarded at the end of a litigation in Criminal Law in general, in this case such a sentence is not seen. As such, these actions can be named as the litigations that cause implementation of sentence in case where breaching of a preventive order has been done. An especial feature in such a case is the implementation of pecuniary punishment instead of a corporeal punishment for breaching the order awarded.

Accordingly, it can be observed that the provisions of the Act are utilized miscellaneously in actions under Section 81 of the CPCA in different Courts empirically. Accordingly, it is important to identify the relevant legal conditions accurately pertaining to Section 81 of the CPCA. Simultaneously, when acting on cases pertaining to Section 81, a proper understanding on Sections 81 to 88 of CPCA too matters considerably.

SECURITY FOR KEEPING THE PEACE IN OTHERS CASES

Section 81.

> Whenever a Magistrate receives information that any person is likely to commit a breach of the peace or to do any wrongful act that may probably occasion a breach of the peace within the local limits of the jurisdiction of the court of such Magistrate, or that there is within such limits a person who is likely to commit a breach of the peace or do any **wrongful act as**

aforesaid in any place beyond such limits the Magistrate may in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period not exceeding two years as the court thinks fit to fix.

SECURITY FOR BEHAVIOR FROM SUSPECTED PERSONS, VAGRANTS, & C

Section 82.

Whenever a Magistrate receives information -

(A) that any person is taking precautions to conceal his presence within the local limits of the jurisdiction of the court of such Magistrate and that there is reason to believe that such person is taking such precautions with a view 'to committing an offence; or

(B) that there is within such limits a person who has no ostensible means of subsistence or who cannot give a satisfactory account of himself, such Magistrate may in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond with sureties for his good behavior for such period not exceeding two years as the court thinks fit to fix.

SECURITY FOR GOOD BEHAVIOR FROM HABITUAL OFFENDERS

Section 83.

Whenever a Magistrate receives information that any person within the local limits of the jurisdiction of the court of such Magistrate is an habitual robber, housebreaker, or thief or an habitual receiver of stolen property knowing the same to have been stolen or that he habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury or that he is an habitual protector or harborer of thieves or that he is an habitual abider in the concealment or disposal of stolen property or that he is a notorious bad liver or is a dangerous character, such Magistrate may in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond with sureties for his good behavior for such period not exceeding

two years as the Magistrate thinks fit to fix.

SUMMONS OR WARRANT IN CASE OF PERSON NOT SO PRESENT

Section 84.

When a Magistrate acting under section 81 or section 82 or section 83 deems it necessary to require any person to show cause under such section he shall if such person is not present in court issue a summons requiring him to appear, or when such person is in custody but not present in court a warrant directing the officer in whose custody he is to bring before the court: Provided that whenever it appears to such Magistrate upon the report of a peace officer or upon other information (the substance of which report or information shall be recorded by such Magistrate) that there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

FORM OF SUMMONA OR WARRANT

Section 85.

Every summons or warrant issued under section 84 shall contain a brief statement of the substance of the; information on which such summons or warrant is issued.

INQUIRY AS TO THE TRUTH OF INFORMATION

Section 86.

(1) When any person appears or is brought before a Magistrate in compliance with or in execution of a summons or warrant issued under section 84 the Magistrate shall proceed to inquire into the: truth of the information upon which he has acted and to take such further evidence as may appear necessary.

(2) Such inquiry shall be held as nearly as may be practicable in the manner hereinafter prescribed for conducting trials in summary cases before Magistrates' Courts.

(3) For the purpose of this section the fact that a person is a habitual offender or is such a person as is mentioned in section 83 may be proved by evidence of general repute or otherwise.

(4) Before commencing the inquiry, the Magistrate may for reasons to be recorded by him, order such person to execute a bond for keeping the peace or for maintaining good behavior pending the termination of the inquiry. An appeal shall not lie against any order made under this subsection.

ORDER TO GIVE SECURITY

Section 87.

If upon such inquiry it is proved that it is necessary for keeping the peace or maintaining good behavior, as the case may be, that the person in respect of whom the inquiry is made should execute a bond with or without sureties, the Magistrate shall make an order accordingly;

Provided -

(a) that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive;

(b) that when the person in respect of whom the inquiry is made is -a minor the bond shall be executed only by his sureties.

DISCHARGED OF PERSON INFORMED AGAINST

Section 88.

If upon such inquiry it is not proved that it is necessary for keeping the peace or maintaining good behavior, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purpose of the inquiry shall release him, or if such person is not in custody shall discharge him.

ACCORDINGLY, PERSON WHO CAN BE SUBJECTED TO A BOND UNDER SECTION 81 OF THE CPCA ARE,

1) any person likely to commit a breach of the peace or to do any wrongful act that may occasion a breach of the peace within the local limits of the jurisdiction of the court of such Magistrate

2) a person who is likely to commit a breach of the peace or do any wrongful act as aforesaid in any place beyond such limits of the jurisdiction of the court of such Magistrate.

COMMENCEMENT OF LITIGATION

"At any occasion the Magistrate receives the information" the litigation can be initiated and accordingly that information may be received either in ordinary writing or orally. In, ***Inspector Vs. Kostan Appuhamy***[1] , it was held that the information may be received in either way above mentioned. Presently, it can be seen that litigations are commenced on reports of information provided by police.

Weerasinghe v. Peter (1937)[2]- This case established important rules regarding the nature of information required to initiate proceedings.

- » The information presented to the Magistrate must be direct evidence, not hearsay.
- » An imminent breach of the peace must be contemplated when the information is provided.
- » An order under Section 81 cannot be based on the argument that the complainant might break the peace due to the accused's actions (e.g., in a land dispute context).

Aluthapola Rathnaloka Thero Vs. Officer in Charge, Police Station Minuwangoda CA PHC 132/2013 Court of Appeal judgment clarified that Section 81 should not be used to settle complex disputes over property or religious institution management (e.g., ownership of temple keys). The court held that such matters often fall under the Primary Courts Procedure Act, and Section 81 is purely for preventing a violent breach of public peace, not determining possession rights. the court addressed the issue of whether the Magistrate possessed authority under

[1]criminal law e hand book (4 CWR 70)

[2]39 NLR 426

Section 81 of the Criminal Procedure Code to dispossess the Appellant from the temple premises for the purpose of preventing a breach of peace. It was held that the orders made by the Magistrate and affirmed by the High Court, which effectively removed the Appellant from his office and property, exceeded statutory authority, as Section 81 permits only the requirement of a peace bond and does not empower the court to dispossess individuals of property via summary orders. The principle was reaffirmed that dispute.

These cases reinforce the distinction between Section 81 (preventive orders) and Section 66 of the Primary Courts Procedure Act (disputes regarding land where a breach of peace is likely). Proceedings under Section 81 must focus strictly on the likelihood of a violent act, not on the underlying civil dispute

WHETHER A COMPLAINT UNDER THIS SECTION CAN BE MADE AS A PRIVATE PLAINT

Under the provisions of this Section a person can be produced before the Magistrate if "any person" breaches the peace or likely to commit a breach of peace. It does not emphasize the fact that the information should be provided by police itself. In ***Weerasinghe Vs. Peter***[3] the lawsuit was taken into consideration on a private plaint by the Supreme Court and accordingly, it is obvious that such a suit can be filed even as a private plaint. There is not any obstacle to file any action as a private plaint under this section in the same way an ordinary private plaint is filed, in case the necessary legal requisites are fulfilled. Accordingly, a litigation can be instituted under Section 81 against any person by police or by a private plaint.

WHAT SHOULD BE DONE NEXT ONCE AN INFORMATION RECEIVED EITHER BY POLICE OR IN THE NATURE OF A PRIVATE PLAINT UNDER SECTION 81?

It is frequently observed that the parties are given a date to appear before the Court after making them enter into a bond by the relevant police. Optionally, it is pleaded to summon the parties. Bail should be granted when the parties appear in the Court irrespective of the way of communication. Thereafter, the ordinary judicial procedure is to advise the parties to secure the peace until the litigation is live. Accordingly, parties are granted a date to show cause to not to execute a bond to secure peace.

[3] 39 NLR 426

However, the Court has the capacity to issue warrants at the inception to avoid breach of peace after receiving the report of information. It is appropriate to issue warrant after recording the satisfactory causes to issue the warrant in the case record. The legal status relevant to issue of warrants is provided in Section 84 of CPCA.

SUMMONS OR WARRANT IN CASE OF PERSON NOT SO PRESENT

Section 84.

> When a Magistrate acting under section 81 or section 82 or section 83 deems it necessary to require any person to show cause under such section he shall if such person is not present in court issue a summons requiring him to appear, or when such person is in custody but not present in court a warrant directing the officer in whose custody he is to bring before the court: Provided that whenever it appears to such Magistrate upon the report of a peace officer or upon other information (the substance of which report or information shall be recorded by such Magistrate) that there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

Accordingly, the reasons to issue warrant or summon should have been mentioned on the warrants or summon briefly. Section 85 of the CPCA provides details on that.

(For the form of summons or warrant see section 85)

THE SITUATION IN WHICH THE DEFENDANT APPEARS BEFORE COURT EITHER ON SUMMONS AND WARRANTS

In case where a defendant appears in the Court either on summon or warrant, he should be enlarged on appropriate bail conditions and the opportunity should be given to show cause to not execute a bond for the purpose of protecting peace. It is clearly held in ***Kanaga Singham Vs. Tambiah***[4] the fact that the offence should have been clearly mentioned on the face of the summons by the time it is issued. Accordingly, pleadings can be observed either to call witnesses or to show cause in writing in Courts. However, opportunity should be provided before giving an order under this Section. Any order given, without providing opportunity is null and void.

[4] 1929 24 NLR 474 P 475

This fact was discussed in ***Salgado Vs. Thon Singho***[5]. The Court should hold an inquiry on the relevant fact before it is going to decide on the accuracy of the received information. For that it is necessary to hold a proper inquiry. The purpose of granting dates to show cause is that. However, unlike in other Criminal cases, in these cases, proceedings are not begun after reading the charges to the accused. These cases can be tried in the same way a summary trial is held. Here, the trial can be held by requiring the parties to secure the peace during the trial. Even though, an order to secure the peace during the trial is given, according to the provisions in Section 84(4), no one can make any appeals against such order. Accordingly, the party that denies the charges has the ability to dispute the witnesses at the trial.

When paying attention to ordinary judicial procedure, it can be noticed that the lawyers present their show cause mostly in writing, considering evidence given under oaths is suitable even in such a situation. However, the opportunity to dispute witnesses by cross examination is lost when the respondent defaults appearing trials. Accordingly, in ***Fernando Vs. Thumby Sinno***[6] it was held that including into a bond based on evidence which did not undergo cross examination is invalid. However, I think if the lawyers present their show cause / reasoning in writing voluntarily, they must take that responsibility. It is the duty of the respondents to act in accordance with the provisions of the CPCA. They should bear the repercussions of failure to show cause properly.

As these actions are filed to secure the peace, by today, presenting the show cause in writing and giving orders depending on those written submissions can be observed often. But it is the duty of the party respondent to select either going for trial in accordance with the available facts or presenting show cause in writing only. However, it is apparent that holding a trial is suitable, utilizing the provisions in the Evidence Ordinance in the same way they are made relevant in a Criminal litigation. For instance, ignoring hearsay evidence and considering the evidence on the character of the respondent to certain extent can be identified.

IS IT POSSIBLE TO MAKE BOTH PARTIES IN A DISPUTE RESPONDANTS IN ONE ACTION UNDER SECTION 81?

In general, when a dispute occurred both parties engaged in the dispute are made respondents in one litigation. In old judicial precedents it was held that both

[5] 8 CLW 107The case ***Salgado Vs. Thon Singho*** is a specific legal case reported in the **Ceylon Law Weekly (CLW)**, which is a series of law reports from Sri Lanka (formerly Ceylon). The citation **8 CLW 107** can be found in **Volume 8**, starting on **page 107** of the Ceylon Law Weekly reports.

[6] 3 NLR 54

[7] See Hewawitharane Vs.Appuhamy 30 NLR 33 Weerasinghe Vs. Mohamad Ismail 1932 33 NLR 245

parties to the dispute can be respondents in one action . But, in ***Hamid Samath Vs. Silva*** [8] its inappropriacy has been discussed.

In ***Velaiden Vs. Zoysa*** [9] it was held that both the parties are unable to make to execute a bond in one litigation to secure peace. When both parties in a same dispute are made parties in one litigation, one will be unable to give evidence against other party as both parties will have to stand in the same dock and give evidence against each other.in this case the court held that it is an **illegality** that invalidates proceedings to charge members of two opposing factions in the same Section 81 proceeding. Parties involved in a conflict must be proceeded against separately.

This situation is discussed in ***Abeywardena Vs. Fernando***[10] Accordingly, it is clear that one part should be sued in one action. In judicial precedents such as ***Wickremesooriya Vs. Don Lewis*** [11], ***Keegal Vs. Mohideen*** [12], ***Police Officer Vs. Dinesh Hamy*** [13], ***Maniagar of Pachchilpali Vs. Ramen Cheti*** [14] the above principle is discussed.

Accordingly, it is clear that as it has been discussed in all abovementioned cases in depth, the most appropriate solution is to sue the parties separately. But, in cases like ***Hewavitharana Vs. Appuhamy***[15] and ***Weerasinghe Vs. Mohomadu Ismail***[16] where it was not necessary to prove the case against each party, for instance in a situation like altercation, it has been discussed the fact that both the parties can institute a single action.

THE NEXT STEP TO BE FOLLOWED AFTER TRAIL

The Magistrate is able to take two steps at the end of a trial.

1) If the person falls within the provisions of Section 81, the Magistrate shall require him to execute a bond that fulfills the needs of the provisions of Section 87 of CPCA.

   (See section 87 of CPCA)

[8] 4 CWR 238
[9] 1910 14 NLR 140
[10] 1924 27 NLR 97
[11] 1915 1 CWR 192
[12] 1918 5 CWR 162
[13] 1919 21 NLR 127
[14] 1909 1 CUR LR 64
[15] 30 NLR 33
[16] 33 NLR 245

2) If the person does not fall within Section 81 provisions, he can be released under the provisions of Section 88 of CPCA.

(See section 88 of CPCA)

THE FACTS THAT SHOULD BE DEEMED IN MAKING AN ORDER UNDER SECTION 81

Having adequate facts is essential to execute a bond that ensures the security of peace. When the Magistrate is satisfied about the possibility of the involvement of the respondent to breach the peace, a bond may be executed under Section 91 of the CPCA.

Section 91.

(1) The bond to be executed by any such person shall bind him to keep the peace or to be of good behavior as the case may be; and in the latter case the commission or attempt to commit or the abetment of any offence punishable with imprisonment, wherever it. may be committed, is a breach of the bond. Power to reject

(2) A court may refuse to accept any surety offered on the ground that for reasons to be recorded by the court such surety is an unfit person.

Accordingly, a bond can be executed for a time period provided in Section 91.

Section 90

The period for which security is required by an order made under the preceding sections of this Chapter shall commence –

(a) where time has not been allowed under section 89, on the date of such order;

(b) where time has been allowed under that section, on the date on which the time so allowed expires;

(c) where the order is in respect of a person who is, at the time the order is made, sentenced to or undergoing a sentence of imprisonment, on the date on which such sentence expires.

At the same time, if it is necessary, provisions of Section 93 can be followed.

POWER TO RELEASE PERSON IMPRISONED FOR FAILING TO GIVE SECURITY

Section 93.

(1) Whenever a court is of opinion that any person imprisoned for failing to give security under this Chapter may be released without hazard to the community or to any other person the court may order such person to be discharged.

(2) A court other than the Supreme Court or Court of Appeal shall not exercise this power except in cases where the imprisonment is under its own order.

PRELIMINARY OBJECTIONS THAT CAN BE TAKEN IN 81 LITIGATIONS

The general preliminary objection that can be taken is instituting actions on behalf of both parties in one case. The other objection that can be taken in a similar litigation is a situation where the offense is uncertain and the offense is pertaining to misconduct such as drunkenness. But, according to Section 81 the act done should be a wrongful act before the law and it should be certain. In various conflicts such as religious conflicts, 81 litigations cannot be instituted.

The act must be a wrongful act in law. In case where litigations are instituted under Section 81 other than the above situations, it is possible to take a preliminary objection. In other words, provisions of Section 81 cannot be applied on any dispute. The allegations against the person must be specific and not based on assumptions or possibilities. If a case is based on vague suspicions, a preliminary objection can be filed to have it dismissed. Section 81 does not apply to situations like simple drunkenness or using foul language, as these fall under different laws. The police cannot use this section to settle issues that are not related to a breach of the peace.

THE FACTS THAT SHOULD BE CONSIDERED IN GRANTING AN ORDER

Accordingly, as I discussed in above article, fundamentally it should be deemed that whether the act is wrongful before the law. Simultaneously, it should also be considered whether the act satisfies the requisites under Section 81 of the CPCA. Moreover, it should also be considered whether it is established the alleged wrong was done by the respondent, whether any chance is there to breach peace, if he is not put on a bond and accordingly whether the facts were proven to satisfy the Magistrate etc.

It is possible to order to execute a bond on relevant conditions if any such order is granted in the manner that I have mentioned before in my article. In addition, executing bond in suitable occasions to secure peace, imposing imprisonment for six-month time or exoneration etc. can be considered in case where that the Court satisfies regarding the safety of the society. Simultaneously, if a bond is ordered, it is also possible to grant an imprisonment until the bond is executed.

In ***Premadasa Vs. David***[17] it was held that magistrate should act justly by considering all relevant facts. However, there should be information that can content the Magistrate. If such information is available a bond can be executed. Moreover, in ***Abeywardena Vs. Fernando***[18] it was admitted that such an order can be given against any person who has a violent behavior (against estates or individuals). Accordingly, the order that is granted should be certain as it has been discussed in ***Jamal Vs. Rebecca Aponsu***[19]. As I mentioned earlier religious conflicts do not come under this category as discussed in ***Langram Vs.Nilame***[20] .Similarly, the duration of the bond should also be taken into consideration in ordering an execution of a bond in such a case.

The order must be made according to Section 90(1) and it must be a bond that have been executed for a specific time period. In ***Stevan De Silva Vs. OIC Police Rabukkana***[21] that has been discussed. Therefore, when a bond is executed, it should be specially remembered.

Accordingly, in a litigation under Section 81 of CPCA, by giving orders depending on the relevant provisions as far as possible, drawbacks can be prevented. Accordingly, I personally believe that this article will assist to resolve confusions that may arise in the practical use of Section 81 of CPCA in litigations in Magistrate Courts. Eventually, I would also like to declare that this article that I created by referring various materials is open to your suggestions and criticisms.

[17] 1956 58 NLR 308
[18] 1924 27 NLR 97 P 98
[19] 1937 39 NLR 426
[20] 1920 22 NLR 445
[21] CA PHC APN 17/2012

SAFEGUARDING CORE PRINCIPLES OF CRIMINAL PROCEDURE IN SRI LANKAN LEGISLATION: A COMPARATIVE ANALYSIS WITH THE US CONSTITUTIONAL AMENDMENTS

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The Sri Lankan Criminal Procedure Code is significantly shaped by international instruments that have contributed to the incorporation of constitutional enactments into the Act, including the Magna Carta, the Fourth and Fifth Amendments of the US Constitution, the International Covenant on Civil and Political Rights (ICCPR), the International Bill of Human Rights, the Universal Declaration of Human Rights (UDHR), and various other international treaties and laws. The Criminal Procedure Code serves as a safeguard for both human rights and the fundamental rights of the citizens of Sri Lanka. Furthermore, there exists a profound connection between an effective criminal justice system and the rule of law with respect to constitutional rights. It is essential that an impartial mechanism is in place to ensure that criminal actions are properly prosecuted, starting from the initiation of the criminal justice process. Consequently, effective criminal investigations must be conducted while simultaneously ensuring the protection of both the suspects' and victims' rights. Such a system must reduce crime rates while also safeguarding the fundamental rights of the populace.

In criminal matters, the police play a pivotal role in arresting and detaining suspects, continuing investigations, formulating charges, and ultimately presenting evidence in trials. While the police must have sufficient autonomy to maintain law and order, it is crucial that they do not infringe upon the rights of citizens as recognized by the Sri Lankan Constitution. Moreover, it is imperative that constitutional rights are not violated while the police exercise their powers. Therefore, it is essential for law enforcement officers to strike a balance in enforcing the provisions of the Criminal Procedure Code, while concurrently ensuring the protection of fundamental rights.

The core principles of criminal procedure enunciated in the amendments to the United States Constitution, particularly those enshrined in the Bill of Rights, are considered fundamental to the protection of individual liberties in criminal justice proceedings. These principles have influenced legal systems globally, including Sri Lanka's legal framework. The Sri Lankan Constitution, influenced by both British colonial legal traditions and modern constitutional principles, incorporates

a range of protections designed to ensure a fair criminal justice process. This essay will examine the extent to which Sri Lankan legislation safeguards the core principles of criminal procedure as laid out in the US Constitution, focusing on key amendments such as the Fourth, Fifth, Sixth, and Eighth Amendments, and their parallels in Sri Lankan law.

1. The Fourth Amendment: Protection Against Unreasonable Searches and Seizures

The Fourth Amendment to the US Constitution guarantees protection against unreasonable searches and seizures, ensuring that individuals are secure in their persons, houses, papers, and effects. This principle requires that searches and seizures be conducted with probable cause and, typically, a warrant issued by a judge.

In Sri Lanka, the Constitution, under Article 13, also provides protections against arbitrary arrest, detention, and searches. Sub article (1) of Article 13 guarantees the right to be free from arbitrary arrest and detention, while Sub article (2) ensures that a person's privacy is not violated without just cause. Additionally, the Sri Lankan legal system upholds that any search or seizure must be conducted with reasonable grounds and often requires a warrant. However, Sri Lanka has faced criticism for the broad discretionary powers granted to law enforcement agencies, which sometimes lead to arbitrary detentions or searches, particularly under the Prevention of Terrorism Act (PTA). This law has been criticized for permitting detention without charge for extended periods and allowing security forces to carry out searches with minimal oversight. In comparison to the Fourth Amendment in the US, Sri Lanka's safeguards are weaker in practice, especially under emergency or counterterrorism laws.

The Sri Lankan Constitution of 1978 guarantees fundamental rights to individuals accused of crimes, particularly the right to be free from arbitrary arrest, detention, punishment, and retroactive penal legislation, as articulated in Article 13(1). Article 13(2) further stipulates that any individual held in custody or deprived of personal liberty must be brought before a competent court in accordance with established legal procedures and cannot be detained or deprived of liberty without a court order. Article 13(4) ensures that no individual may be subjected to the death penalty or imprisonment except by order of a competent court, in accordance with the law. Arrest, detention, or deprivation of personal liberty pending investigation or trial is not classified as punishment.

Section 23 of the Criminal Procedure Code specifies the procedures for making an arrest:

1. The individual making the arrest must physically touch or confine the person to be arrested, unless the person submits to custody through words or actions. The person must also be informed of the nature of the charge or allegation at the time of the arrest.

2. If the individual resists arrest or attempts to flee, the person making the arrest may use reasonable force to effect the arrest.

3. This section does not grant the right to cause the death of a person who is not accused of an offense punishable by death.

If a police officer violates these rights during the arrest, the individual may file a case for the violation of fundamental rights under Articles 17 and 126 of the Constitution, which allows individuals to seek redress in the Supreme Court for any infringement of their rights by executive or administrative actions.

The Fourth Amendment of the US Constitution similarly guarantees that individuals have the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, thus limiting police powers to seize or search individuals, their property, and their homes.

2. The Fifth Amendment: Right Against Self-Incrimination and Double Jeopardy

The Fifth Amendment of the US Constitution provides that no person shall be compelled to testify against themselves (the right against self-incrimination) and ensures protection against double jeopardy, i.e., being tried for the same offense twice.

Sri Lankan law, under Article 13(3) of the Constitution, similarly provides a protection against self-incrimination. A person cannot be forced to confess guilt or testify against themselves. Additionally, the principle of double jeopardy is also recognized, meaning that a person cannot be tried or punished twice for the same offense. These protections are generally aligned with the US Constitution. However, challenges arise in practice, particularly in cases of coerced confessions or undue influence during police interrogations. The Sri Lankan criminal justice system has seen instances where suspects, especially under the PTA, are allegedly subjected to torture or ill-treatment to extract confessions. While the Constitution mandates protections, the reality of implementation remains inconsistent, suggesting gaps when compared to the more rigid protections provided by the US legal system.

While the principle of double jeopardy prohibits successive prosecutions for the same offense, it does not extend protection against multiple prosecutions for distinct offenses. Section 314 of the Criminal Procedure Code explicitly stipulates that no individual shall be tried twice for the same offense. Furthermore, the Fifth Amendment to the United States Constitution unequivocally prohibits any person from being prosecuted more than once for substantially the same crime.

In alignment with these fundamental legal protections, Articles 55 and 56 of the Charter of the United Nations affirm the commitment to fostering conditions of stability and well-being essential to peaceful and amicable relations among nations, founded upon respect for the principle of equal rights and the self-determination of peoples. Accordingly, the United Nations is mandated to promote:

a. higher standards of living, full employment, and conditions conducive to economic and social progress and development;

b. the resolution of international economic, social, health, and related challenges, along with the advancement of international cultural and educational cooperation;

c. universal respect for, and observance of, human rights and fundamental freedoms for all individuals, irrespective of race, sex, language, or religion.

3. The Sixth Amendment: Right to a Fair Trial and Legal Representation

The Sixth Amendment guarantees several vital rights for those accused of crimes in the US, including the right to a speedy trial, an impartial jury, and the assistance of counsel.

In Sri Lanka, the right to a fair trial is a cornerstone of the criminal justice system, as guaranteed by Article 13(3) of the Constitution. It includes the right to be informed of charges, the right to a public hearing, and the right to legal representation. Furthermore, the Sri Lankan legal framework provides for the appointment of legal aid for those unable to afford counsel. However, there are notable challenges in the timely and fair administration of justice. Delays in trials are a significant issue, and many people, especially those from marginalized communities, continue to face barriers in accessing legal representation. Moreover, the independence of the judiciary has been questioned in some instances, raising concerns over the impartiality of trials. In comparison to the US, where the right to a speedy trial is more robustly enforced, Sri Lanka's legal system struggles with

chronic case backlogs and delays, undermining the right to a timely and fair trial.

Article 13(3) of the Constitution states that, any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

However, Articles 13(3) of the Sri Lankan constitution not clearly set out the components of the fair trial. Also, Article 13(5) states that, every person shall be presumed innocent until he is proved guilty:

In the Case of Aponzo Vs. Attorney General and Attorney Geneal Vs Segulebbe Latheef and others

[(2008)1SLR 225] former CJ Ashoka Silva set out 13 principles as ingredients of right to fair trial.

The right to a fair trial amongst other things includes the following: -

01. The equality of all persons before the court.

02. A fair and public hearing by a competent independent and impartial court/ tribunal established by law.

03. Presumption of innocence until guilt is proven according to law.

04. The right of a accused person to be informed or promptly and in detail in a language he understands of the nature and cause of the charge against him.

05. The right of an accused to have time and facilities for preparation for the trial.

06. The right to have a counsel and to communicate with him.

07. The right of an accused to be tried without much delay.

08. The right of an accused to be tried in his presence and to defend himself or through counsel.

09. The accused has a right to be informed of his rights.

10. If the accused is in indigent circumstances to provide legal assistance without any charge from the accused.

11. The right of an accused to examine or have examined the witnesses against him and to obtain the evidence and examination of witnesses on his behalf under the same conditions as witnesses against him.

12. If the accused cannot understand or speak the language in which proceedings are conducted to have the assistance of an interpreter.

4. The Eighth Amendment: Protection Against Cruel and Unusual Punishment

The Eighth Amendment to the US Constitution prohibits cruel and unusual punishment, ensuring that punishments are not disproportionate to the crime committed.

Sri Lanka's Constitution under Article 11 similarly guarantees the right to be free from torture, cruel, inhuman, or degrading treatment or punishment. While Sri Lanka has made strides in outlawing torture and cruel punishment, there have been numerous reports of extrajudicial killings, torture, and abuse, particularly in the context of counterinsurgency operations or under laws like the PTA. Though the legal framework prohibits such treatment, human rights organizations have frequently criticized the state for insufficient enforcement of these protections. Compared to the US, where legal safeguards against cruel punishment are generally more robust, Sri Lanka's track record in protecting individuals from such treatment is weaker, and enforcement remains a significant challenge.

The cases of Wilkes v. Wood and Entick v. Carrington established that warrants which violate common law are deemed unlawful, and the Supreme Court has ruled that evidence obtained through illegal searches cannot be admitted in court. The right to be free from arbitrary arrest is a fundamental right protected by the Constitution of Sri Lanka.

The Role of International Influences and Human Rights Law

Both the United States and Sri Lanka are signatories to various international human rights instruments, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), which further reinforce the rights and protections guaranteed in their respective constitutions. These international frameworks influence the development of national laws and provide avenues for accountability when domestic systems fail to protect individual rights.

In Sri Lanka, despite constitutional protections, there are challenges in aligning domestic criminal procedure with international human rights standards. The lack of robust oversight mechanisms, inconsistent implementation of legal protections, and political interference in the judiciary have been persistent issues.

Conclusion

In conclusion, while Sri Lankan legislation provides some important safeguards aligned with the core principles of criminal procedure enunciated in the US Constitution, significant gaps remain in terms of implementation and enforcement. While both legal systems share similar constitutional guarantees, Sri Lanka's legal and judicial practices are hampered by systemic issues such as delays in trials, arbitrary detention under special laws, and reports of torture or ill-treatment. The comparison between the US and Sri Lankan legal frameworks reveals that while the core principles of criminal procedure are recognized in both, the real challenge lies in ensuring these protections are consistently upheld in practice. The Sri Lankan legal system must address these challenges to ensure that the fundamental rights of individuals are fully protected and that the criminal justice system functions in a fair and just manner.

"CRIMES AGAINST INTERNATIONAL LAW AND THE DOCTRINE OF INDIVIDUAL RESPONSIBILITY"

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Introduction

The evolution of international criminal law has been deeply shaped by the principle that responsibility for grave crimes lies not with abstract entities but with individuals who conceive, order, and execute them. This doctrine of individual responsibility emerged most forcefully in the aftermath of the Second World War, when the Nuremberg and Tokyo Tribunals rejected the defence of "state action" or "superior orders," affirming instead that "crimes against international law are committed by men, not by abstract entities." This assertion marked a decisive shift from collective to personal accountability, setting a foundation upon which contemporary institutions such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) continue to operate.

The doctrine is not without complexity. On the one hand, it establishes the moral and legal imperative that individuals, regardless of their official position, can and must be held accountable for genocide, war crimes, and crimes against humanity. On the other hand, the enforcement of this principle requires navigating tensions between state sovereignty, immunities of state officials, and the collective nature of international crimes that often involve institutional machinery and systematic policy. These challenges raise fundamental questions: To what extent can individual responsibility adequately capture the systemic and structural nature of international crimes? How does the focus on individuals balance with the need to hold states and organizations accountable for enabling or orchestrating such violations?

This article explores the doctrine of individual responsibility as a cornerstone of international criminal law. It examines its historical foundations, its development through international jurisprudence, and its continuing relevance and limitations in contemporary practice. By critically analyzing how international courts and tribunals have applied the principle, the article seeks to assess whether individual responsibility is sufficient to ensure accountability and justice, or whether a

more holistic framework—one that integrates both individual and collective responsibility—is required to enforce international criminal law effectively.

Discussion

The international law governs the affairs among states. This divides into two main

categories. They are,

a. Private International Law(Pvt IL)

b. Public International Law (PIL)

This private International Law governs the acts of private individuals in different states while the public international law governs the acts of different states with each other and further the acts of individual citizens of different states. That means the public international law deals with the rules and principles that deal with the conduct, rights and obligations of states and international organizations, as well as dealing with relations among states.

PIL divides into sub groups such as International Human Rights Law, International Humanitarian Law and International war Law etc. International Criminal Law is an important subgroup of the Public International Law.

While international Law typically concerns with interstate relations, International Criminal Law concerns with individuals, and individual criminal liability-not state or organizations-and proscribes and punishes specific acts that are defined as crimes by international Law.

The rules making up International Criminal Law emanates from sources of international law. There are some unique features of International Criminal Law. They are as follows,

a. ICL is a relatively new branch of international law.

b. ICL is still a very rudimentary branch of law.

c. ICL also presents the unique characteristic that, more than any other segment of international law, it simultaneously derives its origin from and continuously draws upon both international humanitarian law, as well as national criminal law.

d. This law has a twofold relationship with the general body of public international law. The first is mutual subsidiarity or support. The second is that it aims to punish the authors of those transgressions, while however safeguarding the rights of suspects or accused persons from any arbitrary prosecution and punishment.

e. Unlike the other branches of PIL, ICL is changing rapidly.

f. In this area criminal conduct is normally of great magnitude and seriously offends against fundamental values.

International Criminal Law is a new sub Group introduced to the International Law. Due to that the sources of criminal Law is basically same to the Public International Law. They are as follows;

a. Treaty Law

b. Customary International Law(Custom, customary Law)

c. General Principles of Law

d. Judicial Decisions(Subsidiary Source)

e. Learned Writings(Subsidiary Source)

f. Soft Law

These sources are very much similar to the sources of International Law contained in Article 38(1) of the International Court of Justice (ICJ) Statute.

a. International Conventions, whether general or particular, establishing rules expressly recognized by the contesting state

b. International custom ,as evidence of a general practice accepted as law

c. The general principles of Law recognized by civilized nations

d. Judicial decisions and the teachings of the most highly qualified publicists of the various nations

Treaty

Treaties are in the form of charters, covenants, declarations, general acts, international agreements, international covenants, pacts and statutes. Treaty can be divided into three main categories such as Bilateral Treaty, Multilateral Treaty and regional Treaty. But there are complexities with this source of law. One is that ICC (International Criminal Court) ,Article 21 states three levels of rationalization in applying these sources. They are as follows,

a. The distinction between the mandatory and the discretionary application

b. Creation of trifurcated hierarchical normative order of priority

c. Formulation of a general rule for interpretation and application

Article 21 provides that the court shall apply the sources as in the following order,

a. The statute, Elements of crime and its rules of procedure and evidence

b. Appropriate applicable treaties and the principles and rules of international law, including the established principles of the international Law of armed conflict

c. General principles of law derived by the court from national laws of legal systems, provided that those principles are not inconsistent international law and internationally recognized norms and standards.

Some argue that the order of sources would be;

a. Charter of Nuremberg International Military Tribunal (IMT)

b. The statute of the International Criminal Tribunal for Yugoslavia (ICTY) 1993

c. The International Criminal Tribunal for Rwanda(ICTR)

d. 1998 Rome Statute of the ICC

e. Statute of the Special Court for Sierra Leone(SCSL)

There are certain important treaties as well. They are;

a. Convention on the Prevention and punishment of the crime of Genocide 1948

b. Hague Convention of 1907

c. Four Geneva Conventions of IHL of 1949

d. 1977 Additional Protocol II to the Geneva Conventions (AP II)

e. Rome Statute of the International Criminal Court

f. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

g. Statute International Criminal Tribunal for Rwanda

h. Statute of the International Criminal Tribunal for the former Yugoslavia

Even though there are several treaties, to operate there are specific acts that should be taken. They are signing the treaty, Ratification etc.

Customs

This can be considered as the oldest source of International Law. But there is no specific definition for customary international law. There is a closer definition in Article 38 of the Statute of the International Court of Justice. That is "International Custom, as evidence of general practice of law. There are two essential factors to consider a certain phenomenon as a customary international law. The factors are,

a. Widespread State practice

b. Manifestations of conviction that the practice is required by international law. In North Sea Continental Shelf case the court has stated that there are two types of customary international law. The two types are as follows.

- Legal Rules that are logically necessary and self-evident consequences of fundamental international legal principles.

- "Opinion juris" ('an opinion of law') and further this rule should satisfy two criteria. They are as follows.

- Settled and uncontroversial practice of states to act with general consistency in obedience to the rule

- They obey this rule because they believe that they are bound by that and that should not be due to tradition, politeness or convenience.

With the use of customary international law, these states face several controversial issues such as, how many states have to act in a certain way for it to become customary? , At what point does a state act differently cease to be illegal and become a new rule? Who represents a state's real motivation? , Is it not paradoxical that a state must believe a rule is legally binding before it becomes a law?

From 1947 the United Nations considered these issues under the International Law Commission. They attempted for many years to codify International Customary Law.

General Principles of Law

In Antonio Cassese, Black letter Lawyering v Constructive Interpretation it is stated that judges can resort to the sources of law to address lacuna. This type of situation arises where the law cannot be found with the relevant treaty or with the statute of the establishing tribunal. And further in Article 38(1)(C) of the ICJ statute states that," The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply the general principles of law recognized by civilized nations." This is the most flexible but highly controversial source of law. The reason is that although this has been used for the gap filling purpose the meaning is still undefined and obscure.

Main problem that arises is that who makes those general principles and what are those rules? But even though the statutes of the ad hoc tribunals such as ICTY, InternationalCriminal Tribunal of Rwanda("ICTR"), Special Court of Sierra Leon("SCSL") does not containany provisions as to follow the general principles of International Law, they always followedGeneral Law Principles whenever there are gaps. There are 5 different specific meanings to it,

such as

a. Principles of Municipal Law that are recognized by civilized nations

b. Principles that are derived from the unique character of the international community, such as principles of territorial integrity and sovereign equality of states

c. Principles that are intrinsic to the idea of law and basic to all legal systems

d. Universality principles that are "valid through all kinds of human societies" that echo the idea of natural law, such as principles of human rights.

e. Principles of justice

This concept has been discussed in several cases such as Prosecutor v Furund zija .In this case the issue was to define rape. However, the Chamber finally used the criminal law principles common to the legal system by examining the national laws of the countries such as Chile, China, Japan, Germany etc. ICTY has also used general principles to fill the gaps of their statute. Paquet Habana Case also can be discussed here.

After the establishment of ICC ad hoc tribunals have become past events. In ICC statute

(Rome Statute) a new hierarchy of Source are being introduced in section 21(1).

That hierarchy is as follows:

a. The statute, elements of crime ,and rules of procedure and Evidence

b. Treaties, principles, and rules of international Law

c. General Principles of Law

However, this is quite different with the ICJ Article 38(1) sources. However, the source "General Principles" is there.

Judicial Decisions (Stare decisis)

This is considered as a subsidiary source. ICJ statute this is listed as a subsidiary after conventions, customs and general principles. However this is subject to Article 59 and it states that decisions of the International Court of Justice have "no binding force except between the parties and in respect of that particular case". Article 39 states that "The court has striven to follow its previous judgments and insert ameasure of certainty within the process "In Prosecutor v Aleksowski case the ICTY Appeals chamber has stated that" the interests ofcertainty and predictability, the Appeals chamber should follow its previous decisions ,butshould be free to depart from them for cogent reasons in the interest of justice"

Learned writings

According to Article 38 of ICJ this is also considered as a subsidiary source. Generally considered judicial decisions.

It has stated that "Legal literature, although it carries less weight than case law, may significantly contributes to the elucidation of international rules"

Soft Law

These are normally recommendations, guidelines, manuals etc. and should be in writing form .This can be defined as "normative provisions contained in non-binding text". However, this is social rather than a legal norm. And this shows a preference rather than an obligation. This is also considered as a subsidiary source.

Two preliminary issues need to be clarified here. They are,

a. There is the problem of the extent to which the same sources may be used by national courts and within what constraints must be left open.

b. Secondly many criminal lawyers, particularly in countries of Roman Germanic Tradition, being used to interpreting and applying criminal rules laid down in writing codes of criminal law, tend to believe that the major source of ICL can be found in the statute of the ICC or at least that the statute is a sort of 'code of international criminal law'. This is a wrong assumption, partly based on the fact that admittedly that statute is the only international rule on both the 'general part' of ICL and the definition of crimes.

ICC was established on July 17, 1998, and adopted the Rome statute. Entered into force on July 1, 2002 in accordance with Article 126 of the Rome statute and this statute has 128 mains Articles. This statute can be considered as the Foundation of International Criminal Law.

There is always a connection between the UN Charter and with the International Criminal Court (ICC). Article 95 of the UN Charter as well as Article 2 of the ICC statute shows the relationship. Article 5 of the ICC gives four crimes where the ICC has jurisdiction. They are;

a. The crime of genocide

b. Crimes against humanity

c. War crimes

d. The crime of aggression

Article 6 explains what genocide is. It explains that "genocide" means any of the following acts committed with intent to destroy, in whole or in part ,a national ,ethnical ,racial or religious group, as such killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group.

Article 7 states that crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directly against any civilian population, with knowledge of the attack. The acts are Murder, Enslavement, Deportation or forcibly transfer of population, Imprisonment or other severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced disappearance of persons, the crime of apartheid etc.

War crimes are given in Article 8. They are, Grave breaches of the Geneva Conventions of 12 August 1949 such as willful killing, torture or inhuman treatment, including biologicalexperiments, unlawful deportation and taking hostages etc. Further, other seriousviolations of the laws and customs applicable in armed conflict, within establishedframework of international law. Serious violations under Article 3 common to the four Geneva Conventions such as violence to life and person, in particular murder to all kinds, mutilation, cruel treatment and torture, taking hostages, outrages upon personal dignity should not be done and further the wounded and sick shall be collected and cared for. Article 9 states about elements. It states that "Elements of crime shall assist the court in theinterpretation and application of Articles 6,7 and 8. They shall be adopted by two thirdsmajority of the members of the Assembly of State Parties."

Aggression can be explained as planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state. That means the invasion or attack by the armed force, bombardment by the armed force, an attack by the armed force etc.

Part 3 of the Rome statute gives fundamental principles applicable for international crime. No similar principles were there in International Military Tribunal of Nuremberg and Tokyo and also in ICTY and ICTR. This ICC is a result of most of the earlier tribunals and the tribunals were political creations. And the other important aspect was that these tribunals were made after the incident. But this ICC is a permanent court and also for future crimes.

This part 3 can be considered as a major achievement because;

a. It represents an attempt to merge several criminal justice systems into one legal instrument

b. It attempts for the first time to codify criminal participation, mental element required for crime and also the defenses

There are certain potential advantages due to this. They are.

a. Judges' discretion will be limited over the principles

b. Provide a legal framework for the court

c. Predictability is there

d. Promote consistent jurisprudence

However, the applicable law as explained above is different from ICJ Article 38(1). Bashir Case is important on this. It states that the court cannot look into other sources of law unless there is a lacuna.

Article 21 (c) discusses General Principles. But there are issues with this source suchas that is hugely controversial and there is a problem arises whether the ICC can apply national laws of the state. Because the reason is that law might change accordingly with the time and the place of the crime. Special Court for Sierra Leon has stated that judges will be extremely reluctant to adopt the national criminal laws of a particular country. Lubanaga has stated that the ICC will not adopt any national law without proper analysis.

Article 22 sets out the principle of nullum crimen sine lege. That means no crime without law. Article 23 sets out the principle of nulle poena sine lege. That means the law should prescribe the punishment of the act. Article 24 states non-retroactivity. Article 22 to 24 can be considered as a crucial turning point of the

International Criminal Law. In France et al v.Goering has stated that legality depends on the tribunal. But later after Rome statute these were not flexible rules. But before the Rome statue they were flexible because there was no significant law to follow and also the tribunals were set after the incident.

ICC prohibits extension of crimes. It has listed its' own crimes. For example, Bemba case it is stated that recklessness is excluded from Article 30 of the statute. But there is a contradiction with Article 7(1) (K) which states that "other human acts of a similar character". Article 26 states about exclusion of jurisdiction over persons less than 18 years. This has caused moral debate. Except the Sierra Leon court other tribunals have never included a minimum age. Article 27 states that the ICC Statute shall apply equally to all persons without any distinction.

Democratic Republic of Congo v Belgium (Arrest warrant case) has stated that a former minister of foreign affairs may not be subjected to criminal proceedings before a national court but may be subject to prosecution in international criminal courts. Special court of Sierra Leon the court interpreted the Arrest warrant case as an exception to immunity. Omar-Ai-Bashir case is important on this. Article 28 states about the responsibility of commanders and other superiors.

Article 31 to 33 set out the defenses to crime. Article 31 provides non-exhaustive defenses such as Insanity, Intoxication, Self-Defense, Duress/Necessity and also Article 32 states about Mistake of fact or mistake of law.

A key feature of ICC when compared to others are "complementarity", which meansEssentially, the national courts have priority. In this manner the Rome statute is important as a source of International Criminal Law.

Recommendations

- Strengthen Complementarity Mechanisms

  The International Criminal Court and other tribunals should reinforce the principle of complementarity by encouraging and assisting domestic jurisdictions to prosecute international crimes. This reduces impunity and ensures that accountability does not depend solely on international courts.

- Developing Clearer Standards for Command Responsibility

  Jurisprudence on superiors or command responsibility remains inconsistent. International law should articulate more precise guidelines on

when military and civilian leaders are liable for crimes committed under their authority, ensuring accountability for those who orchestrate atrocities through systemic policies.

- Integrate State Responsibility with Individual Responsibility

  While international law rightly emphasizes personal accountability, mechanisms to hold states responsible for tolerating or enabling crimes remain weak. A hybrid approach—such as allowing for reparations or sanctions against states alongside prosecutions of individuals—would create a more holistic framework for justice.

- Enhance Enforcement and Cooperation

  The greatest weakness of the doctrine lies in enforcement. Many indicted individuals evade arrest due to lack of cooperation by states. Strengthening international obligations and creating more robust enforcement mechanisms—including sanctions for non-cooperation—are essential for the doctrine to function effectively.

- Promote Victim-Centered Approaches

  Individual responsibility should not be pursued in isolation from the needs of victims and affected communities. Expanding avenues for victim participation, reparations, and restorative justice within international criminal proceedings would ensure that accountability contributes to reconciliation and peacebuilding.

- Expand Jurisdiction Over Emerging Forms of International Crimes

  The doctrine must evolve to address new challenges, including environmental destruction, cyber warfare, and transnational corporate complicity in atrocities. Expanding the jurisdiction of international courts to cover such acts would reflect the changing nature of global criminality.

Conclusion

The doctrine of individual responsibility remains one of the most significant achievements in the development of international criminal law. By affirming that those who plan, order, or commit crimes against international law cannot shield themselves behind the authority of the state or the machinery of institutions, this principle ensures that accountability is not abstract but personal. From the Nuremberg Trials to the jurisprudence of the ICTY, ICTR, and the ICC, the doctrine has reinforced the idea that international justice must rest on the prosecution of individuals, regardless of rank or status, who bear responsibility for atrocities.

Yet, the application of this doctrine also exposes its limitations. International crimes are rarely the product of isolated acts; they are most often systemic, requiring collective participation, state complicity, and organizational structures. While punishing individuals delivers a measure of justice and deterrence, it cannot fully address the broader socio-political conditions that enable such crimes. Thus, the challenge for contemporary international law lies in striking a balance between individual criminal liability and mechanisms that hold states and institutions accountable for their role in fostering or tolerating violations.

Ultimately, the doctrine of individual responsibility serves not only as a legal cornerstone but also as a moral imperative: that no individual is above the law, and that justice for the gravest crimes requires personal accountability. However, its effectiveness depends on consistent enforcement, the political will of states, and the continued evolution of international criminal justice to address both individual culpability and collective responsibility. Only through this integrated approach can international law fulfill its promise of deterring future atrocities and preserving the rule of law in the global order.

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DOES SRI LANKAN LAW REALLY SAFEGUARD WOMEN'S RIGHTS?
A CRITICAL LEGAL AND SOCIAL ANALYSIS

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Introduction

The question of whether Sri Lankan law adequately safeguards women's rights is not only a legal inquiry, but also a deeply social one. For centuries, in Sri Lanka as in much of the world women have been marginalized, denied access to basic rights, and placed within rigid gendered hierarchies that allocated power, opportunity and autonomy unequally.

Globally, the modern women's rights movement traces much of its momentum to the feminist mobilizations of the eighteenth and nineteenth centuries in Europe and North America. These movements gradually established fundamental rights for women: access to education, the right to vote, equal pay, reproductive rights, legal capacity, and equality within marriage. Many of these rights, once exclusively the domain of men, are today widely recognized in international human rights law and in domestic constitutions, including that of Sri Lanka.

Yet, recognition in law does not always translate into protection in practice. Sri Lanka, despite its constitutional guarantees, continues to wrestle with high levels of gender-based violence, discriminatory social norms, and legal gaps that weaken women's safety and rights. Indeed, the narrative of "woman as homemaker and man as breadwinner" still shapes the lived reality of millions of Sri Lankan women.

This article critically examines the extent to which Sri Lankan law protects women's rights, the strengths and weaknesses of existing legislation, the role of the judiciary, and the societal obstacles that persist. Drawing from personal experience as a lawyer and a judicial officer, this analysis addresses the gap between the law on paper and the reality on the ground.

1. Historical Context of Women's Rights in Sri Lanka

Sri Lanka's legal history shows that it has been slow to adopt robust legal protections for women, particularly in relation to sexual abuse, domestic violence and personal autonomy. For many decades, women lacked legal recourse against domestic violence and sexual harassment, and even today the justice system does not always enable safe reporting or accountability.

The patriarchal structure of Sri Lankan society, like many Asian societies, reinforces prescribed gender roles. Men are expected to be providers, while women are expected to raise children, care for the elderly and maintain the household. Even highly educated women often internalize these roles, believing that their primary responsibility is domestic.

While many developed countries have actively pursued gender equality through legally enforceable rights, infrastructure, and cultural transformation, Sri Lanka remains in transition. The gap between legal recognition and social implementation is wide.

2. Key Sri Lankan Laws Intended to Protect Women

Despite existing weaknesses, Sri Lanka has undertaken several legislative measures to improve women's safety and equality. Some of the principal laws include:

2.1 Maintenance Ordinance 1889 (now Maintenance Act 1999)

This Act ensures that women, particularly separated or abandoned wives, can seek maintenance from husbands who have failed to provide. Although limited in scope, it provides essential economic support for vulnerable women.

Section 2 of the Maintenance Act allows;

(a) a wife who is unable to maintain herself and who has been neglected by her husband who has sufficient means, and

(b) a child who is unable to maintain himself or herself and who has been neglected by his/her parent who has sufficient means,

to make an application for maintenance.

This provision is also difficult to enforce in practice, as the husband may lack sufficient means to support his wife and children. Moreover, if he defaults on a maintenance payment, he faces a maximum imprisonment of one month for each missed instalment. However, imposing this penalty often proves counterproductive, as incarceration renders him unemployed and further diminishes his capacity to provide financial support while serving the sentence.

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

The PDVA introduced Protection Orders against perpetrators of domestic violence. Prior to this, domestic abuse was often dismissed as a "private matter."

The PDVA recognizes physical, emotional and sexual forms of abuse, and allows courts to issue interim protection orders swiftly.

The act of Domestic violence has been interpreted in the Act 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;

Emotional abuse has been interpreted in the Act as a means a pattern of cruel, inhuman, degrading or humiliating conduct of a serious nature directed towards an aggrieved person;

According to **section 11** of the PDVA the court can issue an Interim Order or a Protection Order prohibiting the Respondent from doing any of the following acts

(a) entering a residence or any specified part thereof, shared by the aggrieved person and the respondent;

(b) entering the aggrieved person's

- (i) residence;
- (ii) place of employment;
- (iii) school;

(c) entering any shelter in which the aggrieved person may be temporarily accommodated;

(d) preventing the aggrieved person who ordinarily lives or has lived in a shared residence from entering or remaining in the shared residence or a specified part of the shared residence;

(e) occupying the shared residence;

(f) having contact with any child of the aggrieved person or having contact with such child other than on the satisfaction of such conditions as it may consider appropriate, where the Court is satisfied that it is in the best interest of such child

(g) preventing the aggrieved person from using or having access to shared resources;

(h) contacting or attempting to establish contact with the aggrieved person in any manner

whatsoever;

(i) committing acts of violence against any other person, whether it be a relative, friend, social worker or medical officer, who may be assisting the aggrieved person ;

(j) following the aggrieved person around as to cause a nuisance;

(k) engaging in such other conduct as in the opinion of the Court will be detrimental to the safety, health or well being of the aggrieved person or other person who may require protection from the respondent as the Court may specify in the Protection Order;

(l) selling, transferring, alienating or encumbering the matrimonial home so as to place

the aggrieved person in a destitute position.

In addition to the above orders the court can make any supplementary orders under **section 12** of the PDVA if the court is satisfied that it is reasonably necessary to protect and provide for the immediate safety, health or welfare of the aggrieved person. The court may order;

(a) the police to seize any weapons that the respondent may have in his or her possession;

(b) the police to accompany the aggrieved person to any place to assist with the collection of personal property of such person and of any children;

(c) the respondent and the aggrieved person to attend mandatory counselling **sessions, psychotherapy or other forms of rehabilitative therapy as may be available ;**

(d) the aggrieved person if such person so requests, be placed in a shelter or provided with temporary accommodation the location and other details of which shall be kept confidential if necessary;

(e) a social worker, family counsellor, probation officer or family health worker to monitor the observance of the Protection Order between the aggrieved person and the respondent and submit to Court a report relating thereto, once in every three months.

(f) the respondent to provide urgent monetary assistance to any person, where such respondent has a duty to support such person;

(g) the respondent to make such payments and provide such facilities, or make such payments or provide such facilities as the case may be, as are necessary to enable the aggrieved party to continue in occupation of any residence in which such aggrieved party will reside during the period of operation of such Order, notwithstanding that the respondent has been prohibited from entering or remaining in such residence by an Order made under section 11.

This Act also covers a wide range of persons, an aggrieved party can obtain such orders against.

However, despite the comprehensive protections offered under the Prevention of Domestic Violence Act, many women do not avail themselves of the full scope of its provisions. Cultural conditioning, emotional dependence, and social pressures often discourage women from asserting their legal rights fully. In a significant number of domestic violence cases, the relief sought by the aggrieved woman is modest, limited to a humble request that the court merely advise or admonish the respondent to refrain from harassing or troubling her, rather than pursuing stronger protective measures or enforcement remedies. This restrained approach reflects the deep-rooted societal norms that prioritise family preservation, shame avoidance, and emotional attachments over assertive legal action.

2.3 Penal Code Amendments of 1995

The following are the key provisions of this amendment

- **Sexual harassment:** Introduced a new section criminalizing sexual harassment, which is defined as unwelcome sexual advances or actions by a person in authority that cause sexual annoyance or harassment.
- **Sexual exploitation of children:** Inserted new sections to address the sexual exploitation of children, including acts such as allowing a child to remain in a premises for sexual abuse, acting as a procurer for a child, or using a child for sexual intercourse or any form of sexual abuse.
- **Incest:** Amended the Penal Code to increase the penalties for the commission of incest, making it a more serious offense.
- **Procuration:** Introduced new penalties for the offense of procuration, which involves facilitating sexual intercourse or sexual abuse by a third party.
- **Obscene publication and exhibition relating to children:** Added provisions to criminalize the possession, distribution, or exhibition of obscene materials involving children, including advertisements that could convey such a message.

These amendments were the most significant reforms for women's protection before the PDVA.

3. Sri Lanka's International Commitments

Sri Lanka is a signatory to several international instruments, the most important being:

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

Ratified in 1981, CEDAW obligates Sri Lanka to:

- eliminate discrimination against women,
- ensure equal rights,

- protect women from violence,
- reform discriminatory laws.

3.2 Other international instruments include:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights (ICCPR)
- Convention on the Rights of the Child (CRC)

These treaties demand proactive measures, not merely symbolic commitments.

4. Are These Laws Sufficient? The Persistent Gap Between Law and Reality

The existence of protective laws alone is not the central issue; the true challenge lies in their effective implementation and enforcement. In Sri Lanka, while a comprehensive legal framework addressing domestic violence, sexual harassment, and gender-based discrimination exists, the practical impact of these laws is often undermined by multiple, interconnected societal and institutional factors. Deeply entrenched patriarchal norms continue to shape social attitudes, often normalising male authority and trivialising the experiences of women who face violence or harassment.

Under-reporting of abuse is a persistent problem, driven by fear of retaliation, social stigma, and concern for family reputation, which collectively discourage women from seeking formal redress. This hesitation is exacerbated by widespread mistrust in police and judicial institutions, where survivors frequently encounter insensitive questioning, slow case processing, and a lack of privacy or confidentiality.

Institutional support structures, including shelters, legal aid services, and counselling facilities, remain insufficient to meet the needs of victims, leaving many women without practical means of protection or recovery.

Furthermore, there is a glaring lack of gender-sensitive training for key actors such as police officers, lawyers, doctors, and judges, resulting in responses that may inadvertently re-traumatise survivors or perpetuate victim-blaming attitudes.

The pertinent question, therefore, is not whether Sri Lanka possesses protective laws, but whether these laws genuinely enable women to live free from fear, intimidation, and discrimination. Unfortunately, despite legislative advances, the

lived reality for many women continues to reflect systemic inadequacies, and the promise of the law as a safeguard remains only partially realised.

5. Why Do Sri Lankan Women Hold Back from Participating in Society?

From both experience as a lawyer and the bench, several patterns emerge:

5.1 Social conditioning

Many women are raised to believe their worth lies in household roles. They internalize obedience, modesty and silence, values reinforced by families and sometimes religious institutions.

5.2 Lack of facilities and infrastructure

Structural and infrastructural deficiencies play a significant role in limiting women's full participation in public life. Limited access to adequate sanitary facilities in workplaces, schools, and public spaces creates not only physical discomfort but also psychological stress, often discouraging women from attending school or remaining in employment. Inadequate maternity leave policies, lack of breastfeeding support, and insufficient healthcare facilities further impede women's ability to pursue careers or engage in public activities without facing undue strain. The scarcity of reliable childcare services exacerbates these challenges, forcing many women to confine themselves to domestic roles and responsibilities, which in turn reinforces traditional gender norms and limits their economic independence. In essence, the absence of these basic supports does not merely inconvenience women; it actively constrains their mobility, agency, and opportunities for social and professional advancement.

Fear of sexual harassment compounds these structural barriers and remains one of the most pervasive deterrents to women's freedom. Women routinely encounter harassment on public transportation, where crowded buses and trains provide opportunities for unwanted touching, leering, and verbal abuse. Educational institutions are not immune, with harassment reported in schools and universities, creating an environment of fear that can affect academic performance and participation. Workplaces, too, are sites of intimidation and sexual misconduct, ranging from inappropriate comments to coercion and exploitation. Even walking on public roads or moving within one's own neighbourhood can be fraught with risk, and alarmingly, harassment can occur within the supposed safety of the home, often from known individuals or relatives. This omnipresent threat generates a constant state of vigilance, stress, and anxiety among women, effectively restricting their freedom of movement and participation in society. The situation is exacerbated by weak enforcement of laws and insufficient protection

mechanisms, leaving women feeling that reporting abuse may be futile or even risky.

Consequently, the combination of structural deficiencies and the persistent fear of harassment force many women into domestic confinement, limiting their opportunities for education, employment, and public engagement, and perpetuating cycles of dependency and inequality.

6. What Exactly Is Sexual Harassment? (Section 345, Penal Code)

Section 345 of the Penal Code provides a statutory definition of sexual harassment, describing it as "unwelcome sexual advances by words or actions used to harass another person sexually, or to annoy or embarrass such person, of a sexual nature." This definition is deliberately broad, encompassing a wide range of conduct, including unwanted touching, sexually suggestive comments, exposure, unwelcome sexual advances, coercion, the forced viewing or imposition of pornography, and stalking with sexual intent. By including both physical and non-physical acts, the law recognises that sexual harassment is not confined to overt assault but also includes subtler forms of intimidation and degradation that can profoundly affect a victim's sense of safety and autonomy.

Many women report receiving advice such as "ignore the behaviour," "take a different route," or "dress more modestly". Although often offered with good intentions and aimed at promoting immediate personal safety, such guidance can unintentionally draw attention away from addressing the behaviour of perpetrators and complaining to relevant authorities and taking the matter to courts. It may also reflect broader societal norms that emphasise risk-avoidance by women rather than systemic solutions that confront the root causes of harassment. As a result, the responsibility subtly shifts onto women to modify their behaviour, which can inadvertently reinforce cultural attitudes that normalise harassment and limit women's freedom. A more supportive, victim-centred approach, paired with accountability for offenders, helps challenge these norms and promotes safer, more equitable environments.

This systemic failure to treat sexual harassment as a serious criminal offence has profound consequences. Women are discouraged from reporting incidents, often feeling that the act of coming forward may expose them to ridicule, blame, or retaliation without any real prospect of justice. The lack of timely investigation, coupled with insufficient sensitivity in handling victims, further diminishes confidence in the legal system. Consequently, sexual harassment persists as a pervasive social problem, perpetuating fear, limiting women's freedom of

movement, and undermining their ability to participate fully in education, employment, and public life. The law, though well-intentioned and theoretically robust, achieves limited impact without effective enforcement, institutional accountability, and a cultural shift that recognises the gravity of such offences and prioritises the protection of victims.

7. Are Women "Gentle"? Do They Require Special Protection?

Women do not require special protection because they are inherently "gentle" or fragile; rather, they face disproportionately high risks due to the societal tolerance of gendered violence. While men walking alone at night may reasonably fear robbery or theft, women in similar circumstances confront a far broader spectrum of threats. In addition to robbery, women are vulnerable to sexual harassment, sexual assault, abduction, and even human trafficking. The danger is not a reflection of women's personal weakness, but of systemic social conditions in which violence against women is often ignored, minimised, or inadequately punished. This reality underscores the urgent need for legal and institutional measures that address not just individual acts of violence but the broader structural factors that perpetuate risk.

Comparative experiences from countries such as Japan, South Korea, and Singapore provide instructive examples of how comprehensive strategies can mitigate violence against women. In these jurisdictions, strict enforcement of laws, rapid prosecution of offenders, and heavy penalties act as strong deterrents. Surveillance systems, including extensive CCTV coverage, contribute to public safety by monitoring high-risk areas and facilitating swift police intervention. Investments in safe, reliable, and accessible public transportation ensure that women can move freely without fear, while gender-sensitive policing practices train law enforcement officers to respond appropriately to complaints of harassment or assault. Collectively, these measures demonstrate a multifaceted approach that combines preventive, punitive, and supportive mechanisms to protect women effectively.

By contrast, Sri Lanka has yet to implement measures of similar scope and effectiveness. While legal provisions exist to address sexual harassment and domestic violence, enforcement remains inconsistent, judicial processes are often slow, and institutional support is limited. Public infrastructure and transport systems are rarely designed with women's safety as a primary consideration, and police and judicial personnel frequently lack comprehensive training in gender-sensitive practices. As a result, women continue to navigate a society in which the threat of violence is a constant, shaping both their behaviour and

their opportunities. This disparity highlights the gap between law on paper and the lived reality for women in Sri Lanka, emphasising the need for a concerted effort to combine legislative protection with practical, culturally aware, and well-resourced interventions.

8. Why Do Women Not Report Abuse?

One of the most significant barriers to addressing violence against women in Sri Lanka is the pervasive sense of shame imposed upon victims. Rather than directing blame and accountability toward the perpetrator, societal attitudes frequently stigmatize the woman who comes forward. She is subtly or overtly held responsible for the abuse she has suffered, judged for her behaviour, attire, or perceived moral conduct. This shaming creates an environment in which women feel humiliated or disgraced simply for seeking help, discouraging them from reporting incidents of harassment, assault, or domestic violence.

Fear of retaliation further compounds this reluctance. Women often worry that reporting abuse will trigger threats, physical harm, social exclusion, or even increased violence at home. Perpetrators may exert direct pressure to silence victims, while community and familial pressures may indirectly reinforce fear by threatening social ostracism. This constant anxiety undermines women's sense of safety, making silence appear to be the only viable option for self-preservation.

A lack of trust in law enforcement and the judicial system also discourages reporting. Even if a report is filed, the anticipated long duration of court proceedings, coupled with the stress of rigorous cross-examination, can seem insurmountable. Women fear public humiliation, repeated reliving of traumatic events, and the possibility that justice will be delayed indefinitely, leaving them vulnerable and unsupported throughout the process.

Practical deficiencies in privacy and sensitivity within investigative and judicial settings exacerbate the problem. This lack of secure, private, and empathetic procedures deters women from speaking openly about their experiences, leaving many cases unreported or incompletely documented.

Cultural norms enforcing silence form an additional barrier. Families frequently counsel women to "not make a fuss," "forget it," "think of the children," or "avoid gossip," thereby prioritising social appearances over justice and personal safety. Women internalize these messages, and silence becomes the default coping mechanism. The convergence of shame, fear, institutional mistrust, practical obstacles, and cultural pressure creates a complex web of deterrents that leaves

many women suffering in silence, perpetuating cycles of abuse and reinforcing systemic impunity for perpetrators.

9. The Role of the Judiciary in Protecting Women's Rights

Judges in Sri Lanka carry a profound responsibility, particularly in cases involving sexual violence, where the intersection of law, social norms, and human psychology is most evident. One landmark case that has had a transformative impact on Sri Lankan jurisprudence is the Colombo High Court case of Kamal Addaraarachchi. In this case, Justice Shiranee Tilakawardane decisively rejected pervasive patriarchal notions that sought to conflate a woman's behaviour with consent. Her judgment made it unequivocally clear that a woman's presence in a room with a man, her willingness to accept a ride, her manner of dress, or any expressions of friendliness, cannot, in any context, be interpreted as consent to sexual intercourse.

The judgment underscores the crucial need for trauma-informed adjudication, emphasising that courts must understand how survivors of sexual violence often respond in ways that may seem counterintuitive to those unfamiliar with the psychological effects of trauma. Victims may delay reporting the incident, feel reluctant to undergo medical examinations, or struggle to recount events consistently. These responses, while sometimes misinterpreted as signs of fabrication or uncertainty, are in fact typical of trauma-affected individuals who are grappling with fear, shame, shock, and emotional harm.

Behaviours such as withholding details, displaying hesitation, or becoming uncomfortable in the presence of male police officers, medical professionals, or judicial officials should not be viewed as grounds for suspicion. Trauma can significantly impair memory, influence emotional responses, and affect how survivors communicate, especially in intimidating or unfamiliar environments. Recognising these clinical and psychological realities helps prevent wrongful assumptions about credibility.

The role of judges is not only interpreting and enforcing the law but also shaping social attitudes toward women's rights and bodily integrity. The victims' experiences must be treated with seriousness, dignity, and understanding, transforming the justice system into one that genuinely protects women, challenges entrenched gender biases, and ensures that the principles of equality and human dignity are upheld in practice.

10. Are Judges in Sri Lanka Sensitive Enough?

From personal experience on the bench, the profound reluctance and visible distress of female victims of sexual violence is striking. Young girls, particularly those who have survived incest or other forms of child sexual abuse, frequently tremble, freeze, or cry during identification parades, reflecting the intense fear and psychological trauma that accompanies such experiences. Adult victims, too, often display significant hesitation when questioned by male police officers, lawyers, or medical examiners. They may avoid eye contact, speak in soft or halting tones, refuse to recount details of the incident, or appear emotionally detached or panicked. These reactions are not deliberate attempts to mislead the court; they are natural responses to the trauma, fear, and vulnerability that survivors endure.

Unfortunately, the judicial system and legal professionals sometimes misinterpret these behaviours. Hesitation, emotional withdrawal, or inconsistent recollection is frequently viewed as a lack of credibility, exaggeration, or even dishonesty. Such interpretations ignore the well-documented psychological effects of sexual trauma, which can profoundly affect memory, cognition, and verbal expression. A survivor of rape or sexual assault cannot be assessed using the same behavioural expectations applied to victims of theft, fraud, or other conventional criminal offences, as the psychological and emotional impact is vastly different. Misreading these responses can lead to secondary victimisation, compounding the original harm and discouraging survivors from seeking justice.

Recognising these realities, judges must adopt trauma-informed judicial practices that prioritise the dignity, safety, and psychological needs of survivors. This includes refraining from victim-blaming, avoiding reliance on stereotypical assumptions about how a "credible" victim should behave, and permitting closed-court hearings when public proceedings may exacerbate distress. Questioning should be conducted sensitively, in a manner that minimises humiliation or intimidation, and with an awareness that behavioural inconsistencies often reflect trauma rather than deceit. Courts should assess testimony through the lens of trauma psychology, recognising that fear, panic, emotional withdrawal, and delayed reporting are natural and expected reactions to sexual violence.

Only by incorporating these principles into judicial practice can the courts provide survivors with a fair and compassionate process, ensuring that justice is truly served. Such an approach does not diminish the rigour of the legal system; rather, it strengthens it by aligning judicial assessment with the realities of human behaviour, particularly in cases of profound violation and abuse. Ultimately, trauma-informed adjudication is essential not only for achieving legal outcomes

but also for restoring a sense of agency, dignity, and trust to survivors who engage with the justice system.

11. What Can Sri Lanka Do to Strengthen Women's Protection?

The protection of women's rights in Sri Lanka requires not only enforcement of existing laws but also the strengthening of legal frameworks to address contemporary challenges. One of the foremost steps is to strengthen laws relating to sexual harassment, stalking, and gender-based violence. Current legislation often suffers from vague definitions, insufficient penalties, and procedural delays that undermine its deterrent effect. Updating these laws to include clearer, comprehensive definitions of harassment, coercion, and stalking, combined with higher penalties and accelerated prosecution timelines, is essential. Such reforms would signal unequivocally that the State does not tolerate violations of women's bodily autonomy and would provide legal practitioners with stronger tools to pursue justice effectively.

Equally important is improving police sensitivity and training. Law enforcement officers are frequently the first point of contact for victims, yet inadequate training in gender sensitivity, trauma-informed interviewing, and child psychology often exacerbates the victim's distress. Comprehensive training programs are required to ensure that officers treat women with respect, understand the psychological impact of sexual violence, and can conduct interviews in a manner that is empathetic and non-intimidating. The presence of such training would help to restore women's confidence in the system and encourage reporting.

Increasing the representation of female officers, prosecutors, and judges within the justice system is another crucial reform. A higher proportion of women in these roles not only improves accessibility and comfort for victims but also helps to bring diverse perspectives into legal decision-making. Female officers and judicial officials often have a heightened awareness of the challenges women face, which can improve the quality of investigation, adjudication, and sentencing in gender-related cases. This representation also sends a broader societal message that women are equally capable of holding positions of authority and influencing legal and policy outcomes.

Safer public transportation is an urgent practical measure to enhance women's freedom of movement. Many women face harassment while commuting, which restricts their mobility and participation in economic and social life. Introducing technological and human-based interventions, such as CCTV surveillance, emergency alert systems, trained transport marshals, and strict penalties for

offenders, can create a safer environment. A reliable and secure transport system not only protects women but also empowers them to pursue education, work, and social activities without fear.

Education plays a central role in long-term prevention of gender-based violence. School-based programs should teach children and adolescents the principles of respect, consent, and healthy relationships. Early education helps challenge entrenched patriarchal attitudes and fosters a culture of equality and mutual respect. By instilling these values from a young age, society can cultivate generations that reject gendered violence and understand the importance of equitable treatment for all.

Support services for victims must also be strengthened. Shelters, medical care, psychological counselling, legal aid, and guaranteed confidentiality are essential components of a holistic response. Women must know that they have access to safe spaces and competent assistance when facing violence or harassment. Comprehensive support services not only address immediate physical and psychological needs but also assist women in rebuilding their autonomy, confidence, and social participation.

Finally, promoting women's economic participation is integral to empowering them socially and politically. Economic independence is closely linked to personal autonomy and the ability to escape abusive or restrictive environments. Providing accessible childcare facilities, flexible work arrangements, safety networks, and anti-discrimination protections in employment will enable women to fully engage in the workforce. Economic empowerment not only benefits women individually but also strengthens families, communities, and the broader economy, creating a virtuous cycle of gender equality.

In sum, these measures are interdependent: legal reform, institutional sensitivity, public infrastructure, education, support services, and economic empowerment must all operate in tandem to create a society in which women are genuinely safe, respected, and free to participate fully in all spheres of life. Without a multifaceted approach that addresses both legal and social dimensions, the protections afforded on paper will continue to fall short of the lived realities of Sri Lankan women.

12. Conclusion: Are Women Truly Safe Under Sri Lankan Law?

Sri Lanka does not lack laws. It lacks:

- enforcement,
- implementation,
- sensitivity,
- training,
- and cultural transformation.

Until women feel safe:

- walking on the road,
- taking a bus,
- going to work,
- reporting harassment,
- pursuing leadership roles,

the existence of laws alone cannot be celebrated.

True protection goes beyond statutes — it requires:

- a judiciary that understands trauma,
- a police force that supports victims,
- a society that refuses to shame women,
- and a state that prioritizes safety and equality as non-negotiable rights.

Sri Lankan law can safeguard women's rights. But only when supported by a justice system that listens, believes, and protects, and a society willing to evolve.

The recent decision to recruit a greater number of female judges, particularly at a time when the superior courts have only one or two women on the bench,