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web: www.jassl.org | mail: jsasl2013@gmail.com

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Cover desingner

Gihan Kalyana

Page Layout

Kishani Manohari Balachandra

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EDITOR'S NOTE

The JSA is proud to deviate from its traditional publication, the 'Newsletter' that featured only a mix of judge authored articles. In this journal we present a diverse selection of stimulating articles from judicial officers as well as non judicial scholars. We believe that this journal would be a novel site for compelling exploration of law in all aspects and we hope that you will find the content extremely enlightening.

This journal is a result of a team work and the initiative and hard work of each member of that team was so instrumental in shaping its quality. At this juncture we are deeply indebted to Hon. Ruwan Fernando Director, Judges Institute for graciously volunteering to serve Initiative and hard work as a resource person. It is due to his guidance and support that we were able to make this journal a success. I must thank all those who have sent volunteer submissions within a limited period of time amidst their busy work schedules.

Mrs.Anoma Dissanayake Chairman, National Child Protection Authority deserves our sincere gratitude for her generosity for coming forward to help us financially to get this tiresome work done.

Finally I wish to thank our readers, without whose comments, criticisms, attention and analysis our endeavors would not have been a success.

While extending well wishes to the incoming editorial board, I earnestly hope that they too will strive to honour the initiatives that we have taken to enhance the knowledge base of judicial officers.

Modern day contracting; e-commerce, m-cash & what-next?

Justice Saleem Marsoof, P.C.
Judge of the Supreme Court of Sri Lanka

At first man was illiterate; long thereafter, but before the invention of paper, he became literate. In recent times man has become e-literate. The electronic revolution has transformed the way man does business and has brought about a great transformation in the law.[1] This transformation has given birth to what we call 'e-commerce', which includes 'm-commerce', which is an off-shoot of 'e-commerce' that was propelled by the advent of user friendly smart phones and solutions such as eZ Cash. These phenomena resulted from the combination of the Internet with computers, mobile phones and other modern devices which help people to interact and do business in a way that could not have even been imagined a century or two ago. Technology and the way people interact and do business transactions have changed so rapidly in recent times that no one can answer the question: what next?

'e-commerce' or "electronic commerce", has been defined as "the buying and selling of goods and services on the Internet, especially the World Wide Web"[2], which makes possible "the paperless exchange of business information using electronic data interchange (EDI), e-mail, electronic bulletin boards, fax transmissions, and electronic funds transfer."[3] While these definitions emanate from cyberspace, it has been suggested that "the rapid changes in the Internet and continuously evolving technologies have made it not only unrealistic but pointless to reach a permanent definition of e-commerce."[4]

1. S. Marsoof, *Legal Issues Relating to E-Commerce*, The Chartered Accountant (50th Commemorative Issue of the Journal of the Institute of Chartered Accountants) Volume 44 page 38.
2. SearchCIO, at *http://searchcio.techtarget.com/definition/e-commerce* (last accessed 21.11.2012)
3. BusinessTown.com, at: *http://www.businesstown.com/internet/ecomm-definition.asp* (last accessed 21.11.2012)
4 U. G. Seebacher, and L. B. Juszczyk, *Cybercommerce Reframing: The End of Business Purpose Engineering?* (2002) 19

The advent of electronic and e-business contracts has generally left the global as well as national legal systems struggling to keep up and gasping for breath. In much the same way as those who do business through electronic and e-business contracts have progressively developed new business techniques, procedures and rules, the legal systems of most nations had to work overtime to develop new laws or adapt existing laws to fit new settings, but it is not always clear as to how these laws will apply. Contract law can and does provide most of, but not all, the solutions to meet the challenges posed by electronic commerce.

One of the major problems faced by 'e-commerce' was that the ease at which transactions could be entered into through the electronic media was not extended to the recognition and enforcement of such transactions. In Sri Lanka, as well as elsewhere in the world, legislation had to be enacted to facilitate this process and to meet the challenges posed by this development in the manner of doing business. For instance, the Evidence (Special Provisions) Act of 1995,[5] Information and Communication Technology Act of 2003,[6] the Payment and Settlement Systems Act of 2005,[7] the Electronic Transactions Act of 2006[8] the Payment Devices Frauds Act of 2006[9] and the Computer Crimes Act of 2007[10] were enacted as part of the process of transforming the law to meet the challenges posed by this change.[11] Apart from becoming familiar with the provisions of the relevant laws, present day business men, lawyers, judges and policy makers must also be mindful of international conventions[12] and model laws,[13] which could be of value in grappling with some of the problems posed by these developments.

The requirements of 'writing' and 'signature'

The Electronic Transactions Act of 2006[14] was enacted with the objective of facilitating domestic and international e-commerce.[15] The provisions of the Act have in particular focused on removing difficulties that could arise from the traditional legal requirements of 'writing' and 'signature' in the context of e-commerce. The main obstacle in regard to the proof and enforcement of an electronic transaction was the requirement that certain contracts must be made in writing or should be in writing and signed by the parties

5. No. 14 of 1995
6. No. 27 0f 2003
7. No. 28 of 2005
8. No. 19 of 2006
9. No. 30 of 2006
10. No 24 of 2007
11. *See,* S. Marsoof, *Electronic Transactions in the Modern World: An Analysis of Recent Sri Lankan Legislation* [2006] 4 Sri Lanka LCL Rev 108
12. Such as the UN Convention on Electronic Commerce (2006) at: *http://www.Uncitral.org/pdf /english/ texts/electcom/06-57452_Ebook.pdf*
13. *See,* for example, the UNCITRAL Model Law on Electronic Commerce (1996) at:: http://www.Law.upenn. edu/bll/ulc/ucita/ucita200.htm; UNCITRAL Model Law on Electronic Signatures (2001) at::http:// www.uncitral.org/ pdf/english/texts/electcom/ml-lecsige.pdf
14. *Supra* note 8
15. §2 of the Electronic Transactions Act, *ibid.,*

thereto. While under the laws in force in Sri Lanka 'writing' is required to enforce a promise to marry,[16] a deed signed by parties and attested by a notary is essential to validly deal with land[17] or establish a partnership.[18]

A contract for the sale of goods which has not been executed by at least part-payment or part delivery of goods, is unenforceable unless it is evidenced by a note or memorandum in writing.[19] Similarly, no bill of sale or movable property is valid unless it is in writing and signed by the seller or his agent and is duly registered.[20] A bill of sale is necessary only where the possession of the goods sold is not delivered to the buyer, the object being to pass property in the goods without delivery.[21] This may have cast doubts as regards the validity or enforceability of most paperless contracts, if not for Section 4 of the Electronic Transactions Act of 2006, which provides as follows:

> "Notwithstanding the fact that the provisions of written laws for the time being in force in Sri Lanka attach legal validity to certain instruments, only if such instruments have been reduced to writing, such requirement shall be deemed to be satisfied by a data message, electronic document, electronic record or other communication in electronic form *if the information contained therein is accessible so as to be usable for subsequent reference*"[22]

Some, but not all, of the terms used in the above provision have been defined in the Act.[23] The Act defines terms such as 'data message' and 'electronic'. According to the Act, an 'electronic document' would include any "documents, records, information, communications or transactions in electronic form" and an 'electronic record' means "a written document, or other record created, stored, generated, received, or communicated by electronic means".

Neither the phrase 'electronic form' nor the term 'accessible' have been defined in the Act, but it may be inferred from the definition of 'electronic' found in the Act that the phrase 'electronic form' will extend to information generated, sent, received or stored by electronic, magnetic, optical or similar capacities regardless of the medium. Any such

16. *See,* §20(3) of the Marriage Registration Ordinance No. 19 of 1907 (CLE 1956 Official Ed. Cap 112) as amended by Act No. 11 of 1963, Act No. 3 of 1970, Act No. 18 of 1995, Act No. 12 of 1997, Act No. 11 of 2001, Act No. 36 of 2006 and Act No. 38 of 2006
17. § 2 of the Prevention of Frauds Ordinance, No. 7 of 1840 (CLE 1956 Official Ed. Cap. 70) as subsequently amended
18. *ibid.,* §18
19. § 5 of the Sale of Goods Ordinance, No 11 of 1896, (CLE 1956 Official Ed. Cap. 84) as subsequently amended
20. § 17 of the Registration of Documents Ordinance No. 23 of 1927 (CLE 1956 Official Ed. Cap 112) as subsequently amended
21. See, David v Mendis 53 N.L.R.337. The requirement does not apply to a sale of future or unascertained goods. See, Darley Butler & Co. v Silva 11 N.L.R.316
22. Article. 6 of the UNCITRAL Model Law on Electronic Commerce (1996) supra note 13, is much simpler, and provides that "where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference."
23. *See,* § 26 of the Electronic Transactions Act, supra note 8

information will be deemed to be in writing only if it is *accessible* so as to be usable for a subsequent reference through a computer or some similar device. Thus, electronic mail (or e-mail) is clearly a "communication in an electronic form" which is accessible for future reference.

In Sri Lanka there are many laws which require the signature of the person entering a particular transaction for the same to have legal efficacy.[24] The concept of 'signature' has been given narrow interpretations in our courts. For instance, in *Meyappan vs. Manchanayake*[25] Sansoni J. stated that as a matter of language, giving the words their ordinary meaning, "when a document is required to be signed, or when a person's signature is required on a document, the person's name should be written by hand with a pen or pencil." On the basis of the test adopted by Sansoni J, a digital or electronic signature will have no validity. However, Section 7 of the Sri Lankan Electronic Transactions Act[26] now states that:

> *"Where any Act or enactment provides that any information or communication shall be authenticated by affixing the signature, or that any document should be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to be satisfied, if such information or matter is authenticated by means of an electronic signature."*

Electronic Signatures

The phrase 'electronic signature' has been defined in the Act to mean "any letters, numbers, symbols, images, characters or any combination thereof in electronic form, applied to, incorporated in or logically associated with an electronic document, with the intention of authenticating and, or approving the same, in order to establish authenticity or integrity, or both"[27] Understood in the light of the explanation to Section 7, what the section means is that where an enactment requires a person to affix his handwritten signature or any mark on any document, it would suffice if the information is found in an electronic form and is authenticated by means of an electronic signature.

'Electronic signature' is a generic, technology-neutral term that refers to various methods by which an electronic record may be authenticated. Although electronic signatures may take many forms and can be created by many different technologies, the most common

24. See, for instance, §§ 2, 4 and 18 of the Prevention of Frauds Ordinance, No. 7 of 1840 supra note 17; § 3(1), 23 and 24 of the Bills of Exchange Ordinance No. 25 of 1927, (CLE 1956 Official Ed. Cap. 82), as subsequently amended

25. 62 NLR 529 at 533

26. *Compare,* Article. 7(1) of the UNCITRAL Model law on Electronic Commerce (1996), *supra* note 13, which provides that "where the law requires a signature of a person, that requirement is met in relation to a data message if *(a)* a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and *(b)* that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances,

27. *See,* § 26 of the Electronic Transactions Act, supra note 8

and time-tested technology is the Digital Signature. A digital signature may be defined as a transformation of a record using an asymmetric crypto system and a hash function so that a person having the initial message and the signer's public key can accurately determine whether the transformation was created using the private key that corresponds to the signer's public key.[28] Since a public and private key pair has no intrinsic association with a particular individual, being simply a pair of numbers, an additional mechanism is needed to securely and reliably associate a particular person or entity to a particular key pair. This is done through the use of a Certification Authority (CA) and Certification Service Providers (CSPs) as provided in the Electronic Transactions Act.[29]

Electronic Contracts

Making of electronic contracts is fundamental to e-commerce. Most of the extremely complex issues that can arise from an electronic transaction can be avoided through contractual provisions that are carefully thought out and formulated, and the contract can also provide for imaginative solutions and remedies to particular problems and even the mechanism to resolve any dispute that might arise. The Electronic Transactions Act seeks to facilitate the formation of contracts in cyberspace, and it has been observed that "the principles of law that have been developed by the courts in regard to offer and acceptance can be applied unaltered to the modes of communication that have evolved in the Information Era."[30]

Section 11 of the Electronic Transactions Act expressly provides that "….unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed in electronic form. A contract shall not be denied legal validity or enforceability on the sole ground that it is in electronic form."[31] This simply means that a contract could be made not only by an exchange of e-mail but also on-line through the internet. The Act contains certain deeming provisions pertaining to the authenticity[32] and receipt[33] of an electronic communication, which will apply unless there is some applicable contractual provision to which the parties have agreed.

For instance, it is provided in Section 12 (1) of the Act that, in the absence of an agreement to the contrary, an 'electronic communication' (which term should be understood to

28. *See,* N. Kamath, *Understanding Digital Signatures,* Law Relating to Computers, Internet & E-Commerce, (2000) Ch.3. *See also,* R. D. Ryder, *Intellectual Property and the Internet,* (2002) pp.55 to 61
29. *See,* § 18-20 of the Electronic Transactions Act, supra note 8. For a more detailed discussion of these provisions, *see* S. Marsoof, *Electronic Transactions in the Modern World: An Analysis of Recent Sri Lankan Legislation, supra* note 11
30. A. Marsoof, *Offer and Acceptance in the Information Era,* (2005) Meezan 137 *See* also, J. Fernando, *Electronic Transactions Legislation – Background and Features* (2005) Vol XI Bar Association Law Journal 82
31. The language of this section appears to be influenced by Art. 11 of the UNCITRAL Model Law on Electronic Commerce (1996), supra note 13, which provides that "……unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose."
32. § 12 of the Electronic Transactions Act, *supra* note 8
33. *ibid.,* § 13

include all data messages, electronic documents, electronic records and other electronic communications), shall be deemed to be that of the originator of such communication, if (a) it was sent by him or (b) by a person who had the authority to act for and on his behalf or (c) by an automated information system programmed by the originator or on his behalf. Similarly, it is provided in Section 12(2) of the Act that, the addressee of any such communication is entitled to act on the assumption that it is a communication of the originator of the said communication if - (a) the addressee has no reason to doubt the authenticity of the said communication, (b) or there do not exist any circumstances where the addressee knows, or ought to have known by exercising reasonable care, that the said communication was authentic. Section 13 of the Act provides that in the absence of any agreement with respect to the form or method of acknowledgment, an electronic communication may be acknowledged by (a) any communication of the addressee, whether automated or otherwise, or (b) any conduct of the addressee, sufficient to indicate to the originator that the communication has been received.

It is important to note in this connection that the distinction drawn by Lord Denning between contracts entered into *inter-praesentes* or *inter-absentes*[34] in *Entores Ltd v. Miles Far East Corporation*[35] is of importance in deciding whether a contract is formed at the time when an offer is accepted or at the time when the acceptance is communicated to the party making the offer. Where the parties are *inter-praesentes* as when they are present at the same place or are linked by telephone, actual communication of the acceptance is essential for the formation of the contract. This is not so where the acceptance was effected by post with the prior actual or implied authority of the offeror as illustrated by the decisions in *Adams v. Lindsell*[36] and *Household Fire and Carriage Accident Insurance Co. v. Grant*[37] in which the courts applying the "expedition theory" held that the mere act of posting the letter of acceptance was sufficient for the contract to be formed.

The question arises as to which side of the line an exchange of offer and acceptance by e-mail would fall, and the answer appears to be that the exchange of e-mail should be treated in the same way as the use of post for acceptance and the expedition theory would apply to such an exchange of mail. However, as an e-mail can only be sent by activating the 'send' key while being on-line, it has been suggested that an acceptance by e-mail would be complete *if and when the offeree sends the acceptance e-mail, while being online.*[38] In this context, it is noteworthy that Section 14 of the Electronic Transactions Act seeks to clarify many issues which had astounded legal analysts. For instance, it makes it clear that (unless otherwise agreed to by the parties) if I make an offer to you by e-mail using

34. Parties are said to be *inter absentes* when they are separated by time and/or space. Where the parties are in the presence of each other they are said to be inter praesentes, However, telecommunication technology has developed to such an extent that parties are deemed to be in the presence of each other when they are communicating by phone
35. [1955] 2 QB 327(CA)
36. [1818] 1 B & Ald 681; 106 ER 250 (KB)
37. (1879) 4 EX D 216
38. A. Marsoof, *supra* note 30 at p.144

my own computer, the e-mail is deemed to have been dispatched when it enters an information system outside my control.[39]

Similarly, if you have designated an information system for receiving such e-mail, the e-mail sent by me is deemed to have been received by you when it enters your designated information system, but if the e-mail was sent to an information system of yours which is not so designated, only when you actually retrieve the e-mail.[40] If I have stipulated that my e-mail shall be binding only on receipt of an acknowledgement of receipt from you, then unless acknowledgement has been so received, my e-mail is deemed never to have been sent by me.[41] Where there is no such stipulation and if I have not got an acknowledgement from you for my e-mail within the time stipulated in my e-mail or within a reasonable time, I can give you notice specifying a reasonable period of time for acknowledgement, and if there is no acknowledgement of receipt even within the aforesaid time limit I may, after giving notice to you, treat my e-mail as though it has never been sent.[42]

The Electronic Transactions Act provides that in the absence of a contrary agreement between the parties, an e-mail is deemed to have been dispatched at the place where the sender has his place of business, and is deemed to be received at the place where the receiver has his place of business.[43] It is further provided that if either one of them has more than one place of business, the principal place of business shall be regarded as the place of business, and if one or both of them has no place of business, then the place of residence will be deemed to be the place of business.[44] These rules apply not only to e-mail but also with respect to other data messages, electronic documents, electronic records or other communications.

Online Licensing Agreements

Difficult questions regarding the existence of *consensus ad idem* have arisen in relation to licence agreements which may be entered into online. Business enterprises have attempted to overcome such questions by developing the practice of wrapping the licence offer in one of three ways to facilitate the signification of acceptance. These 'wraps' may be classified as click-wrap, shrink-wrap and browse-wrap, depending on the method that has been prescribed for signifying acceptance of the terms of the licence. While in a click-wrap arrangement, acceptance may be signified through clicking an "acceptance" icon or otherwise typing the words "I accept" on the field provided for this purpose, in a shrink-wrap situation, the licence terms may be read and accepted by the consumer after

39. § 14(2)(a)(i) of the Electronic Transactions Act, *supra* note 8

40. *ibid.*, § 14(2)(a)(ii)

41. *ibid.*, § 13(2)

42. *ibid.*, § 13(3)

43. *ibid.*, § 14(3)

44. *ibid.*, § 14(5)

opening the product. On the other hand, a browse-wrap arrangement does not require the active consent of the user, and acceptance of the contract terms is implied from the user's browsing or other activity on the web site even if he or she had no opportunity of reviewing the terms of the licence.

The validity of click-wrap contracts is well settled, and courts usually enforce them because the consumer has to manifest his or her intention to accept the terms of the contract before using the product.[45] The position is less certain with respect to shrink-wrap arrangements, in which the terms of the licence are found within the packaging of software that advise the consumer that the use of the software is subject to the terms of a licence agreement contained within the package.[46] Courts have generally taken the view that a shrink-wrap licence is generally valid and enforceable.[47]

In a browse-wrap arrangement, the terms and conditions of use of the downloadable product is posted on the website, typically as a hyperlink at the bottom of the screen. Unlike in a click-wrap arrangement, a browse-wrap agreement does not require any express manifestation of assent.[48] It appears from the decisions of courts that a browse-wrap agreement will be upheld against a user only if-

(1) notice of the agreement is prominently displayed,

(2) there is evidence that the user was on notice of the terms of the licence; and/or

(3) the user visits the relevant web site with such frequency that knowledge of the terms can be imputed to him or her.[49]

Avoidance of Doubts

Section 17 of the Electronic Transactions Act, also contains provisions that help to avoid certain doubts in various online contexts. Thus, it is provided in this section that (a) if an offer and acceptance has been in whole or in part expressed by means of an electronic record, an electronic signature attached to, or logically associated with, such electronic record shall not be denied legal effect solely on the ground that it is with an electronic signature; (b) if an electronic communication is used in the formation of a contract, the contract shall not be denied validity or enforceability solely on the ground that an electronic record had been used for such purpose; (c) the accepted principles of common law relating to contracts that the offeror may prescribe the method of communicating

45. *See, Hotmail v. Van $ Money Pie* 1998 WL 388389, 47 U.S.P.Q.2d. 1020 (N.D.Cal. 1998); *Register.com, Inc. v. Verio, Inc.,* 356 F.3d 393, 429 (2d Cir. 2004)

46. *See Specht v. Netscape Communications Corp.,* 150 F. Supp. 2d 585, 592 (S.D.N.Y. 2001)

47. *ProCD v. Zeidenberg,* 86 F.3d 1447 (7th Cir. 1996); *Peerless Wall and Window Coverings, Inc. v. Synchronics, Inc.,* 85 F. Supp. 2d 519, 527 (W.D. Pa. 2000) (holding that the "recent weight of authority is that „shrinkwrap licenses . . . are generally valid and enforceable")

48. *See, Hines v Overstock.com Inc.,* 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

49. *See, Ticketmaster Corp. v. Tickets.com,* Case No. CV997654HLH VBKX, 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003)

acceptance, shall not be affected by anything contained in Chapter III of the Electronic Transactions Act; and that (d) a contract formed by the interaction of an automated message system and a natural person or by the interaction of automated message systems, shall not be denied validity or enforceability solely on the ground that there was no review or intervention by a natural person of the final contract or of each of the actions carried out by the automated message system.

Contracting Through Automated Systems

Of the aforesaid provisions of Section 17 of the Electronic Transactions Act, one in fact gives rise to as many doubts as it dispels. This involves, contracts entered through automated systems, which is contained in sub-paragraph (d) of Section 17 of the Act. According to this provision, as already seen, a contract formed by the interaction of an automated message system and a natural person or by the interaction of two or more automated message systems, shall not be denied validity or enforceability solely on the ground that there was no review by a natural person of the final contract or of each of the actions carried out by the automated message system. The automated system is in a way the agent or tool of the person who installed it, but the terminology of “electronic agent” used in certain other legislation has been avoided in the Sri Lankan Act, perhaps advisedly so as not attribute the status of “agent” to a non-human agency.

Perhaps, a shortcoming of the Sri Lankan legislation is that it does not provide an answer where something goes wrong with the automated system. For instance, if an ATM machine which interacts with an individual such as a customer of a Bank, malfunctions, is the transaction valid or enforceable? It is instructive to note that in certain jurisdictions express provisions have been made to deal with problems of this nature. For instance, in South Africa it is expressly provided that “a party interacting with an electronic agent to form an agreement is not bound by the terms of the agreement unless those terms were capable of being reviewed by a natural person representing that party prior to agreement formation.”[50] The solution provided by the British Columbia legislation is to treat the electronic record created by an individual with an electronic agent of another person as “invalid and unenforceable if the individual made a material error in the record and –

(a) the electronic agent did not provide the individual with an opportunity to prevent or correct the error;

(b) the individual notifies the other person of the error as soon as practicable after the individual learns of the error and indicates that he or she made an error respecting the electronic record;

(c) the individual takes reasonable steps, including steps that conform to the other person’s instructions, to return the consideration received, if any, as a result of the error or, if instructed to do so, to destroy the consideration; and

50. § 20(d) of the South African Electronic Communications and Transactions Act, 2002

(d) the individual has not used or received any material benefit or value from the consideration, if any, received from the other person."[51]

It might be useful to consider these provisions carefully with a view of making the necessary amendments to the Sri Lankan Act. These are salutary provisions consistent with the fundamental purpose of the Act, which is, to remove barriers to electronic transactions while leaving the substantive law, e.g., law relating to mistake, unaffected to the greatest extent possible.[52]

Where two or more automated systems interact without any human intervention to review or approve the final contract, more fundamental questions could arise. Suppose the members of the Bar Association consume a large amount of junk food, and the Modern Cafeteria of the Association continuously stocks its vending machines. The supplier who stocks these machines uses an EDI system to accept orders and process them electronically for immediate supply. In an effort to avoid frequent inventorying, the Bar Association installs a programme for the vending machines that will keep track of the supply of food in the machines. When the inventory reaches a low level, the programme automatically dials the supplier's EDI system and places an electronic order to refill the machines. The vending supplier's EDI system confirms the order and transmits a purchase order to the warehouse for immediate delivery.

This is a case where there is no human review of, or intervention in, the final contract for the sale of the goods in question. In view of Section17(d), the contract is valid despite the absence of human intervention in the making of the final contract, and the question can be posed as to whether this is a statutory repudiation of the common law requirement *of consensus ad idem.* An astute jurist might find that the requisite *consensus* existed in the minds of the supplier and the Bar Association that installed the automated systems knowing very well what it can achieve. The provisions of the Electronic Transactions Act only seek to negate any claim that the lack of human intent, at the time of contract formation, prevents contract formation. When machines are involved, the requisite intention flows from the programming and use of the machine. But what happens if there is an error that occurred due to technical reasons that has made the resulting contract unacceptable to one or more of the parties? Neither the Sri Lankan Act nor the legislation enacted in other jurisdictions provide a solution to the problem, and a court might hold the parties to the contract, which is their own making, however distorted it might be.

Electronic Notarization of Documents

A question of some interest to lawyers as well as to notaries in these modern times is how to handle a legal requirement of notarization. This question becomes important in

51. § 17 of the British Columbia (Canada) Electronic Transactions Act, 2001
52. Extract from the overview of the Uniform Electronic Transactions Act (1999) which was approved by the National Conference of Commissioners on Uniform State Laws, USA at the Annual Conference held in Denver Colorado, 23rd to 30th July 1999

the context of laws that require a document or signature to be notarized, acknowledged, verified, or made under oath. Can such a requirement be fulfilled through the electronic medium? Or, put in another way, can there be an eNotary? There is nothing crazy in the idea of an eNotary. USA has shown the world that it does work, and can have great significance in nations with huge territorial limits which make face to face notarization impracticable.

An eNotary is conceivably a modern day Notary Public who notarizes documents electronically. Mainly, he would use a digital signature and a digital notary seal to notarize digital documents and validate same with a digital certificate. Once his secure public key is attached to an electronic document (such as a pdf or word document) which is rendered 'tamper evident' (that is, 'tamper proof' through the application of a device or process that makes unauthorized access to the protected object easily detectable). In other words, the e-Notary will use cryptography and a public key to create, manage, distribute, use, store, and revoke the digital certificate. He also keeps an electronic register to record each notarization performed by him.

It must be mentioned that it was the ground breaking Section 11 of the United States Uniform Electronic Transactions Act of 1999[53] (which has been adopted in other federal legislation since 2000) that paved the way for this transformation in notarization technique. This section provided that-

> *"If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record."*

Under the Uniform Electronic Transactions Act (UETA) provision, a notary public or other authorized officer may act electronically. The provision while preserving the other requirements of notarization laws, simply allows the signing and information to be accomplished in an electronic medium.[54] For example, if a buyer wishes to send a notarized Real Estate Purchase Agreement to a seller via e-mail, the Notary must appear in the room with the buyer, satisfy him/herself as to the identity of the buyer, and swear to that identification. All that activity must be reflected as part of the electronic Purchase Agreement and the notary's electronic signature must appear as a part of the electronic real estate purchase contract.

However, it is relevant to note that Article 11(2) of the UNCITRAL Model Law on Electronic Commerce[55] has allowed some amount of discretion to States to decide, in accordance with prevalent public policy, what amount of electronic notarization should

53. The Uniform Electronic Transactions Act (UETA) approved by the National Conference of Commissioners on Uniform State Laws, U.S.A at the Annual Conference held in Denver, Colorado, July 23-30, 1999
54. Comments on the UETA, *ibid*
55. The UNCITRAL Model Law on Electronic Commerce (1996), *supra* note 13

be permitted. Thus in Sri Lanka, last wills, contracts of sale or conveyances of immovable property or any interest in such property, express trusts and powers-of-attorney are expressly excluded from the ambit of the Electronic Transactions Act,[56] but for other transactions and instances electronic means of notarization will become effective when the relevant Minister makes regulations for this purpose as contemplated by paragraphs (f),(h) and (i) of Section 8(2) of the Electronic Transactions Act.

Conclusions

The question then is: what next? The information era in which we live is moving at a gigantic pace, which has left all of us breathless. It is hard for law enforcement authorities, lawyers and judges to grapple with the challenges posed by developing technology, and to reconcile legal principles and attitudes we are familiar with to the demands of the times.

Those who manipulate the law to their own advantage or blatantly violate the law to make money are always ahead of the law enforcement authorities, and it is necessary not only to refine and develop the laws to meet the challenges that the technology poses from time to time, but also to augment the infra-structure and enhance standards of expertise necessary to grapple with them. It will become increasingly difficult for lawyers and judges to deal with the new type of litigation that arise from such manipulations and violations, unless they keep abreast of new legal concepts and methods that are being fashioned to meet the demands of the times.

56. *See,* § 23 of the Electronic Transactions Act, *supra* note 8

JUDICIAL STRESS – REALITY EXPOSED

Justice P.H.K.Kulatilaka
Former Judge of the Court of Appeal
Former Director of the Sri Lanka Judges Institute.

After forty years of experience in different fields in the legal profession i.e. as Legal Assistant to the Supreme Court Judges ,State Counsel and Senior State Counsel, High Court Judge, Judge of the Court of Appeal, Deputy Director and Co- Director of the Sri Lanka Judges Institute I feel I am competent to speak on this subject. The Judiciary is traditionally a stress denying profession because of the restraints imposed by the profession itself. The judges unlike in any other profession are shy to come out openly and admit that they are prone to depression or stress.

Nevertheless recent studies have revealed that they are most likely and very much prone to stress. Tension is a debilitating factor that any human species will have to undergo at some stage in their life time. Judges are no exception. It comes on them in carrying out their day to day work. A Judge's life is no bed of roses. Their task is not easy. They have to perform daily, and in the full glare of public gaze what most of the public officers dare not to do, that is making decisions.

Judging involves giving a hearing to both sides to a dispute that come before them for our judicial process is hell bent on an adversarial procedure. Lengthy arguments and submissions by Counsel very often involving complicated and difficult questions of law, objections raised during trial calling for on the spot orders, making the right decision at the end of the day in respect of disputes that came up for determination will no doubt build up tension in them. All our Judicial Officers will remember that there were occasions in the recent past where they sought our opinion and advice as Directors of the Sri Lanka Judges Institute about rudimentary problems of judging. We were ready to assist them in their hour of need with our well earned experience.

The Hon. Justice Michael Kirby ,Supreme Court, New South Wales speaking on Judicial Stress at an academic programme for judges from Sri Lanka held at the National Judicial

Academy in India on 8th August 2011 remarked ' Magistrates have a very high level of stress both because of the pressure of their work and high component of crime'. This pronouncement even though he had arrived at in the context of the New South Wales Magistrates no doubt applies in the Sri Lankan context as well. I can well remember that in 2011 on a particular day at Ruwanwella M.C. we were told that there had been 600 call matters to attend to and when the Magistrate adjourned for the day it was past 5.00 p.m. In that predicament how could a judge find time to hear trial cases.

Stress,to put it in a simplified way sets in, "as the mind signals the body to mobilize its resources in a situation of stress. Glucose, simple proteins and fats pour out of storage to stroke the muscles. To increase this delivery of nutrients and oxygen the heart beats faster, blood pressure goes up and breathing rate increases. The stress hormone seems to be associated with the human sleep cycle as well".

According to research in view of the work they do day to day , judges normally have a lot of this hormone rushing in their systems.

I can remember once during a seminar organized by the Judges Institute Professor Dianth Samarasinghe at the request of a senior judicial officer addressed the judicial offices on how to reduce stress and recommended few simple exercises as well. That proved to be a salutary contribution for the well being of the judicial officers who attended the seminar programme that day.

Stress sets in right at the beginning of a judge's career as Magistrate/ Addl. Distirct Judge. The transition from a practicing lawyer to a judicial officer pushes him into a mire of social isolation. Mounted on the bench for the first time in his life the Magistrate will find as if the whole world is gazing at him. On the other hand he is troubled by a feeling of loneliness that makes him desperate. It is some sort of a weird feeling. But strangely, 'I am the Judge' feeling takes him over and put him back on course.

It is interesting to note how Mr. Gordon Tweedie a leading Canadian barrister describes the plight of a newly appointed judicial officer. He sald - ' In our society we isolate judges…All of a sudden a lawyer at 40 goes from fraternizing with friends to becoming a judge. He can't golf. Go to dinner or socialize with his former colleagues. An active man is now isolated and lonely. It leads to the old expression- ' if you are hungry, angry and tired, you are one step from a drink'. Of course in Sri Lanka except in few cases our new entrants to the Judiciary are in their late twenties or early thirties. Hats off to a former Chief Justice whose thinking was "catch them young". His thinking proved right.

In the past the practice had been to recruit 10 to 15 new judges and send them to the Judges Institute. Duty was cast on the Directors to use their skill, knowledge expertise, commonsense and experience and pass them off with sufficient confidence to face the music in Court. By then, they had gained the required knowledge in court craft as well by sitting along with senior Magistrates and District Judges in their Court houses. The

Directors of the Judges Institute have a very important role to play. I quote the very words of the highly respected former Supreme Court Judge and Director J.F.A. Soza – ' Kule, Giving advice and judging judges are going to be a part of your life now. It is a tough assignment. Whether it is your lunch time or dinner time is immaterial. You must be ever ready to give them the correct advice. Remember they seek your advice because they trust you. There is a veil of secrecy '. [vide Daily Mirror, April 29.2013]

In addition the Directors would speak to them sometimes personally during Saturday Lectures in order to put them at ease. Absence of such a mechanism would cause uncertainty, self doubt and stress.

Another method the Directors made use of to assist the new entrants in their work was to get feed – backs from proper sources concerning their performance. We had to be extra careful because we had to sort out only what is constructive criticism. If the need arises the Directors would put them right. I remember of the case of a Magistrate from a suburban M.C sent to us for further training. Justice Soza and I got information from a feed - back source that the officer was a very duty conscious and hard working officer and a disgruntled lawyer had petitioned against him. We took immediate steps to persuade the authorities to send him back to his court within few weeks.

Most bothering phenomenon that makes the blood pressure shot up is that the Judges are over burdened. Ever increasing work load from the day of assuming duties becomes a big bother to almost all judicial officers. It is a multi faceted problem. On the one hand there is the 'backlog' of cases. They are trial ready cases but remaining untouched. On the other hand is the 'delay' which relates to cases signifying the lapse of an abnormal period of time between the filing of a case and its termination . Then comes the flow of new cases. Every time he comes on the bench the first thing he sees is the heap of case records. He keeps on asking himself ' Will I ever be able to clear this mess'.

Hon. Justice Micheal Kirby rightly observed that ' it can result in a resigned lack of interest in work and a fatalistic belief that every day is the same'. [supra]

Of course a solution to this threatening problem calls for an expert empirical study. This must attract immediate attention. Increase in the intake of new judges, setting up of additional Court Houses, setting up of fast track Courts where there is an excess of backlog and part heard cases of more than five years old are some of the customarily suggested solutions. It is like cleansing the Augean stables. Adoption of delay reduction techniques with leadership coming from the judges in collaboration with his staff and the members of the bar may produce amazing results. This would enable the judge to arrest the stress in that regard to some degree.

But in order to contain the tension and stress judges should not be too hasty in clearing backlog or part-heard cases because such an approach will affect quality of justice and apt at making silly mistakes.

During our tenure of office we found some judicial officers bothering about whether his or her judgment or verdict would be appealed against and if so whether it will be set aside by the Appeal Court. Such an unnecessary fear is not called for and should never trouble a judicial mind. It kills initiative and poison the judicial thinking. The judges should judge according to their conscience.

Amidst all these odds it is interesting to observe how our judges show a bold front. They manage to keep their cool intact without losing their temper. That is the judicial culture and tradition they had inherited from the judges of yore. The judicial officers even though they are shy to admit it they feel that their dedication, commitment and hard work are never been appreciated. It may be for some a feeling that he or she has been passed over for promotions, when others seemingly less worthy had been preferred will naturally lead to self pitying , pain of mind and disappointment.

To expect them to work in a tiring environment without having proper housing, sufficient officers etc. would add up to their stress hormones. In rural areas People don't build houses to rent out. About two years back I had the misfortune of seeing a sad and pathetic sight where a Magistrate was occupying the up stair section of a dilapidated house with a ladder to go up and an old bucket to carry water for his toilet and washing purposes. This was an untold sad tale or plight of a judge, the giver of Justice who strives hard to keep the streams of justice pure and clear. Recently a High Court Judge [Civil High Court] shyly told me how he and his brother Judge went from house to house hunting for an apartment for them to reside. No doubt such humiliating experience would be a source of stress. The high ups and authorities are aware of this plight but they have more important things to focus upon. They know that the Judges would hear cases even under the shade of a tree and impart justice.

I had occasion to hear some judicial officers telling, 'I had been transferred to three stations in one year. My furniture has gone from bad to worse. Very often I had to bear up the cost of transporting my furniture ', or to the effect ' I have been serving in stations far removed from my family for a number of years etc'. This sort of utterance portrays pain of mind he or she was undergoing.

Few decades back there was no reason for the Judges to be concerned themselves about their security. The society itself used to protect their Judges, the most revered and cared for officer in town. Then surroundings where his residence was a 'silence zone'. That was a self imposed restraint by the society itself.

Now times have changed. It was only the other day that Hon. Mr. Sarath Ambepitiya the High Court Judge of Colombo was gunned down at close range in broad daylight by a drug baron. It was during the same time that a District Judge in an outstation court was assaulted while in Chambers in front of the C.O. There had been few other instances where the accused had tried to embarrass the Judicial Officers. Now the judges have been provided with personal security as well in addition to the security given to court houses. Nevertheless they are much perturbed by the crime wave sweeping across the country.

Another disturbing factor which the judicial officers do not want to speak is about the politicos and their goons trying to put their weight about may be thinking that they can influence a judge's decision. I refer to few instances in the past of how these disgruntled elements had tried their luck as related to Justice Soza and me at a Board Meeting by the then Chief Justice.

In one incident when a particular Magistrate of a suburban court was in his chambers getting ready to go on the Bench in the morning his telephone started ringing. The caller said ' I am so and so…' The Magistrate without answering kept the phone back. Telephone kept on ringing and the caller repeated the same trying to introduce himself. Judge had said sternly not to disturb him and kept the telephone back.

The disappointed caller rang the Chief Justice and complained to him what happened to him. Then the C.J.had told him 'You are disturbing my officers, you can't interfere in their work'. Matter ended there.

The other case was regarding the verdict and sentence given by a Magistrate to an important politico who was the accused in the case. The Higher ups who were visibly perturbed by the verdict and sentence complained to the C.J. His Lordship's prompt reply was ' if he was aggrieved by the verdict and sentence well, he can appeal against it'. I cited these two instances to show that when they have such assurance for their protection the Judges can administer justice with a view to keep streams of justice pure and clear.

In conclusion I quote Hon. Justice Michael Kerby which is to the following effect –

> *"With stress in equal measure, in the life of a judicial officer there is excitement, intellectual stimulation, personal satisfaction, still much public esteem, a general sense of social utility and worthwhileness, and never ending privilege it is to be a judicial officer in a country ruled by the law… It is a fulfilling life, stress and all."*

Commercilisation of Personality & Celebrity Rights:

new approaches to intellectual property rights[1]

Ruwan Fernando
LL.M (Cardiff), UK
Diploma in Intellectual Property Law (SL)
High Court Judge & Director, Sri Lanka Judges' Institute

Introduction

> *"The case was argued before me on behalf of the applicants on the assumption that it is possible to bring a passing off suit in respect of an image, including a name, unconnected with any business at all. That assumption appears to me correct. I think the law now is, at least in Australia, that the inventor of a sufficiently famous fictional character having certain visual or other traits may prevent others using his character to sell their goods and may assign the right so to use the character. Furthermore, the inventor may do these things even where he has never carried on any business at all, other than the writing or making of the work in which the character appears"*[2]

The words of Pincus J. in the Australian case of Hogan v. Koala Dundee[3] provide an interesting example of how far the Australian courts attempted to protect the characters of famous persons whose fame is being used by unauthorized persons for selling their goods or services for commercial gain. An analysis of case law in a number of jurisdictions shows that celebrities with a strong celebrity markets do not hesitate to protect their valuable assets viz. the commercial personality against unauthorized appropriation of their fame for commercial gains. Although Sri Lanka has a very rich intellectual property regime, the case law in this area of law has not developed in Sri Lanka in comparison with both common law and civil law jurisdictions.

1. This article focuses on celebrity rights under IP environment in the United Kingdom and Australia,. The principles that are Involved would be equally applicable to Sri Lanka with necessary changes. The author wishes to thank Mr. Howard Johnson, LL.M Course Director of the Cardiff Law School 2004-2005 for his interesting lectures on Intellectual Property Law which encouraged the author to write this article The author can be contacted at ruwan1fernando@yahoo.com

2. Hogan v Koala Dundee (1989) 12 IPR 508 at p. 517

3. Ibid

The commercial appropriation of personality is a common phenomenon in the modern society for the commercialisation of goods or services by the industry even though the character of a personality has little or no connection with such goods or services. By and large, both celebrities (famous persons) and ordinary individuals with no obvious public profile are being used by the industry to sell a vast range of goods or services or marketing a career in the commercial world. The appropriation of personality has been recognised as a bundle of rights that protect different aspects of one's personality such as the use of his name, image, reputation, voice, signature, likeness or other forms of his identity against unauthorised public exposure in a civilised society. The development of personality right in both common law and civil law jurisdictions however, reflects different approaches being employed to provide redress to the misappropriation of personality rights- either pecuniary or non-pecuniary interests in personality.[4] Significant differences exist in the approach employed in protecting rights in personality in civil law and common law jurisdictions which are mainly based on promotion of interest-based classification that includes economic or pecuniary interests in personality and non-pecuniary or dignitary interests.[5] includes includes the existing trading or licensing interests or other intangible recognition values.[6] On the other hand non-pecuniary or dignitary interests include interests in reputation, interests in personal privacy and interests in freedom from mental distress.[7]

Yet, there is no uniformity in approach with regard to the legal basis on which the commercial appropriation of personality flourishes and its parameter. Different approaches are applied in different jurisdictions to provide substantive legal protection for the appropriation of an individual's identity in the commercial context. The problem however, is to what extent the concept of personality has been recognised in the modern legal jurisprudence and the scope of remedies available for unauthorised commercial use of one's personality without his or her consent. It would be therefore important to study the nature of their rights and the extent to which such personalities will have a remedy to prevent such unauthorised exploitation in a commercial context.

The concept of personality

The concept of individual's persona or personality is a term by which an individual is recognised by another individual in the society differently as it includes attractiveness, character, charisma, charm, disposition, identity, individuality, magnetism, nature or identity of an individual.[8] Personality of a celebrity includes their physical appearance, image or likeness, name, voice, signature, style, photograph, gestures, recognizable attire, look and facial features which are inherent in any individual. They can exploit the value

4. Ibid p. 8
5. Ibid ,p 8
6. Ibid
7. ibid
8. Compact Oxford Dictionary, Thesaurus 4th Indian Ed. 2006, 659

of their identity and character which attract the right of personality and the right is most often asserted by or on behalf of professional athletes, international figures such as footballer David Beckham, Paris Hilton, Victoria Beckham, Justin Bieber, Madonna, Jennifer Lopez, Sharuk Khan, Aishwariya Rai and Sri Lankans Kumar Sangakkara , Sanath Jayasuriya, Bhatiya Jayakodi and Santhush Weeraman would thus fall into this category of celebrities.

Personality rights as property rights

The personality right is generally regarded as a property rights in common law jurisdictions whereas in civil law jurisdictions it has a broad meaning. The right of personality has two broad components namely, the right of privacy and the right to commercialisation of character.

1. The right to privacy -privacy rights (unauthorised invasion of individual's private space, a state in which an individual is not watched or disturbed by others). The right to privacy has 2 sub components- commercial and non-commercial invasion of the privacy of a person.

(i) Non- commercial appropriation of personality of an individual under privacy rights- The right to privacy is created when the invasion of his privacy is caused by an invasion of private space of an individual (ex- right of an individual not to be watched or disturbed by others in his private space).

(ii) Commercial appropriation of personality under privacy rights – When the invasion of privacy of an individual who has appropriated his personality is caused by publishing information of a confidential nature without the necessary consent of the owner, the owner's right to commercially appropriate his privacy is breached (ex. common law remedy of breach of confidence).

2. The right to commercialising character –The commercial appropriation of character (character merchandising).

Character merchandising is the term commonly used to describe the licensing of real or fictional characters on or in relation to goods or services with which the character usually has little or no connection whatsoever.[9] This means the adaptation or secondary exploitation, by the creator of a fictional character or by a real person or by one of several authorised third parties of the essential personality features of a character of an individual (ex. name, image or appearance).[10] Those essential features of an individual are merchandised in relation to various goods and/or services with a view to creating

9. John Hull, "The Merchandising of Real and Fictional Characters: An Analysis of Some Recent Developments" (1991) 4 ENT. LR 124

10. Heijo E Ruijenaars, The WIPO Report on Character Merchandising" (1994) 25 I.I.C. 532 (WIPO/INF/108) December, 1994.

in prospective customers, a desire to acquire those goods and or the use of the services because of the affinity with the character.[11]

Any person who has created an image or built a character in the society (name, image, appearance, voice of a character) and having become a public profile or a well-known or famous person has a right to appropriate his image or personal character in a number of ways for commercial gain. The development of law on commercial appropriation of personality of a celebrity was the result of the concept of character merchandising.

Types of character merchandising- The concept of Character merchandising has a number of categories such as:

(a) **Image Merchandising-** Image right- merchandising of fictional characters by real persons (human characters) (fictional characters played by real persons) (fictional humans or real persons exploiting fictional characters.[12]

(b) **Character merchandising of non-human characters-** licencing of fictional non-human characters (ex. cartoons- micky mouse, ninja turtles, and dingy cartoons, Donald Duck or Bugs and comic book characters).[13]

(c) **Personality merchandising-** merchandising activities of real persons- Real persons merchandising their activities by exploiting their celebrity for commercial gains. Real, either known celebrities or instant celebrity such as sports, film, pop and TV stars or real persons without public profile but by their activities can grant others the right to use their name, picture, character or face, actions or any other distinguishing feature in relation to commercialisation of goods or services of those third parties.[14]

Those features of character whether fictional, real or real persons exploiting fictional characters are appropriated in relation to various goods and/or services with a view to creating in prospective consumer a desire to acquire those goods and/or to use those services because of the consumers' affinity to that character.[15] Hence, each of these categories has elements in common, the most basic of which is the purpose behind

11. Ibid
12. This involves the use of fictional characters by real persons such as actors, (ex- Ex- Crocodile Dundee played by Paul Hogan or Lone Ranger played by Clayton Moore or Lone Ranger played by Clayton Moore or Tarzan played by Jonny weissmuller or James Bond played by Roger Moore have particular types of images which can be exploited for commercialisation of their personality.
13. This is done through licensing. Copyright features of these rights include-library works (Pinocchio by Collodi or Tarzan by E.R. Burroughs), strip cartoons (Tintin by Herge or Asterix by Uderzo and Goscinny), Batman, artistic works (paintings (Mona Lisa by Leonardo da Vinci), drawings (panda), cinematographic works (Crocodile Dundee, King Kong,, Rambo)
14. (Ex- a celebrity sport star appearing on a TV advertisement for the marketing or promoting a particular marketable goods or services through licensing. (ex- exploitation of individuals such as celebrities (e.g. sportsmen or sportswomen, film, TV and pop starts).
15. See note 9 above

exploiting a particular character.[16] The character is exploited in the marketing field when there is an affinity in the mind of a consumer between the character and the products in the market and to encourage consumer purchases based on that affinity.[17]

Scope of the Article

This article is only concerned about the commercial appropriation of personality under the right of character (celebrity rights) which involves economic interests of the personality as a form of property. It does not examine the commercial or non-commercial appropriation of personality under privacy rights which may lead to causes of action both in common law and civil law jurisdictions (ex- defamation, breach of confidence etc.).

Personality merchandising- celebrities or public figures

It would be important first to understand what the term celebrity means for the purpose of commercialising personality rights. The term celebrity is generally referred to well-known personality or famous person who has a prominent profile and commands some degree of public fascination and influence in day-today media.[18] They can include actors, authors, musicians, models, singers, public figure, and sports stars film stars, superstars, television personalities, politicians or anyone who can capture the attention of the public.

The Intellectual Property Act of Sri Lanka does not define the term 'celebrity.' It however, defines the term 'performers' in section 5 to include singers, musicians and other persons who sing, deliver, declaim, play in, or otherwise perform, literary or artistic works or expressions of folklore.[19] It is important however, to note that some of the above mentioned categories can be regarded as celebrities by their fame, even though; every performer may not be a celebrity. A person to be qualified to be a celebrity must be a famous person who should possess the quality of public perception to capture public attention or public image or public affinity. A performer can therefore qualify as a celebrity if he or she qualifies such criteria in a particular society.

The underlying commercial interests in personality may be damaged by unauthorised commercial exploitation by third parties and hence, several jurisdictions have now employed intellectual property rights such as copyright, trademarks and business good will and unfair competition to provide a redress to unauthorised commercial use of the personality. Nevertheless, there are different approaches adopted by different jurisdictions as to the recognition of the right of celebrities within the realm of intellectual property rights and other rights to secure them against any harm to their commercial identity.

16. Charlotte Waelde, "Commercializing the Personality of the Late Dianna, Princess of Wales-Censorship by the Back Door" (Norma Dawson and Alison Firth (editors) Trade Marks Retrospective, Sweet & Maxwell (2000) p.214

211, 214

17. Ibid

18. Compact Oxford Dictionary, Thesaurus 4th Indian Ed. 2006, 131

19. Section 5, Intellectual Property Act No. 36 of 2003

It is argued here that the Sri Lankan legal system provides a variety of remedies to protect celebrities against unauthorised misappropriation of their commercial personality. This article however, only examines the intellectual property aspect of celebrity rights.

Trade mark law-Trade mark law is the paradigm example of allocation by law of control over the exploitation of attributes of personality as registration confers monopoly rights.[20] But only a "sign capable of being represented graphically" can qualify and therefore names, other words, signatures, photographs and other images can in principle be registered but not, for example, a distinctive voice.[21] There appears to be however, serious limitations for celebrities wanting to exploit the statutory monopoly by the use of trade mark registration.

Features of a Trade mark

A trade mark may consist in particular of arbitrary or fanciful designations, **names**, pseudonyms, geographical names, slogans, devices, reliefs, letters, numbers, labels, envelopes, prints, stamps, seals, vignettes, selvedges, borders and edgings, combinations or arrangements of colours and shapes of goods or containers.[22] The important factor however, is that a trade mark is any visible sign serving to distinguish the goods of one enterprise from those of another enterprise.[23] Under the Sri Lankan IP Act, a trade mark is any visible sign serving to distinguish the goods of one enterprise from those of another enterprise.[24] A trade mark is therefore used by manufacturers and traders to identify their goods and distinguish them from goods made or sold by others. The IP Act too expressly mentions the possibility of registering names as trademarks if they are capable of distinguishing goods of one enterprise from those of another enterprise.[25]

Names of a celebrity as a trade mark

The question that arises for examination is however, whether the name of a celebrity can be registered as a trade mark under the trade mark law. There had been instances where celebrities applied for the registration of their names for goods such as posters, printed matter, mugs and T-shirts and caps. Will a customer by merely seeing for example, 'Sanath Jayasuriya Mugs, T-shirts or Caps for sale take such Mugs as something made or approved by Sanath Jayasuriya as what is printed on T-shirts, Mugs or Caps refer to a name of a person which is not distinguished but merely descriptive.? It is unlikely under normal circumstances that the people would think that such Caps, T-shirts or Mugs were made or approved by Jayasuriya but usually such goods may be purchased by the public because such people would like the person (the affinity towards the celebrity).

20. Mark Warby QC MERCHANDISING FAME or *What can a celeb do these days to cash in on fame (legally)? http://www.5rb.com/docs/Merchandising%20Fame.pdf, p. 2*
21. Ibid
22. se. 102 (3) of IP Act of Sri Lanka
23. Se101 IP Act
24. se. 101
25. Se 102 (3) read with section 102 (3) (d)

Although a trade mark can include a personal name of a celebrity, the difficulty arises for celebrities as some of their names are well known and commonly used in the society and thus may devoid of any distinctive character. On the other hand a name can be inherently distinctive if it is unusual in character and thus would acquire distinctive character through use. This means that the mark must be one that can inform consumers where the goods they are buying originate (indicating trade origin).[26] The issue is whether celebrity names function in this way in informing consumers where the goods they are buying originate? It would be important at this stage to examine the development of case law in this area of trademark registration.

At this stage it would be important to raise the argument put forward by Peter Prescott Q.C in Elvis Presley Trade mark (Court of Appeal)[27] that the more famous the celebrity, the more difficult it becomes to register his name as a trade mark. The case highlights one important principle that the more you are famous, the less you are likely to register a trade mark with his or her name. The TRAZAN Trade Mark[28] was one such example. The applicant in that case filed two applications to register the word 'TARZAN' as a trade mark in respect of (i) films prepared for exhibition and magnetic tape recordings; (ii) games, toys, playthings, gymnastic and sporting articles. One issue was whether the word Tarzan was an invented word **at the date the application was filed** under section 9 (1) (c) of the Trade Mark Act 1938 (now repealed). The second issue was whether the word 'Tarzan' had a direct reference to the character or quality of the goods in respect of which it was sought to register it under section 9 (1) (d) of the said Act.

The Court of Appeal in rejecting the application held that (i) although the word 'Tarzan' was an invented word, 'Tarzan was very well known **at the date the applications were filed** (as it had passed into everyday language when the applications were filed to register it) and therefore ceased to be an invented word (9 (1) (c); (ii) the word 'Tarzan' has a direct reference to the character of goods as any other film could not be better described than as a Tarzan film (9 (1) (d).

In Elvis Presley Trade Marks application[29] the Applicant (Elvis Presley Enterprises Inc. (EPEI) (EPEI is the successor to Elvis Presley's commercial operations) for the registration of three trade marks in the UK under the Trade Marks Act 1938. They were ELVIS, ELVIS PRESLEY, and the signature Elvis A Presley in respect of perfumes and other cosmetics, all of which were opposed by the registered proprietor (Sid Shaw) who registered the mark 'Elvisly Yours' in respect of toiletries.The Registrar dismissed Shaw's opposition and thereafter Shaw appealed to the High Court. Laddie J. held that none of the marks merited registration because all were lacking in sufficient inherent distinctiveness to succeed without evidence of factual distinctiveness. Accordingly, the High Court allowed

26. ibid
27. Elvis Presley Enterprises Inc v Sid Shaw Elvisly Yours 1999) RPC 567 (Also decided under the repealed Trade Mark Act 1938)
28. TARZAN Trade Mark (1970) RPC 450 decided under the old Trade Mark Act 1938.
29. Elvis Presley Enterprises Inc v Sid Shaw Elvisly Yours 1999) RPC 567 (Also decided under the repealed Trade Mark Act 1938)

Shaw's appeal and directed the Registrar to refuse EPEI's applications. Although the case was apparently on the question of trade mark, the Court dealt with the status of personality rights as it involved a trade marks bearing the name of a famous person.

The High Court held that there is very little inherent distinctiveness in the mark "ELVIS" and as such ELVIS" is incapable of distinguishing the products in question and in that sense it applies equally and strongly to "ELVIS PRESLEY". In short the decision of Laddie J was that EPEI's trade marks were not registrable as trademarks bearing the name of a famous person cannot be registered for **memorabilia as the marks were not distinctive of the products.**

EPEI appealed. The Court of Appeal accepted the view taken by Laddie J. that members of public purchase Elvis Presley merchandise <u>not because it comes from a particular source, but because it carries the name or image of Elvis Presley.</u> Walker L.J. took the view that for goods of the sort advertised by Elvisly Yours (or by Enterprises in the United States) the commemoration of the late Elvis Presley is the product and the article on which his name or image appears (whether a poster, a pennant, a mug or a piece of soap) is little more than a vehicle. The Court of Appeal held that the High Court was correct in treating all these goods as memorabilia or mementoes and not treating some as being in different classes of consumable goods and therefore the marks were of very low inherent distinctiveness. The trade mark "Elvis Presley' was rejected for the same reasons as Elvis Presley's name had very little inherent distinctiveness. It appears therefore that the products sold under the name of Elvis as memorabilia concerning Elvis Presley <u>would be descriptive of the goods sold lacking distinctiveness.</u>

Although the signature was not classified as descriptive and protected, the Lord Morritt took the view that the signature of Elvis A. Presley fully satisfies the distinctiveness and other requirements of the Act, He said however, that since there was evidence before the Registrar that the signature comprising the mark was that of Elvis Presley and therefore the <u>authenticity of the signature has not been established</u> on the balance of probability. For those reasons the Court of Appeal rejected each of the 3 marks on the ground of lack of distinctiveness.

It is interesting to see how the approach taken in these two cases was to be applied to cases decided under the Trade Mark Act 1994 of U.K. Some Judges have taken the view however, that if the approach taken in these two cases were to be applied to applications under the 1994 Act, the result would be that many applications for registration of trade marks consisting of the names of famous people and fictional characters would be refused.[30] It is apt to refer to section 3 (1) of the Trade Mark Act of U.K 1994 under which the following shall not be registered:

(b) trade marks which are devoid of any distinctive character;

30. In the matter of Application No. 2313504 in the name of Linkin Park LLC 07.02.2005

(c) trade marks which consist exclusively of signs or indications which may serve, in trade to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services or other characteristics of goods or services.

In the case of DIANA, PRINCESS OF WALES TRADE MARK,[31] which was decided under the Trade Mark Act 1994, the Executors of the Will of Diana, Princess of Wales applied to register the words DIANA, PRINCESS OF WALES as a trade mark to control trade in memorabilia and commemorative items bearing Diana's name. They contended that, following her death, use of the name in connection with any product would be taken by the public to be authorized by the memorial fund or the estate.

In refusing the application, the Court held that (1) as a living person could not own the rights to their own name, Diana, Princess of Wales, had no exclusive right to use her name for commercial purposes when she was alive; (decision in ELVIS PRESLEY Trade Marks[32] followed); (2) a name unique to a particular person did not of itself have distinctive character as a trade mark as the essential function of a trade mark was to guarantee that the items bearing it had originated under the control of a single undertaking responsible for their quality; (3) unless, therefore, such control could be shown, the use of a famous name to endorse a product was not a trade mark use; (4) in the instant case, the average consumer would not have expected all commemorative items bearing Diana's name to be marketed under the control of a single undertaking; (5) the fact that the estate had resorted to additional means of denoting official authorization, namely the use of logo and hallmark suggested that it was not confident that the use of the name alone would guarantee a trade connection between the goods and the estate. Accordingly, it was decided that at the date of the application, the words DIANA PRINCESS OF WALES did not have the distinctive character required for a trade mark and were excluded from registration by the Trade Marks Act 1994 s.3 (1) (b).

Subsequent decisions under the 1994 Act have taken a more balanced approach as it is seen in the judgment of Laddie J. in Arsenal Football Club Plc. vs. Reed.[33] Justice Laddie found that (i) Mr Reed's use of the Arsenal marks was not trade mark use as the Arsenal marks were not used by Mr Reed to indicate the identity of the supplier of the goods; (ii) his customers did not think that Mr Reed's products came from or were endorsed by

31. DIANA, PRINCESS OF WALES TRADE MARK [2001] E.T.M.R. 25, Judge not specified, TMR

32. ELVIS PRESLEY Trade Marks [1999] R.P.C 567, [1999] C.L.Y. 3574 followed;

33. Arsenal Football Club plc. v Reed (2001) RPC 46 The claimant (Arsenal Football Club Plc.) is a well-known Football Club which generated revenues in the business inter alia by selling merchandising products. The Club was the proprietor of two word marks, ARSENAL and ARSENAL GUNNERS and two device marks, the Arsenal crest and the Arsenal cannon, registered in respect of outer clothing, articles of sports clothing and footwear merchandise. Matthew Reed had been selling football merchandise articles with the Arsenal FC marks from stalls near the Highbury Stadium for around 30 years. The few official products, he had offered, were specially labeled. At the stalls were notices and disclaimers, stating that the products were not official. [Arsenal sued Mr Reed for trade mark infringement under section 10(1) of the Trade Marks Act 1994 and passing off. The Trade Mark infringement was based on the use by Mr Reed of signs identical to its registered trade marks for goods identical to those in respect of which it registered the marks.

the club; (iii). Mr Reed's customers perceived the Arsenal marks 'as a badge of support, loyalty or affiliation' in relation to the club; (iv). By "use as a trade mark", the Court meant use of the mark to indicate the trade origin of the goods. Laddie J. concluded that the use of Arsenal's marks made by Mr Reed fell outside the parameters of "trade mark use"; rather than indicating that the merchandise originated with Arsenal, the marks were perceived "as a badge of support, loyalty or affiliation" to the football team.

The Court of Appeal allowed the appeal, and held that non trade mark use could amount to infringement where it undermined the essential function of a registered trade mark which is to identify the origin of the goods. In his leading judgment Aldous, LJ stated: 'As the ECJ pointed out, the actions of Mr Reed meant that goods not coming from Arsenal but bearing the trade marks, were in circulation. That affected the ability of the trade marks to guarantee the origin of the goods. The Court also found that there was confusion since there were instances of confusion where consumers seeing identical signs to Arsenal's registered marks, complained to Arsenal. The Court said that if there was no such likelihood of confusion there would be no need for Mr Reed to inform his customers expressly that the goods were not official. It was clear that the trademarks did designate origin. The correct approach appears to be to consider whether the famous name put forward for registration is so descriptive in relation to the goods or services for which registration is sought. The question therefore is whether name of a famous person could be perceived by customers as anything more than a description of the subject matter of the goods or services.[34]

Unregistrable Trade marks under section 103 of IP Act of Sri Lanka

In the Sri Lankan IP Act, sections 103 (1) (b) and (d) and (f) are analogous to section 3 (1) (b) and (c) of the U.K. Trade Mark Act 1994 and a mark cannot be registered under the provisions those sub sections, which provide that marks:

(b) which consists exclusively of a sign or indication which may serve, in the course of trade, to designate the kind, quality, quantity, intended purpose, value, place of origin or time of production or of supply of the goods or services concerned.

(d) which, is incapable of distinguishing the goods or services of one enterprise from those of another enterprise.

(f) which is likely to mislead trade circles or the public as to the nature, the source, geographical indication the manufacturing process, the characteristics or the suitability for their purposes of the goods or services concerned.

As discussed in the judgments cited under the U.K. Trade Mark Act 1938 and 1994, it is likely in Sri Lanka that the names of a well-known (famous person like a celebrity or a

34. See decision of L.C.A.P. page, 8

celebrity group) may be considered as mere descriptive of the subject matter of posters, mugs, caps, T-shirts, at the date of registration. Therefore names of famous persons or groups are unlikely to be accepted as trade marks for those goods under section 103 (1) (b) (d) and (f) of the Act. On the other hand if it can be shown that the well –known (celebrity) or a group at the application date is a trade source of such goods and the like, a well-known name or a group it could gain registration on that basis.

It appears that the trade mark law cannot be used to protect the personal names of a famous persons for memorabilia sold with their pictures if it would be descriptive rather than distinctive for such memorabilia sold with the picture or name of such celebrities. It appears therefore that there are certain inherent obstacles in using the registered trademark law to provide redress to celebrities whose names are sought to be registered in relation to goods or services. If it could be established however, that any trade mark which is demonstrated to be distinctive, it may be regarded as distinctive in law and therefore registrable in relation to goods or services. For example, if a celebrity may want to register distinctive character of his personality in the form of a trademark (ex- name of a distinctive group like ABBA) as a famous trade mark in relation to some goods and also to prevent others from unauthorized use of his fame, it is arguable that he should be able to use trademark law to protect its distinctive trademark.

Copyright

The IP Act provides protection to literary, artistic or scientific works which are original intellectual creations in the literary, artistic and scientific domains including and in particular works that fall within the category of works specified in subsection 1 of section 6.[35] Such works shall be protected by the sole fact of their creation and irrespective of their mode or form of expressions as well as of their content, quality and purpose.[36] .Section 9 of the Act grants exclusive rights to the owner of copyright to authorize others to do the acts specified in that section.[37]

Real characters and copyright- (merchandising of fictional characters by real persons)

This involves the use of fictional characters played by real actors in the promotional or advertising of goods or services persons. It is sometimes difficult for the public to differentiate the real person who is the actor from the role he plays (character portrayed).[38] Sometimes, there is a complete association and the real person is referred to and known by the name of the character.[39]

35. Se 6 (1)
36. Se. 6 (2)
37. Se. 6
38. Ibid, note 29, p.9
39. Ibid

The question may arise whether copyright can subsist only in a name of a celebrity. The authorities are to the effect that there is no copyright in a name of a character as such since a name or title is usually insufficiently substantial to attract the description of 'literary work'. In the case of Exxon Corp. v. Exxon Insurance Consultants Ltd[40] it was decided that although names and titles such as books, plays or films are in writing, the is no copyright in a name as such names or titles (ex. books, plays or films) do not afford information sufficiently to attract the description 'literary work'. On the other hand, names and titles are not original as names or titles are not the result of a substantial amount of labour, skill and judgment or are not substantial enough to be protected by copyright law.[41] There are other reasons why names and titles should be excluded from protection as literary works by copyright law such as the inconvenience that would arise if someone was able to control the way certain words and phrases were used only with his permission.[42]

On the other hand protection of names and titles under the copyright law is unnecessary as they are adequately protected by passing off, trade mark law and artistic copyright.[43] Nevertheless, it is settled that famous or well recognized characters (celebrities) have no copyright in their faces (or in a face specially made up) as it was decided that there is no copyright in Adam Ant's facial make up.[44] On the other hand a question may arise whether a celebrity can prevent his or her photograph being taken by another. Since copyright subsists in photograph,[45] the photographer has the copyright of the photograph taken by him, it is unlikely therefore that a mere celebrity in that form will be able to object to his photograph being just taken by a person in public. First, it may be difficult for a celebrity to claim ownership to their photographs as the ownership is with the photographer unless the photograph was commissioned by the celebrity for private purposes. Therefore when using a photograph of a celebrity for any reason, there seems to be a risk of infringement of copyright of the photographer or the publisher of the original image. This will not prevent a celebrity to resort to other remedies available under the statutory or common law when his/her other rights are being violated by third parties (ex-performers' rights or defamation).

However, where a third party using a performer's name and photograph in such a way as to create the false impression that a little known performer at the time a picture was taken was the principal performer on the album when in fact he was merely an accompanist, the performer would be able to prevent the third party from using his name and photograph for creating such false impression.[46] On the other hand the celebrity whose commercial

40. Exxon Corp. v. Exxon Insurance Consultants Ltd (1981) 2 All ER 495
41. Lionel Bently and Brad Sherman, Intellectual Property Law 2nd ed. Oxford, 61
42. Ibid p. 62
43. Ibid
44. Merchandising Corp of America v Harpbond Ltd (1983) FSR 32
45. Section 6 (f) of IP Act of Sri Lanka
46. Yameta Co. Ltd v Capitol Records, Inc. 279 F. Supp. 582

personality has been misappropriated by a third party by crashing into his fame for commercial gain, the celebrity concerned will have other IP (performers' rights) and common law remedies as would be seen in the following parts of this article.

Fictitious Characters and artistic copyright

The fictional characters are made by the creator of the character either for literary, artistic, cinematographic works or promotional, popularising, advertising or any other distinguishing functions where the character can be recognised as a commercial value attached to it. In the commercial world, those characters are used to marketing products or services, popularising international or national or local functions or events or cinematographic activities.[47]

In Mirage Studios and Others v Counter- Feat Clothing Company Ltd,[48] the claimant in this case created fictitious humanoid cartoon characters called 'Teenage Mutant Turtles' in the form of certain strips. Although he did not manufacture or market any goods, the major part of his business involved in creating and marketing cartoons, videos and films of Turtle and part of the business included the turning to profit of those characters by licensing the reproduction of them on goods sold by third parties. A major part of his business income arose from royalties received from such licensing activities. The defendant without permission made drawings of Turtle characters (not a counterfeit) that were in similar in appearance to the claimant's characters and began to licence the drawings. Those pseudo-Turtles were used to decorate clothing. The plaintiff sued the defendant for copyright infringement and passing off.

The evidence showed however, that the defendants had not prepared the drawing of Turtles without reproducing the same but having copied the idea or concept of Turtles and to some extent the name of 'Ninja Turtles.' It was so strongly argued on that basis that there was no copyright in an idea or a name and hence, the claim based on copyright should fail. Since, the case was concerned about the question of injunction; the Judge did not decide that issue but only said that the plaintiffs had an arguable case of copyright infringement. If it could be established at the trail however, that a defendant had only taken the concept or idea of Turtle and made a drawing of humanoid-looking Turtles although that resembled to the genuine Turtles, the copyright infringement might fail.

The tort of Passing off

The law of passing off, which is a form of tort known to the English common law was described by Lord Halsbury in Reddaway v Banham[49] in the following words: "nobody

47. The fictional character which has become a high degree of reputation among the public can be made by (i) literary works (ex- Pinocchio by Collodi or Tarzan by E.R. Burroughs or books featuring James Bond by Ian Fleming); (ii) strip cartoons (ex- Micky Mouse by); (iii)artistic works such as paintings (ex- Mona Lisa by Leonardo da Vinci); (iv) cinematographic works- movies such as Crocodile Dundee, and Rambo (WIPO, WO/INF/108 of December 1994 ,p 4-5)

48. Mirage Studio and Others v Counter Feat Clothing Company Ltd (1991) FSR 145

49. Frank Reddavay & Co Ltd v George Banham & Co Ltd (1896) AC 199 at 224

has any right to represent his goods as the goods of somebody else" The law of passing off was at one time restricted to the representation of one person's goods as those of another, but later was extended to business and services arising out of many forms of unfair competition where the activities of one trader causes damage or injury to the businesses or goodwill associated activities of another trader.

In the modern authority on passing off, Ervin v Townsend (the 'Advocaat' case),[50] Lord Diplock described passing off action as a misrepresentation made by a trader in the course of trade to prospective customers of his or ultimate customers of goods or services supplied by him which is calculated to injure the business or goodwill of another trader and which causes actual damage to a business or goodwill of the trader by whom the action is brought or will probably do so. These five elements of passing off were reduced in Reckitt Coleman Products Ltd v Borden Inc as (1) Reputation or goodwill attached to the goods or services (2) Deception (Misrepresentation of that goodwill) (3) actual damage or reasonable likelihood of damage.

The concept of passing off is not limited to a classical case where one trader represents his goods as being that of another, it had been in recent times extended to goods or services arising out of many forms of unfair competition where the activities of one trader causes injury or damage to a business or goodwill of another trader.

The case law developed under the former Trademarks Ordinance clearly demonstrates that the tort of passing off is recognised in Sri Lanka.[51] It appears therefore that the tort of passing off that was incorporated into the provisions of the repealed section 142 of the Code of Intellectual Property Act of 1979 and was retained subsequently in the present section 160 (2) and section 160 (3) of the Intellectual Property Act of 2003 as an act of unfair competition. The action of passing off is a remedy available in common law and it continues to be so despite the statutory provisions relating to unfair competition.[52] This position is supported by the decisions of Sri Lankan Courts.[53]

The early cases in the United Kingdom suggest that the tort of passing off had been limited to cases in which the defendant sold goods in substitution of those of the claimant. The scope of the law of passing off had evolved over the years in response both to changes in the nature of trade and to refinement of legal analysis.[54] The tort of passing off is very much relevant in cases where commercial exploitation of celebrity rights such as their names, voice, signature, performances, likeness and other characteristics are commonly misappropriated by third parties for commercial gain without the consent of celebrities (ex. celebrities' good will or fame are falsely used without their consent to indicate that the commercial products or services were endorsed by them. The tort of passing off has

50. Erven Warnink B.V. v J. Townend & Sons (1979) AC 731 at 742
51. Kapadiya vs. Mohamed 20 NLR 314 at 317 Shaw
52. Dr. D.M.Karunatarne, A Guide to Law of Trade Marks and Service Marks in Sri Lanka Vishva Lekha Publications 1997 at p. 145. and kapadiya vs. Mohamed
53. Kapadiya vs. Mohamad 20 NLR 314
54. Laddie J. in Irvine v. Talksports Ltd (2002) EMLR 32

been expanded in recent years to protect image of personalities including celebrities against the unauthorised exploitation by others for commercial purposes resulting in confusion among customers.

The tort has thus evolved in cases involving false endorsements of goods and damage to reputation of a person and such actions have been held to constitute a cause of action in passing off. This enables the commercial control of the use of image by celebrities and other individuals not to have their names, likeness, signatures, voices, pictures used for commercial purposes without their consent.[55] The English law has developed the tort of passing off as a means of protecting individuals and celebrities whose images have been used to sell a vast range of goods and services without their consent. An analysis of English law decisions shows however, that the English law was reluctant to recognise the personality rights or publicity rights directly as a free standing action. The judicial developments after 2000 contributed immensely to the development of personality rights in the United Kingdom and today the tort of passing off provides individuals and celebrities whose image has been used for commercial promotions by third parties without their consent.

Personality Merchandising (Merchandising of personality by real persons in the film or music industries or sports personalities)

This involves the use of name, image, voice, signature, pictures, photographs and other personality features of real persons such as film, music, television, and radio or sports personalities. This type of merchandising of personality is used in the promotional, marketing or advertising of goods and services of commercial entities by the real persons who are either famous as music, TV or sports personalities or well-known to the public with a public affinity. They are used by the merchandisers as they believe that the main reason for a person to buy a product involving a celebrity is not because of the product itself which is not important to the buyer as it has a quality or is low-priced, but because the name or image of a celebrity appealing to person is reproduced on that product[56] (ex- mugs, T-shirts, budges, caps on which the name, signature or image of the celebrity is reproduced).

The personality of a celebrity can be merchandised in a number of ways such as:

(a) Character merchandising by endorsement or false endorsement (somebody recommending a certain product or service to the public)

Early decisions in the English Court on the question of endorsement have recognised the rule that false endorsement does not give rise to actionable claims unless the plaintiff and the defendant both were engaged in the same field of activity. On this basis English Courts were reluctant to accept that consumers will necessarily be misled into believing

55. Stephen R. Barnett, "The American Right of Publicity and Visual Art: Solutions for the Growing Conflict" Intellectual Property Rights, S.K. Verma & Raman Mittal (editor) Indian Law Institute (2006) p. 176)
56. ibid note 8, at 9

that the use of a name or other attribute of a character (real or fictional) indicates a relationship between the character (or its owner) and the trader concerned.[57]

Commercial view of character merchandising in Australia

On the other hand the Australian courts for many years have adapted an altogether more commercial view of character merchandising.[58] An analysis of the Australian cases shows that unlike in the earlier English cases, there is no requirement for a common field of activity to found a claim of passing off.[59] The crucial factor that had been considered was whether there is a misrepresentation- a real likelihood of a confusion or deception of the public rather than any common field of activity. In order to decide this question, the Courts have always looked for evidence to decide whether the public would regard an association between the goods that are sold and the creator of the character commercially. The first important Australian case is Henderson v. Radio Corporation Pty Ltd,[60] where the plaintiffs were professional ballroom dancers and the defendants were in the business of making and distributing records. The defendant used a photograph of the plaintiffs' dancing for the cover of a record of ballroom dance music called 'Strictly for dance' without the permission of the plaintiffs. The plaintiffs were ballroom dancers and they sued the defendant in passing off alleging that the defendants wrongfully published their photograph on the cover of a gramophone record.

However, the Court of Appeal held that the plaintiffs were entitled to damages notwithstanding the fact that professional dancing and record production were two different fields of business The Court was of the view that as the use of the photographs suggested that the public might have assumed that the plaintiffs recommended or approved of the defendants' goods or had some connections with the goods. The Court took the view that there was a false representation since the business of the defendants was connected with the plaintiffs' business (ballroom dancing) and therefore the plaintiffs' reputation had been wrongfully appropriated. It was held thus that this constituted a tort of passing off.

The recent case law in Australia shows that this extended view of the passing off action taken by the Henderson case benefited both real and fictional characters.[61] For example in Hogan v Koala Dundee Pty Ltd (the Crocodile Dundee case),[62] the creator and the star of the 'crocodile Dundee' film and producer of the film brought action against the owners of Koala Dundee Stores which sold clothing and other accessories. The defendant sold T-shirts and other items which featured Crocodile Dundee character.

57. John Hull, "The Merchandising of Real and Fictional Characters: An Analysis of Some Recent Developments) (1991) 4 ENT. LR 124, 127
58. John Hull note 68 at p. 129
59. Ibid
60. Henderson v. Radio Corporation Pty Ltd (1969) RPC 218
61. John Hull, note 68 p. 129
62. Hogan v Koala Dundee (1988) 12 IPR 508

The trail judge found that there was a real likelihood that a substantial number of viewers would have responded to the advertisement 'on the footing that in accordance with normal practice, Paul Hogan or the film makers would have had 'some association of a commercial nature' with its production or more generally, with the shoes and held passing off had been established. In dismissing the appeal Federal Court of Australia held that a significant section would be misled into believing that a commercial arrangement had been concluded between Paul Hogan and the defendant under which agreed to the advertising and the defendant intended to stimulate in the minds of consumers, including those who had the relevant preconceptions, an impression that there was an association between shoes and Paul Hogan in the guise of Mick Dundee.[63] It seems therefore that the Australian Courts have taken a very broad view of the reality of merchandising practiced by celebrities in the TV advertising and advertisement. Thus Passing off has been extended to prevent the use in the marketing or advertising of goods or services of fictional characters which may lead to confusion among customers.

Change in Direction in English law

In 1990 however, the attitude of the English courts that common field of activity was a requirement for passing off action was changed in a case involving a fictional character where passing was extended to prevent the use in the marketing or advertising of goods or services of fictional characters resulting in confusion among customers.[64] The High Court held that passing off should not be limited to those who market or sell the goods themselves but it should extend to non-traders as long as the public is misled as to a feature or quality of goods that the non-trader is reputed to have created. High Court held that (i) there had been a misrepresentation by the defendants because a substantial number of buying public would believe that a famous cartoon or television character was reproduced on goods, such reproduction of character was the result of a licence granted by the owner of 'Turtles' in that character; (ii) to market goods which the public mistake for genuine article necessarily involved a misrepresentation to the public that they were genuine and therefore the facts of the case fulfilled the constituents in the *Advocaat case.*[65]

The change in direction that the requirement of common field of activity was no longer a requirement for passing off action was followed in England in the leading decision in Edmund Irvine v Talksport.[66] The subject of dispute was the photograph on the front side of the brochure showing Edmund "Eddie" Irvine, the 1st claimant holding a portable radio bearing the 'Talk Radio'. This image had been created by SMP by manipulating a photograph of the 1st claimant.. The 1st claimant contended that the picture falsely gave the impression that he (Irvine) had endorsed the defendant's radio station and consequently that the distribution of the brochure constituted an actionable passing off. The defendant

63. See separate judgments of Steppard J, Beaumont J & Burchett J
64. Mirage Studios and Others v Counter- Feat Clothing Company Ltd(1991) FSR 145
65. for requirements of Advocaat case see note 69
66. Edmund Irvine v Talksport (2002) EMLR 32

contended that the law of passing off did not apply to cases of false endorsement such as this.

Laddie J. decided that the public can be misled if the likeliness of a famous person is used to advertise a product without authorisation provided that he had built up sufficient goodwill and that the advertiser gives the impression that the person used really endorses the product. Accordingly, it was decided that the parties need not to be in competition as the law will not allow others to use goodwill so as to reduce, blur or diminish its exclusivity. On the evidence the Court decided that (i) a significant proportion of those to whom the brochure was sent would have thought that the 1st claimant had endorsed or recommended Talk Radio and the photograph in question had indeed led a sufficient number of recipients to believe that Irvine had agreed to endorse this product and on this basis the judgment was entered in favour of the claimant.

The case highlights that with the expansion the passing off, it is the commercial environment in which it operates that is actionable. It is obvious therefore that the protection is not confined to celebrities but to any individual such as a 'man in the street' whose personality can be used for advertising purposes. Thus, when the image of such an individual including a celebrity is used for commercial purposes without authorisation, the remedy of the action of passing off is available to such a person where the ingredients of passing off are satisfied.

The analysis of the English cases commencing from Mirage Studio show that at last the U.K courts are coming closer to Australian approach and have at last taken a more commercial view by adopting the public misrepresentation doctrine by deviating from 'common field of trade activity' by looking at the link made by the public between the character and the its owner[67]

It appears therefore that there is no requirement for a common field of activity to found a claim of passing off but the crucial question that has to be decided is whether there is a misrepresentation- a real likelihood of a confusion or deception of the public and consequent damage to the claimant. In order to decide this question, the Court should look for evidence whether the public would regard an association between the goods that are sold and the creator of the character of a commercial nature commercially. Then the Court should look at evidence whether a significant section of the public would be misled into believing that a commercial arrangement had been concluded between the contested parties under which the claimant agreed to the disputed trading activity of the defendant. Then if it could be established that there was a misrepresentation by the misleading conduct of the defendant under which a substantial number of the public would have responded to the false commercial activity of the defendant, the passing off would be made out.

67. John Hull note 68 at p. 129

Celebrity rights and action of unfair competition in Sri Lanka

The recent statutory protection grated to celebrities or well- known fictional characters in Sri Lanka against acts or practices carried out or engaged in, in the course of industrial or commercial activities that is contrary to honest practices is a recognition of celebrity rights under the concept of unfair competition.[68] However, torts such as defamation, breach of confidence and passing off are also available for affected celebrities. The Right of a celebrity as a means of protecting his or her legitimate commercial practices against unfair commercial practice in the course of commercial activities has now become the law of this country.

Particular acts of unfair competition under the Sri Lankan law as relates to celebrities

The chapter dealing with unfair competition in the Sri Lankan Act shows that the provisions on unfair competition are wide and exhaustive unlike in the case of passing off. However, the main features of the law of unfair competition in Sri Lanka are as follows:

1. Causing confusion - An act or practice of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition where it causes, or likely to cause, confusion with respect to another's enterprise or its activities, in particular, the products or services offered by such enterprise.[69] Thus, confusion, may in particular, be caused inter alia with respect to celebrity or a well- known fictional character.[70]

2. Damaging another's goodwill- An act or contrary to honest practices in industrial or commercial activities constitutes an act of unfair competition where that damages, or is likely to damage, the goodwill or reputation of another's enterprise.[71] Thus, any act or practice contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition where such acts damages or is likely to damage, the goodwill or reputation of another's enterprise, whether or not such act or practice actually causes confusion.[72] Thus, damaging another's goodwill or reputation may, in particular, result from the dilution of the goodwill or reputation attached inter alia to celebrity or a well-known fictional character.[73]

In this context it is now appropriate to examine the acts of unfair competition caused by confusion with respect to another's enterprise or its activities or by damaging another's goodwill or reputation under section 160 (3) of the Act. This is the section which has incorporated the elements of the common law tort of passing off.

68. Unfair competition is defined in the Intellectual Property Act of 2003 as "Any act or practice carried out or engaged in, in the course of industrial or commercial activities that are contrary to honest practices shall constitute an act of unfair competition (se 160 (1).
69. Section 160 (2)
70. Section 160 (2) (b)
71. Section 160 (3).
72. Section 160 (3).
73. Section 160 (3) (b).

Acts or practices that cause confusion or damage the goodwill or reputation (Section 160 (2) and 160 (3)

Although passing off is a separate tort independent from the action of unfair competition, it is observed that many elements of passing off are incorporated in the statutory provisions relating to unfair competition in Sri Lanka. Nevertheless, Sri Lankan case law suggests except in very few instances the tort of passing off is limited to a classical case where one trader represents his goods as being that of another. On the other hand the development of the common law tort of passing off suggests that it could be extended to goods or services arising out of many forms of unfair competition where the activities of one trader causes injury or damage to a business or goodwill of another trader. It seems that the development of the statutory action of unfair competition in Sri Lanka has made the expansion of passing off difficult and the emphasis was placed more on the statutory remedy rather than the common law tort of passing off. It is argued that the statutory action of unfair competition and the common law tort of passing off provide a dual legal regime under which celebrities whose images have been used for false endorsements and merchandising their character without their consent will have protection in Sri Lanka.

Information as property and undisclosed information

The other development of personality rights of celebrities is that very often their privacy is being persistently abused through misappropriation by others for commercial gain. (ex- personal details of such celebrities are being constantly infringed by leaking their commercial and private details to the public, their photographs of commercial value are taken by unauthorised persons for commercial gain, their photographs are manipulated linking them to inappropriate behaviour). Accordingly, the celebrities who wished to control their confidential information of commercial value attempted to protect their privacy rights when unauthorised persons invaded their privacy by resorting to actions available in the legal system.

It is significant to observe that the need to protect undisclosed information has been recognised in the IP Act of Sri Lanka and now the new regime on undisclosed information comes within the scope of unfair competition in Sri Lanka. Section 160 (6) of the Act pertains to disclosure, acquisition or use by others of 'undisclosed information' in a manner contrary to honest commercial practices. Section 160 (6) relates to undisclosed information which has a **commercial value**. Accordingly, it confines to Trade secrets. Trade secrets are protected in Sri Lanka by Contract and/or free standing action for breach of confidence. Contractual remedy includes misuse of secrets by employees during or after their employment and can be extended to cases of breach of contract, either expressed or implied. Acquisition of trade secrets by a third party can be prohibited when the use of the information becomes a breach of right to privacy.[74]

74. In Prince Albert v. Strange (1849) 1 Mac & G 25 , it was held that relief would be available against the defendant even though he was a third party

Section 160 (6) (b) describes example of unfair competition in respect of undisclosed information by other without the consent of the rightful holder such as industrial or commercial espionage, breach of contract, breach of confidence, inducement to commit any of the above acts and acquisition of undisclosed information by a third party. It is to be noted that 'information shall be regarded 'undisclosed information' if- (i) it is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (ii) it has actual or potential commercial value because it is a secret; (iii) it has been kept a secret by the rightful holder.[75] This is one legal regime available to a celebrity

Thus, the acts or practices mentioned above (celebrity rights) may constitute an act of unfair competition under section 160 (3) of the Sri Lankan Act. Even in the absence of elements of damaging the goodwill or reputation, if the acts complained of can cause or likely to cause confusion with respect to another's enterprise or activities, such acts may constitute an act of unfair competition under section 160 (2) of the Act.

Conclusion

The celebrity rights have been recognised in the form of acts or practices in the course of commercial or industrial activities that is contrary to honest practices as an action of unfair competition. It is yet to be seen whether Sri Lankan Courts will recognise a free standing privacy rights for commercial misappropriation of celebrities' fame in addition to existing intellectual property remedies and common law remedies.

Sri Lankan celebrities however, can enjoy a number of remedies for the protection of economic interests and non-economic interests. The case law in this area is however, yet to be developed. It is inevitable that with the expansion of the celebrity market.in Sri Lanka, increasing use of appropriating personality rights might lead to misappropriation of celebrity rights as well giving rise to different types of litigation.

The time has come to the Sri Lankan courts to look for new approaches to intellectual property law and common law remedies by recognising the ability of celebrities to protect commercially-valuable aspects of celebrity lives and setting down legal parameters in this developing area in keeping pace with the development taking place in other jurisdictions. It remains to be seen how and the extent to which the Sri Lankan Courts would meet this challenge.

75. Section 160 (6) (c)

The Insurance Ombudsman Scheme and Its Relevancy to "Judicial Decision" Making

Dr. Wickrema Weerasooria
Attorney-at-Law
Insurance Ombudsman, Sri Lanka

Introduction

When the Director of the Judge's Institute Mr. Ruwan Fernando requested me to contribute an article to this journal, I agreed to write one on the Insurance Ombudsman Scheme. I have been the Ombudsman for the past nearly ten years since its inception in February 2005. I have also been invited on several occasions by the Judges Institute to deliver talks to the District Judges. I have spoken on Buddhist Ecclesiastical Law in view of my text on the subject. I have also spoken on Banking and Finance Law and more recently on Insurance Law and Third Party Motor Accident Claims. Talking to the District Judges on the above occasions and discussing with them the legal and practical issues confirmed my high esteem of our judicial system. The District Courts are considered as the original courts for all civil jurisdiction. Hence, their importance.

In this article I will briefly outline how Ombudsman Schemes came to be established in our country and the type of schemes now operating and what they basically do. I will next show the difference between the Insurance Ombudsman Scheme and the way in which District Judges conduct their cases. The differences are many but there are a few striking features of the Ombudsman scheme which may be applied by District Judges to settle the dispute before them. After all is said, ensuring justice to the litigant is the object of both.

Origin and Development of Ombudsman in Sri Lanka

Ombudsman schemes are new to Sri Lanka and many Sri Lankans – including some lawyers – are unaware of the ombudsman schemes operating in the country. For instances, even recently a lawyer asked this contributor "what is an Ombudsman and what does he do".

The dictionary meaning of the term Ombudsman is "a government official appointed to investigate complaints made by individuals against the government or public bodies". According to the dictionary meaning, the origin of the word is Swedish-from umboth (commission) plus mathr (man). Thus, the term "ombudsman" can mean a "One-man Commission"

Historically, the modern office of "Ombudsman" can be traced to the establishment of such an office in Sweden in 1809. From Sweden, the Ombudsman concept was copied in other Scandinavian countries like Finland, Denmark and Norway and over the last two hundred years Ombudsman Schemes came to be established globally in most developed countries.

In Sri Lanka, during the reign of the Sinhalese Kings, it is said that there was a senior and trusted official in the King's palace called "The Dukganna Rala" which in translation means "The person who receives or hears complaints". However, it is generally believed that this high personage listened to and provided whatever relief he could only to the complaints and requests of the King and not his subjects. It is also said that the King's complaints to the "Dukganna Rala" mainly concerned the problems the King had with his wife – the Queen. Thus, it appears that the office of 'Dukganna Rala" was not meant for the average citizen

Sri Lanka's Parliamentary Ombudsman

In modern times, Sri Lanka's first Ombudsman was established by the 1978 Constitution. Article 156 of the Constitution established "the office of the Parliamentary Commissioner for Administration (Ombudsman)". Since 1978, two legislative enactments were made relating to the office of the Parliamentary Ombudsman. as follows –

i. Parliamentary Commissioner for Administration Act No.17 of 1981, and

ii. Parliamentary Commissioner for Administration (Amendment) Act No.26 of 1994.

Under the law now applicable, the Parliamentary Ombudsman is appointed by the President and can continue in office until he reaches 68 years unless he resigns or is removed by the President on account of illness or mental incapacity. Like in the case of a Supreme Court Judge, he can also be removed by an address in Parliament. Thus, the Parliamentary Ombudsman's independence is assured. The Parliamentary Ombudsman's functions and powers are :-

> *To investigate and report upon complaints or allegations of the infringement of fundamental rights and other injustices by public officers or public corporations, local authorities and other like institutions, in accordance with and subject to the provision of law.*

The world 'injustice' is defined broadly in the legislation to include any injustice caused by any decisions / recommendation (including a recommendation to a Minister) or by any act or omission and the infringement of any right recognized by the Constitution.

Matters excluded from Parliamentary Ombudsman's purview

The Parliamentary Ombudsman is not entitled under the legislation to investigate any matter relating to:

(a) Members of the Armed Forces or Police (b) The appointment, transfer, dismissal or disciplinary control of public officers (c) The Auditor General and the Commissioner of Elections.

As seen above, the Parliamentary Ombudsman can only inquire into complaints relating to public sector and local government sector bodies and institutions. Also, his decision or award lacks implementation effect unless the institution or official to whom it is directed decides to comply with it, The first feature is a limitation on his jurisdiction. The second feature is a limitation on the effect of his award. His report is however tabled in Parliament and Parliament, if it so deems fit, can take steps to ensure that an ignored award is honoured.

I have used the good offices of the Parliamentary Ombudsman in a matter where the payment of a University academics salary was being wrongfully withheld by the Vice Chancellor's office. I am happy to record that within two weeks the Vice Chancellor was ordered to pay the salary etc.

Other Sri Lankan Ombudsman Schemes

Apart from the Parliamentary Ombudsman, currently there are only two other Ombudsman Schemes successfully operating in Sri Lanka. This is the Financial Ombudsman which commenced in December 2003 and the Insurance Ombudsman which commenced in February 2005. The above two schemes are not statutory schemes but are modelled on similar schemes operating in developed countries.

The Financial Ombudsman

The Financial Ombudsman was set-up in December 2003 with the approval of the Central Bank, by the banking industry and other financial institutions supervised by the Central Bank like the finance companies, the leasing companies and the primary dealers. They incorporated a company under Company Law called the Financial Ombudsman, Sri Lanka (Guarantee) Ltd. This Company selects the Financial Ombudsman on an open advertisement in the newspapers. His term is four years.

Origin of the Financial Ombudsman Scheme

This author is indeed proud that he was closely associated with the establishment of this scheme. Upon his return to Sri Lanka in 2002 after teaching for several years at Monash University in Australia, he was invited to take up office as a Consultant in Legal Reforms to by the Central Bank Governor. At that time from 2000 onwards, the Government had set-up a Financial Sector Reforms Committee (FSRC) chaired by the Central Bank Governor. The author who was a member of that Committee, proposed to the Committee that a Banking Ombudsman scheme similar to the one established in several other countries be established.. As an academic at Monash University he had worked closely with the Australian Banking Ombudsman scheme. While the idea gained favour, the heads of our banks were not overtly enthusiastic about such an Ombudsman. Then, the Government enacted the Consumer Affairs Authority Act No.9 of 2003. Under that Act, all banking and financial transactions, were also subjected to inquiry and investigation by the Consumer Affairs Authority. To overcome this problem, the banking industry quickly agreed to establish the Banking Ombudsman scheme so that any complaints can be handled by the Ombudsman rather than by the Consumer Affairs Authority. That is how the Sri Lankan Banking Ombudsman scheme came to be established. Just before the scheme started to function in December 2003, other financial institutions like the finance companies, leasing companies and primary dealers also wanted to join the scheme. Hence, the name was changed from Banking Ombudsman to Financial Ombudsman.

Powers and Functions of Financial Ombudsman

The Financial Ombudsman's powers and functions are laid down in the Memorandum and Articles of Association of the Company Limited by Guarantee. Generally speaking the Financial Ombudsman can inquire into complaints by customers of the banks and other financial institutions who are members of the scheme and those institutions will be bound by his decisions and awards. Like in other Ombudsman schemes in foreign countries, the Financial Ombudsman is not bound or restricted by rules relating to the laws of evidence or legal procedures which govern a normal court of low. Nor can lawyers appear before the Ombudsman. The object of freeing the Ombudsman from having to observe legal rules and preventing lawyers appearing before him is to enable him to decide disputes without delay. All that is required is that he must be reasonable, fair and just in arriving at this decisions and awards. This is how Ombudsman schemes in foreign countries also operate and the Financial Ombudsman of Sri Lanka will be guided by the foreign schemes.

Insurance Ombudsman

This scheme is a replica of the Financial Ombudsman scheme. It was set up by the insurance industry which today consists of twenty two companies and the scheme has the concurrence and approval of the Insurance Board of Sri Lanka which is the state regulatory body for insurance. The following matters are within his jurisdiction.

(i) Non-settlement or delay in the settlement of claims.

(ii) Inequitable interpretation or application of the terms and conditions of insurance policies.

(iii) Any complaint by a policy-holder against an insurance agent relating to an insurance policy.

(iv) Any matter referred to the Ombudsman by the Insurance Board of Sri Lanka (IBSL)

(v) Any matter referred to the Ombudsman by the Consumer Affairs Authority of Sri Lanka (CAA)

Basic Differences between Ombudsman and District Judges

Now I refer to the obvious similarities and differences between the Ombudsman schemes and the District Judges. The Ombudsman scheme is a non-statutory voluntary scheme set out by the industry with the approval of the government. The Ombudsman is a person of repute selected by the industry. There is no age limit and he can entertain any complaint not normally exceeding Rs. One million but this monetary limit has not been insisted upon.

Both Ombudsman and District Judges are concerned mainly with civil matters and are "avenues" to settle and obtain relief at first instance. They are not appellate bodies looking at decisions made by others. Both the Ombudsman and the District Judges normally look at only civil matters and not criminal matters.

Ombudsman are restricted by the terms of their establishment. For example the Financial Ombudsman can only hear financial disputes and the Insurance Ombudsman only insurance matters. While both systems are intended to grant relief to those who come before them, the following differences are striking. A judgment of a District Judge is enforceable. A decision or opinion of an Ombudsman is not technically enforceable but the industry normally accept it. If not the Ombudsman Scheme will collapse.

The procedure for seeking relief or presenting a complaint to the Ombudsman is so simple compared to the procedural requirements of going before a District Court with Plaints and Summons, Answers, Issues and Trials. A half paragraph letter setting out the institution concerned and the applicant name and particulars will suffice for a complaint to the Ombudsman. The Ombudsman then obtains all the relevant facts from the institution concerned and an inquiry is fixed as early as possible and the mater settled either way. A complainant who is dissatisfied can seek judicial redress and going before the Ombudsman is no bar to such a step and the proceedings before he Ombudsman can also be led in evidence in the event of a court case.

Adversarial and Inquisitorial Systems

Laws are implemented and justice administered in two main ways. The first is called the Adversarial or Adversary system. It is also sometimes called the Accusatorial System. This is the system that applies in common law countries such as the United States, England, Sri Lanka and other Commonwealth nations like India, Canada, Australia etc.

The Inquisitorial system (which is based on Roman-law) applies in civil law countries in Europe like France, Germany and in Latin America.

In the Adversarial system (which applies in Sri Lanka) each side to a litigation is normally represented by his or her lawyer. The judge, who hears the case, adopts a neutral or impartial role and after hearing both sides, the judge gives his verdict or judgment. This is how Labour tribunals function.

In the Inquisitorial system, the parties to the case must provide all relevant evidence to the court by means of documents and witnesses, and the judge himself questions and examines the parties and their witnesses and then gives a verdict or judgment. In other words, the court (the judge) acts as an investigative body and does not play a mere neutral or impartial role.

As to which System – Adversarial or Inquisitorial – is better depends on which country you live. It is too late now to change these Systems in the countries in which they apply. Sri Lanka has been quite content to have the Adversarial System and there has been no attempt to change it. We have lived under this system ever since the British introduced it after 1796 and it is far too late now to think of other options. Under both systems, justice can be done, if there is a will to do it. As that great English writer, MaCauley said : "As to forms of government and procedure, let fools contend; for what is best administered is best".

However, as the Insurance Ombudsman I combine both the Adversarial and Inquisitorial Systems I examine the relevant files and correspondence of the parties to the dispute without any of them being produced in evidence etc. This a District Judge cannot do in the case of a trial or inquiry. The Ombudsman scheme is also not burdened by the rule of stare decisis or binding precedent. Each case is decided on its own merits and has no bearing on a subsequent case.

Finality about Complaints to Ombudsman

The Insurance Ombudsman's objective is as far as possible to settle complaints (disputes) to the satisfaction of the complaining policy holder. Where this is not possible because in the Ombudsman's view, the insurance company (the insurer) has not been at fault, the Ombudsman politely informs the complainant that he is unable to help him/her and closes the file. He also gives his reasons for being unable to assist. In some cases, the Ombudsman speaks to the complainant at his office (separately from the insurer) and explains to the complainant why he is unable to grant any relief.

Once the above steps are taken, the office file on the matter is closed. The Insurance Ombudsman is keen to ensure that no complaint is kept pending without a decision for more than three to four months at the maximum.

There are no formal/special application forms to fill up. All that one need do is to briefly write out the complaint in any language (English / Sinhala / Tamil) of your choice but giving your name / address / Telephone / Fax No. (if available) and also stating the name of the insurance company and the insurance policy number. If the complaint refers to a motor vehicle the vehicle registration number should be given. Only written/signed complaints will be entertained. The Ombudsman normally, get the insurance company to supply the required documents and provide details of the claim and why it was rejected or not settled etc.

Ombudsman Scheme and Lawyers.

One does not need get the assistance of lawyers to come before the Ombudsman. All one need do is to set out the complaint in writing as explained earlier. One is not prohibited from getting a lawyer to draft your complaint but the general practice in Ombudsman Scheme is that no lawyers are permitted to appear before the Ombudsman. Nor is the Ombudsman bound by legal rules and procedure which apply to Courts of Law.

Insurance Ombudsman's Mediations and Settlements. Has it been a success.

However, after serving over eight years as the Ombudsman, I feel that the scheme has been a success and well worth the effort and the expense (very little) to operate it. One way to evaluate the scheme is to ask; "what if there was no such Ombudsman Scheme"? Will the insurance industry and the Policy holders be happy? The response could well be a negative one.

In my view, the Insurance Ombudsman's Office – which is a free, transparent friendly and hassle free service – has been a helpful forum for complainants to air their grievances. They are able to bring the insurer's staff to the Ombudsman's Office and not be at the mercy of the insurer's office! These are words and views used by complainants to the Ombudsman.

Truly, many claims have been mediated and settlements arrived at and some relief granted. Even a small increase of payment to the amount earlier agreed to by the insurer is gratifying because unlike a litigation or Court case there is no financial cost to the Complainant. There is no Court costs to the complainant or legal fees to pay lawyers.

If the Ombudsman feels that the claim is a genuine one and what stands in the way of a settlement or a higher payment by the insurer – is a purely technical shortcoming on the part of the insured – then the Ombudsman makes an appeal to the insurer to *put aside the legally justifiable rejection of the claim and to consider at least an ex gratia payment.* Whoever invented this term ex gratia has done an invaluable service to policy holders of insurance companies!

There is another practical reason for settling claims. This is what Insurers refer to as Commercial Reasons. They use Commercial Reasons to honour at least part of the claim and this payment is also made on an ex gratia basis. An example of Commercial Reason is the complaining policy holder having other policies with the insurer or the leasing/ finance company that leased the "Accident Vehicle" having a good business relationship or connection with the insurer. Leasing or finance companies are the vehicle's "Absolute" Owner and Insurance Companies get considerable business from them and would not like to displease them. Hence, they may settle at least a part of the claim on an ex – gratia basis for commercial reasons.

Thus, Commercial Reasons and Ex Gratia grounds are like Twins in insurance claim settlements. Here the law is put aside to maintain the good relations between the insurer and the insured. After all, with over twenty companies in the market, insurance business is very competitive and it is best not only to win clients (policy holders) but to sustain and maintain existing policy holders.

Shortcomings of Ombudsman Schemes

The other feature that needs improvement for all Ombudsman schemes – voluntary or State established – is to publicise them more. Many members of the Sri Lankan public are not aware that there are Ombudsmen appointed to investigate complaints into financial and insurance matters.

Another shortcoming is that apart from the Parliamentary Ombudsman, the annual reports of the other Ombudsmen are not published and therefore not available for public scrutiny and comment. In most other countries annual reports by Ombudsman are not only compulsory but they must be published and accessible for public comment and criticism if any. A similar procedure should be followed in Sri Lanka. This is the obligation of the industry that established each scheme.

Also, and this comment is obvious, the person who is appointed as Ombudsman (man or woman) should be a person of competence and integrity and not a stooge of the industry or the government who can be influenced or compromised. The best evidence of the Ombudsman's independence and integrity is his or her annual report which should be published and made available for media scrutiny and comment.

This contributor strongly recommends the establishment of Ombudsman Schemes to cover areas such as private hospitals (now over 190), electricity, water services and even advertising. They can be industry appointed ombudsman who will not burden the Consolidated Fund.

Sentencing in Criminal Justice in Sri Lanka: Issues, Policy and Need to Reform[1]

M.A.D.S.J.S.Niriella
LL.B. (Hons) (Colombo) M Phil (Colombo)
Head/Department of Public and International Law,
Faculty of Law, University of Colombo.

Introduction

> *"Sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what an appropriate sentence is in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."*[2]

This statement demonstrates the importance of a sentencing policy and set of guidelines which make possible the judges in deciding the appropriate sentence for a criminal offence. Wide disparities of sentencing for similar offences undermine the concept of natural justice. Sentencing disparity for similar offences also leads not only to a controversy in the legal fraternity but a failure of the whole criminal justice system. Sri Lanka also has been faced this problem over the years. Absence of a proper sentencing policy and set of guidelines to be used by judges in courts presses on the criminal justice system of Sri Lanka to develop a policy guideline that could be used by Sri Lankan courts. Therefore, the main objective of this paper is to discuss the necessity of a possible sentencing policy and guidelines which the legal authorities of Sri Lanka could follow in sentencing. In order to achieve the above said objective the paper deals with a brief discussion of purposes

1. M.A.D.S.J.S.Niriella, Head/Department of Public and International Law, Faculty of Law, University of Colombo, Sri Lanka.
2. In *Veen v The Queen* (No 2) (1988) 164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ p. at 476. Further see In *R v Engert* (1995) 84 A Crim R 67 Gleeson CJ stated at p. 68;

of sentencing, principles of sentencing, options for sentencing available, international instrument and standards relating to sentencing, policy and guidelines available in other jurisdictions such as England and Australia and essential factors that should be considered including aggravating and mitigating factors in determining the appropriate sentence.

Punishment

Sentencing is that stage of criminal justice system where the actual punishment of the convict is decided by the judge. In other words it follows the stage of conviction and the pronouncement of the punishment imposed on the convict.

The concept of punishment is as old as human society. It is a wide and ambiguous concept too. When a person commits a crime by violating criminal law, he is punished by imprisonment, a fine or any other mode of punishment which is prescribed in criminal law. The ambiguity and wideness of the concept can be seen in various definition of punishment. Different authors and jurists in the field of law define punishment in various ways according to their perspectives, notions and researches.According to the Concise Oxford Dictionary of Current English punishment defines as a penalty imposed for transgression of the law or any ill suffered (loss or suffering or severe treatment)[3] in consequence of wrongdoing.[4] Manu the great Indian law giver, refers to punishment as the protector of all creatures; through fear of it observance of duties and obedience to the law is ensured.[5] Positivists such as John Austin, Blackstone define punishment as an instrument which makes people do what the State wishes.[6] From these definitions themselves, it is clear that the society needs punishment as social control and to maintain law and order. Society justifies punishment for moral reasons, and these reasons are identified as the aims of punishment. [7]

Theories of Punishment

The Greek philosopher Aristotle's idea of punishment was that of deterrence and retribution. According to him the corrective measure must be a mean between loss and

3. Thompson Della,The Concise Oxford Dictionary of Current English, 9th Edition, New York, Oxford Press, p. 1111.
4. Marckwardt Albert H., Cassidy Frederic G. and McMillan James G., *Webster Comprehensive Dictionary, International Edition,op. cit.* p. 1023.
5. Quoted from Amarasinghe A.R. B., 1999, *The Legal Heritage of Sri Lanka,*Colombo, Royal Asiatic Society of Sri Lanka, p. 35; For more see, Mohan Das Ram, 1982, *Crime and Punishment in Ancient India,* Bodh-Gaya, Kanchan Publications, pp. 23-25.
6. Quoted from Sunder Orvil C. 1953, *An Introduction to Criminal Justice Text and* Cases,Boston, Little Brown and Co., p. 11. Further see Hall Jerome, 1960, General Principles of Criminal Law,Indianapolis- New York, BobbsMerill Co., p.321;Westermarck E., 1912, 'The Origin and Development of the Moral Ideas, Vol. III', London, p. 169 in Chaudhari K.S., *Punishment to Criminals and Contemners,* 1992, Re printed 1993, Jaipur-India, Maheshwari Law Publishers, p. 3 for definition of punishment.
7. For the purpose of this paper aims of punishment could be understood as objectives/aims/purposes of sentencing.

gain.[8] Eminent legal scholars such as Blakstone, Bentham, Stephen, Salmond, Rupert Cross, Nigel Walker, Holms and Gour propounded different points of view with regard to the aims of punishment. Blakstone[9] identified three main legitimate purposes of punishment, namely reform of the offender, general deterrence and incapacitation. For Bentham,[10] the main aims of punishment were prevention and compensation. Stephen[11] has the same theories of punishment as Bentham, except that he seems to be aware of an added moral dimension, which might be called expiation. According to Salmond,[12] the main objective of criminal justice is to protect society from criminals by punishing them under the existing penal system. For Rupert Cross,[13] general practice of punishment by the State is only justified if it has two objectives i.e., the reduction of crime and the promotion of respect for the criminal law. J. Holmes[14] pointed out that prevention is the chief purpose of punishment. In criminology these purposes are known as theories of punishment and fundamentally there are five main theories of punishment. They are retribution, deterrence, incapacitation, rehabilitation and restoration.[15]

Retribution

The theory of retribution is probably the most ancient theory of punishment,[16] which is expressed by the biblical dictum: an eye for an eye and a tooth for a tooth.[17] According to the dictionary it implies that the punishment should be related to the harm done by the crime, rather than to the moral guilt of the criminal.[18] The main purpose of the retributive theory of punishment is that the criminal is to be punished simply because he has committed a crime. In other words, retribution is the pain which a criminal deserves to suffer because of his commission of the crime. The retributive supporters such as Mabbott,[19] Murphy,[20] Hegal,[21] Immanuel Kant[22] and Walter Moberly[23] justify

8. Sethna M.J., *Society and the Criminal,* 1971, Melbourn, Australia, the Law Book Co. p. 240.
9. Ibid.
10. Bentham J., *The Rational of Punishment,* 1825, London, Robert Heward, p. 19, in Sethna M.J., *Society and the Criminal,* op. cit., p. 237.
11. Siddique Ahmad, 1997, *Criminology : Problems and Perspectives,* Lucknow, Eastern Book Co., p. 112.
12. Fitzgerald P.J., 1996, *Salmond on Jurisprudence,* 12th Edition, London, Sweet and Maxwell., p. 94.
13. Quoted from, Chaudhari K.S., 1992, *Punishment To Criminals And Contemners,* Jupur-India, Maheshwari Law Publishers, p. 10.
14. Holmes J., 'Common Law', p. 46, in Sethna, M.J., *Society and the Criminal, op.cit,* p. 137.
15. In Jhabwala v. Emperor, (1933) Cr. L.J. 967 the Court emphasized that the theories of punishment are based on the protection of the public, the prevention of crime and the reformation of the offender.
16. Gobert James, and Dine Janet, *Cases and Materials on Criminal Law,* London Blackstone Ltd. p. 22.
17. Ibid.
18. Martin Elizabeth A., *A Dictionary of Law,* New York, Oxford University Press p. 320.
19. Mabbott J.D., 1969, *'Punishment',* (ed.) Action H.B., *The Philosophy of Punishment:* A collection of Papers, op.cit. pp. 39-64 and p. 178.
20. Murphy J.G., 1994, *'Marxism and Retribution'* in (eds.) Duff Antony and Garland David, A Reader on Punishment, New York, Oxford University Press, pp. 44-70.
21. Ahmad Siddique, 1997, Criminology: *Problems and Perspectives,* Lucknow, Eastern Book Co., p. 111.
22. Ahmad SIddique, 1997, Criminology: *Problems and Perspectives, op. cit.* 112.
23. Moberly Walter, *'The Ethics of Punishment',* (1968) p. 144 in Paranjape N.V., 1996, *Criminology and Penology, Allahabad,* Central Law Publications, p. 145.

the retribution theory of punishment as a very important feature of the administration of criminal justice, because if punishment is not imposed the aggrieved party (victim or his relatives or friends) may take the law into their hands, and attempt to punish the offender. Further, this theory is based on the fulfillment of moral responsibility and the rationale behind the retributive theory is that a good deed deserves to be crowned with a reward, and a bad deed must meet with a bad reaction, namely suffering. This interpretation forms the main difference between retribution and other theories; retribution looks back to the crime, and punishes the offender because of the crime, while other theories look forward to the consequences of punishment and hope to achieve the protection of society, crime reduction and the rehabilitation of the offender. The word 'retribution' as used has several meanings. It is mostly employed to indicate either vengeance or expiation, but more commonly today it refers to giving the offender his or her just desert, or using punishment as a system of censure, denunciation or reparation.

Deterrence[24]

The main idea of this theory is to deter the offenders from repeating the same course of conduct, and to deter others from adopting the same course of conduct. According to Utilitarians such as Jeremy Bentham, John Stuart, and H.L.A. Hart, deterrence should be the main objective of punishment. Unlike the retribution theory, deterrence is forward looking and concerns the consequences of punishment; its aim is to reduce further crimes by the threat or example of punishment[25] Deterrence supposedly operates at three levels, i.e. general deterrence,[26] individual deterrence and educative deterrence. General deterrence seeks to create fear in the mind of members of society by providing adequate penalty and exemplary punishment to offenders in order to deter them from criminality. In other words, under general deterrence, the punishment of the offender is for the benefit of the public at large, in the hope that the example and threat of punishment will deter them from committing a crime.[27] Under individual deterrence, due to the fear of the previous punishment offender will not offend again. In other words, because of the earlier unpleasant experience of punishment, the offender is restrained from committing (similar or other) crimes in the future. In an Indian case, Sunil Batra,[28] the Court accepted that the individual deterrent is one of the main aims of punishment. Under educative deterrence offender will not re-offended due to the understanding (proper knowledge)

24. Criminal Law (Sentencing) Act 1988 (SA) s 10(1)(i).
25. Refer DullavsStae 1958 AIR 198; KhanaSadayvs State 1958 AIR 190; ADU Ram vs State of Jammu and Kashmir
26. Mason-Stuart v R (1993) 61 SASR 204; [1993] SASC 4322].
27. Hurst (1958) Cr. L.J. 709; Storey, (1973) 57 Cr. App. R. 840, C.A: (1973) 1 WLR 1045; Motiey (1978) 66 Cr. App. R. 274, C A; Bruce (1977) 65 Cr. App. R. 148, C A.
28. 1978 AIR SC 1675

of god and bad (what should do and should not) which he learnt from the punishment that he underwent.[29]

Incapacitation[30]

This theory causes the offender to be restrained from committing further crimes by disabling him. Proponents of the incapacitation theory of punishment advocate that offenders should be prevented from committing further crimes either by their (temporary or permanent) removal from society or by some other method that restricts their physical ability to reoffend in some other way. The overall aim of incapacitation is to prevent the most dangerous or prolific offenders from reoffending in the community. It is clear the idea posed by Van Der Merwe.[31] He says that incapacitation is the direct and the best way of protecting society from criminals.[32]

Rehabilitation[33]

Under this the objective of punishment is to make the offender a 'better person', capable of being re-integrated into society by improving the offender's character.[34] According to reformationists, a criminal should be studied like a patient in his entire socio-economic surroundings and attempts should be made to reform or treat and rehabilitate the offender. The crime was seen as a symptom of an illness that could, with the appropriate remedy, be cured. Under this theory, an opportunity is provided for the State to take steps to reform offenders and so to control crime. The ultimate aim of the punishment is to make the offender to resocialize, to readjust him to society and to rehabilitate him.[35]

Restoration

This promotes reparation overretribution. Restoration emphasizes accountability of the offender to the victimand the victimized community rather than to the state. In these and other respects, restoration strikes at the heart ofcurrent sentencing policies and practices.[36] This theory focuses on restoring the harmful effects of these actions, and actively involves all parties in the criminal justice process. According to this theory an

29. Andenaes J., 1952, General Prevention, U.K., Northwestern University School of Law, Vol. 43, J. Cr., C. & P.S. 176 at 179-181.Gross Hyman, 1979, A Theory of Criminal Justice, London, Oxford University Press, p. 400; Braithwaite J., 1989, Crime Shame and Reintegration, CambridgeUniversity Press, p. 77.Also refer, Goldsmitt v State 490 So, 2d 123 (fla. 1986).
30. Criminal Law (Sentencing) Act 1988 (SA) s 10(2)(a)).
31. Van Der Merwe D.P., Sentencing, Johannesburg, Juta and Co. Ltd pp. 3-16.
32. Further refer, R vs Sargent (1975) 60 Cr. App. R. 74. Also see R vs Nicholls 1970 Cr. App. R. 150; R vs Brewster 1980 CA; R v Hatch(1996) Cr. L.R. 679, CA.
33. Criminal Law (Sentencing) Act 1988 (SA) s 10(1)(i).
34. Vartzokas v Zanker (1989) 51 SASR 277
35. See New York vs. Williams 337 US 247 (1949).
36. See LeenaKurki, Incorporating Restorative and Community Justice Into American Sentencing and Corrections, Research in Brief, Washington, DC: U.S. Department of Justice, National Institute of Justice/Corrections Program Office, September 1999, NCJ 175723.

opportunity is given for offender and victim to restore their relationship, along with a chance for the offender to come up with a means to repair the harm done to the victim.[37]

In determining and imposing the most appropriate punishment the first issue to be address is the reason/justification of punishment or in other words why do we punish a offender? It is clear that no penal philosophy can today be based upon one single idea, be it retribution, incapacitation, rehabilitation or restoration. Therefore we may argue that, for an ideal penal programme, there should be a combination of all these theories of punishment to maintain law and order which lay down in sentencing legislation. As far as the criminal justice system of Sri Lanka is concerned the Penal Code or any other Act which prescribes a particular act as a crime and their punishments, does not express the aims of punishment. Therefore it is suggested that Sri Lanka should enact a sentencing legislation like in other jurisdictions; Australia, UK and USA.[38]

Sentencing in criminal procedure and options for sentencing

Criminal proceeding passes through different stages, particularly being divided into three phases, i.e., pre-trial, trial and post trial dispositions. It encompasses investigation (detection and enforcement), prosecution, ascertainment (conviction/ acquittal), sentencing and sentence-execution. Sentencing comes with the termination of the trial phase or once the accused pleads guilty. By the examination of the witness and evaluation of the invoked demands of the party of the crime, the court determines whether the crime was committed or not and whether or not the accused is to be imposed criminal liability. If the court concludes a conviction on a charge then the door for sentencing opens for the court. In Sri Lanka Death penalty, imprisonment, fine, forfeiture of property are recognized as customary (traditional) sentences.[39] Since Sri Lanka has abolished capital punishment

37. Von Hirsch, A., Roberts, J.V., Bottoms, A.E., Roach, K., and Schiff, M (2003). Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?, Oxford: Hart Publishing; Van Ness Daniel, Strong KerenHeetderks, 1997, Restoring Justice, New York, Anderson Publishing Co. p. 116;Braithwaite, J. (1982).'Challenging Just Deserts: Punishing White-Collar Criminals', The Journal of Criminal Law and Criminology 73(2), 723- 763. — The Journal of Criminal Law and Criminology 73(2), 786-790. — (1982) 'Comment on the 'Criminal Law as a Threat System", (1982) 'Reply to Dr. Ernest van Den Haag', The Journal of Criminal Law and Criminology 73(2), 790-793. — (1997) Crime, Shame and Reintegration, Cambridge: Cambridge University Press. — (1998) 285 'Restorative Justice', in M. Tonry (ed) Handbook of Crime and Punishment, New York, NY: Oxford University Press. — (1999)'Restorative Justice: Assessing Optimistic and Pessimistic Accounts', Crime and Justice: A Review of Research 25, 1-127. — (2001) 'Reconciling Models: Balancing Regulation, Standards and Principles of Restorative Justice ractice', in H. Mika and K. McEvoy (eds) International Perspectives on Restorative Justice Conference Report,Belfast: Queens University. — (2002) Restorative Justice & Responsive Regulation, Oxford: Oxford University Press. Braithwaite, J. and Pettit, P. (1990). Not Just Deserts: A Republican Theory of Criminal Justice, Oxford: Clarendon Press.
38. In New South Wales Crimes (Sentencing Procedure) Act 1999 sets out the purposes/ aims of punishment for which a court can impose a sentence. Section 3A sets out the following seven purposes "for which a court may impose a sentence on an offender":a) to ensure that the offender is adequately punished for the offence, b) to prevent crime by deterring the offender and other persons from committing similar offences, c) to protect the community from the offender, d) to promote the rehabilitation of the offender, e) to make the offender accountable for his or her actions, f) to denounce the conduct of the offender, g) to recognize the harm done to the victim of the crime and to the community. According to Section 142 of Criminal Justice Act 2003, reformation, reparation, protection, deterrence and punishment are the main purposes of sentence.
39. Section 52 of the Penal Code No 2 of 1883.

in practice (abolitionist de facto) imprisonment and fine are more common modes of sentence. Probation, community corrections, compensation, suspended sentence and conditional discharge are other sentencing options available in existing penal system of Sri Lanka. Choosing the best form of sentence plays a vital role both in determining the most appropriate degree of punishment and achieving the main objective/s punishment. Therefore, it is pertinent to discuss the sentencing principles which facilitate the judicial officers in determining the most appropriate form of punishment.

Sentencing principles

The legislature prescribes the type/s of punishment for every criminal offence. For example, section 302 of the Indian Penal Code states that 'whoever commits murder shall be punishable with death, or imprisonment for life, and shall also be liable to pay a fine.' Sri Lanka, section 296 of the Pena Codes says that 'whoever commits murder shall be punishable with death. Without rigidly prescribing a certain type of punishment for a certain criminal offence, the legislature should permit the court to select the most appropriate form of punishment in order to achieve the main objectives of punishment in the imposition of punishment. The Statute should provide the guidance to choose the best one, out of the given options. The South African Criminal Amendment Act No. 107 of 1990 is one of good example: it prescribes capital punishment for the offence of murder, but allows discretion to the judge to impose another type of punishment if any extenuating circumstance exists. Thus the court is able to select an appropriate form of punishment in accordance with the main aims of punishment. According to Van Der Merwe,[40] this technique is far more effective than imposing the type of punishment which is prescribed by the legislature for a certain type of crime. It is not always easy for courts to make a choice between the different methods of punishment available in a criminal case, and therefore there can be a difference of opinion. Therefore, judiciary should adopt sentencing principles (policy) to determine the most appropriate mode of punishment. Such sentencing principles are found under standards of international law. They are evading from cruel, inhuman or degrading forms of punishment; there should be restitution to the victims of crime; non-custodial measures of punishment should be considered rather than imposing immediate custodial sentences; prescribed punishment may be mitigated if the accused pleads guilty, equality of impact and proportionality; equality before law; minimum intervention and cost effectiveness of sentence. Certainly these principles are important to achieve the main aims of punishment.

Once the sentencing judge has chosen the mode of punishment he/she should decide the most appropriate degree of (length of imprisonment or the number of hours of the service that the offender should render or the amount of fine etc.) punishment. Like in many other jurisdictions Sri Lankan judges has the wide discretion in imposing punishment, restricted only by appellate review and a limited number of mandatory sentences.[41]

40. Van Der Merwe, D.P., Sentencing, op. cit, pp. 4-1.
41. See the Penal Code Amendment 1995 No. 22.

As said earlier in Sri Lankan courts judges took different positions in justifying their punishment. This could be proven by analyzing following cases. *In Piyasena v The A.G.*[42] *and Candradasa v Liyanage Cyril*[43] it wasappeared to be more concerned about the need to deter the offender and the rest of the society from committing future crimes and to protect the society from wrongdoers and crimes.[44] In *Piyasena v The A.G.*, the three accused-appellants were charged on two accounts punishable under section 357 (abduction) and 364 (rape) of the Penal Code. The prosecutrix was raped by the three accused, each three times once in the prosecutrix's own house in the presence of her mother and twice elsewhere where there were no eyewitness. Affirming the conviction given by High Court, Jayalath J said that there is no doubt that the crime committed by the accused-appellants is a heinous crime which requires deterrent punishment.[45] Similar view was taken in Candradasa v Liyanage Cyril where the respondent forcibly entered the Magistrate Chambers and abused him and threatened to dash the child on the floor and kill or cause bodily harm to the Magistrate if his wife was not released forthwith. (She was found guilty of the unlawful possession of 1123 grams of ganja, an offence punishable under the Poisons, Opium and dangerous Drugs ordinance.) Imposing 7 years rigorous imprisonment Atukorale J stated.

> *"Of all contempt committed against the lawful authority of Courts of law the most heinous are those which involve actual or threatened injury to the person of a judge with a view to intimidating him into revoking or altering an order or decision made by him in the discharge of his judicial duties. The outrageous nature of the acts committed by the respondent constitutes not only an affront to the dignity and authority of the Court but also a direct challenge to the fundamental supremacy of the law itself. It is absolutely imperative that such conduct, whenever or whatever Court is Courts should be dealt with speedily, firmly and unmercifully......... therefore this case call for very deterrent punishment on the respondent."*[46]

A distinct approach was adopted in some cases moving from deterrence theory to reformative theory as to the main aim of punishment.[47] In addition to the above said decided cases there are number of instances we may find in our case law that the judges have taken various stands in imposing punishment. This situation again tells us the necessity of introducing a policy and guideline for the legal authorities can follow in imposing punishment. However, it is appreciated the effort taken by higher courts considering some factors in imposing punishment. E.g. Ranasinghe and Others[48] the

42. (1986) 2 SLR 388.
43. (1984) 2 SLR 193.
44. See A.G. vs. H.N. De Silva 57 NLR 12; Gomas vs Leelaratne 66 NLR 234.
45. (1986) 2 SLR at p. 397.
46. (1984) 2 SLR at p.p. 193-194.
47. Karunaratne v the State 78 NLR 413.
48. (1993) 2 SLR 81.

court said that the gravity of the offence, the public disapproval, the protection of vulnerable group of people (in this case women), deter potential criminals and punishing the offender are the factors which called immediate custodial punishment. As held in A.G. vs. Janak Sri Uluwaduge and Others,[49] in determining the proper punishment the Judge should consider the gravity of the offence, the deterrence aspect of the punishment imposed on the offender and the nature of the loss of the victim. The same view was expressed in A.G vs. Mendis[50] and A.G. vs. De Silva[51] .And further said the reformation of the criminal should also be taken into consideration subsequent to the gravity of the offence.[52]

Factors to be considered

Van Der Merwe says[53] that the Court has to weigh all relevant factors in order to determine the blameworthiness of the offender. According to him, this blameworthiness of the offender may be either subjective blameworthiness[54] which relates to the offender personally (such as a mental illness or defect, physical weakness, whether the offender is a young adult or an old person) or objective blameworthiness[55] (i.e. a fair and well balanced decision with regard to the blameworthiness of the offender). Normally, the objective blameworthiness is instrumental in reducing the degree of punishment. But objective blameworthiness depends on the point of view of the person judging. If according to his or her thinking, the blameworthiness of the offender is very high, he or she deserves severe punishment (in other words such an offender deserves a heavy punishment in the punishment scale). For example, if an offender commits the offence of murder under grave and sudden provocation, this is a good reason to reduce the punishment. However, sometimes these factors relating to objective blameworthiness are not of help in determining the appropriate degree of punishment. They may not take into account the poverty of the offender's family, or the hardships the family of the offender undergo when the offender is incarcerated. At this juncture one may argue that some factors, such as the physical weakness or the poverty of the offender, should not play a major role in measuring the degree of punishment. But, it is clear that factors relating to either subjective or objective blameworthiness of the offender refer only to the offender's point of view. So that we have to look at the other side of the coin, namely that factors such as the gravity of the offence and the social danger must also be considered as a criterion to determine the appropriate degree of punishment. It is therefore necessary to isolate those factors which should have a bearing to determine an appropriate degree of punishment for any crime.

49. Further see De Zoysa vs. Inspector of Police 74 NLR 425;A.G. vs. De Silva 57 NLR 138;Premarajh vs. Officer of In-Charge of Wattala Police 2 SLR 361.
50. 1995 SLR 12.
51. 57 NLR 138.
52. Further, see De Zoysa vs. Inspector of Police 74 NLR 425; Peramarajh vs. O.I.C. Police Wattala 2 SLR 361; John Mathew 1 SLR 243. In contrast; .Bandara vs. Republic of Sri Lanka , 2002 SLR 277.
53. Van Der Merwe D.P., *Sentencing op.cit* . p. 5-17.
54. *Ibid.*
55. *Ibid.*

According to Andrew Ashworth,[56] the factors that have to be considered for a criterion to determine the appropriate degree of punishment can be categorized into four main groups, namely: the facts of the case, the principles of sentencing, crime and punishment, and demographic features of sentencing. He says that[57] more personal factors to be considered may be categorized into 5 main groups. Namely:a) Mental illness or defect of the offender, b) The age of the offender, c) Intoxication, d) Provocation or jealousy, e) Other factors: previous conviction - criminal record of the offender; maturity, advanced age or illness of the offender; secondary ill-effect to the offender or his or her family; coercion or intimidation or influence by a third party; ignorance of the law, wrong legal advice or the newness of the offence; reparation made and remorse shown by the offender, and other ex-post facto acts; degree of participation, degree of foreseeability and dolus eventual; entrapment cases and the relationship of the victim with the offender; brutality, brazenness or recklessness of the offender, good behaviour of the offender, retaliation by friends of the accused, and the cumulative effect of punishment delay in bringing the trial before Court.[58]

By following the aforesaid gradations these factors may be categorized into five main categories as follows;

- Factors relating to the victim; a) vulnerable situation of the victim, b) damage caused by the offence to the victim
- Factors relating to the offender; a) previous conviction (criminal records) of the offender, b) age of the offender, c)sociological background of the offender, d) health and mental condition of the offender, e)social contribution by the offender, and f) brutality, brazenness, premeditation or recklessness of the offender
- Factors relating to the offence; a) nature and the gravity of the offence
- Factors relating to society; a) social danger, b) other effects on society, or the secondary ill-effects to the offender's family
- Other important (relevant) factors such as technical lapses of procedure-delay in bringing the culprit before Court etc..

56. This is based on Ashworth Andrew, 1995, *Sentencing and Criminal Justice, 2nd* Edition, London, Butterworths.
57. This is based on Van Der Merwe D. P., *Sentencing, op. cit.* pp. 5-23-42.
58. Report 139 submitted by New South Wales Law Reform Commission recommending some reforms/developments to the Crime Sentencing Procedure Act 1999. According to the commotion's report, factors which are to be considered in determining appropriate punishment includes the nature, circumstances and seriousness of the offence, the personal circumstances and vulnerability of the victim, the extent of the harm caused, the offender's character, background and offending history, the extent of any remorse shown and the offender's prospects of rehabilitation.

As said earlier Sri Lankan courts also consider a number of factors to mitigate or aggravate the quantum of punishment. E.g. Solicitor–General v Alwis,[59] *Attorney - General v De Silva*[60] *Peter*[61] *Gunasinghe v Perera*[62] *E. M. Seneviratne v The State,*[63] However, the question is whether Sri Lanka has followed formal criteria in respect of assessing the appropriate degree of punishment, such as is followed by the jurisdictions. The wide discretion in assessing the appropriate degree of punishment lead to a wide disparity of sentencing. Therefore it may be suggested that the Sri Lankan penal system needs formal criteria on the sentencing factors to determine the appropriate degree of punishment in order to minimize the wide disparity in the degree of punishment.

Comparative study

Many jurisdictions have introduced statutes to deal with the sentencing process as well sentencing policy and guidelines. These statutes help the courts to minimize the disparity of punishments in similar cases. This section will discuss selected (according to authors wish) sentencing policy guidelines and sentencing legislations which are prevailed in other jurisdictions.

In India sections 235 (2)[64] and 248 (2)[65] of the Code of Criminal Procedure Act No II of 1974 which provided the opportunity to 'hear' the accused on the question of punishment before impose the appropriate punishment upon him. This is called 'hearing on question of punishment'. The determination of the right measure of punishment is not an easy task, and no hard and fast rule can be laid down. The court has always to bear in mind the necessity of balancing the offence, the offender and the punishment. In other words, the court should impose a balanced punishment taking into consideration the offence and the offender both. In Santa Singh v State of Punjab[66] the court stated that, before imposing an appropriate degree of punishment a 'hearing' directs the Court's attention to such matters as the nature of the offence, a prior criminal record, if any, of the offender, his age and record of employment, his background with reference to education and home life, and the possibility of treatment or training. Also to the possibility that the punishment may act as a deterrent to both the offender and others, and meets the current

59. (1939) 41 NLR 101.
60. (1955) 57 NLR 121.
61. (1945) 47 NLR 23.
62. S.C. No. 688 – S.C.M. of 10/11/1937 – quoted from Peiris, G.L., *Criminal Procedure in Sri Lanka, Under the Administration of Justice Law, No. 44 of 1973,* Lake House Investment Limited, 1975, p. 492.
63. Ref. 05/02/2001, C/A 78/99, H.C. Kandy 1638/95 – quoted from BASL News, (Newsletters of the Bar Association of Sri Lanka) February, 2001, published by the Bar Association of Sri Lanka, p.5.
64. Section 235 (2) of the Indian Code of Criminal Procedure Act No. II of 1974 says that if the accused is convicted, the judge shall unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him.
65. Section 235 (2) of the Indian Code of Criminal Procedure Act No. II of 1974 says that 'where in any case (under this Chapter), the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of section 235 or section 360 he shall after hearing the accused on the question of sentence, pass sentence upon him'
66. AIR 1976 SC 2386.

community needs, if any, for such a deterrent in respect of that particular type of offence. Sri Lanka should pay her attention on this.

Minnesota Guideline Grid in the State of Minnesota in the United States of America, the legislature has attempted to implement more determinate rather than indeterminate punishment. This guideline involves assessment, as a commission has to work out a two dimensional sentencing grids in which two correlating factors are the gravity of the offence and the previous convictions of the offender. This provides the court with a fairly narrow punishment range, but does not mean that the judge loses his punishment discretion. However, if in this system the judge wishes to depart from the prescribed guideline, he or she should state the reasons for such a departure in writing in the judgment. It is informative to note that the factor found to have the strongest bearing upon the decision to imprison was the criminal record of the offender. The second most important factor was the gravity of the criminal offence. For this reason the two correlates were factored into the punishment grid as a horizontal and vertical axis respectively. From this grid the judge can deduce whether the offender should be imprisoned, and if so what the range of permissible imprisonment would be. The vertical axis is made up of ten categories of crime and they are ranked according to seriousness. One may say that this is based on the just desert principle, according to which one should be punished more heavily for serious crimes. The aim of retribution seems to be uppermost in this axis. The horizontal axis, on the other hand, is supposed to represent the criminal history of the offender, usually a record of previous convictions. Under this axis the offender is awarded negative points for his previous convictions. If the offender was convicted for a criminal offence with intention this would count as one point, whereas a conviction for a minor criminal offence with recklessness or negligence would count half and quarter of a point respectively. A point is also added if the offence was committed while the offender had been released on probation or parole for a previous offence, or has actually committed the offence in prison. If the offender gains more points he moves up this axis which mainly deals with his previous history, and this shows how dangerous the offender is likely to be to the community. Therefore, in this horizontal axis the aim of incapacitation seems to be the uppermost aim. If an offender gathers one point or less than one point (half or quarter of a point), that offender is categorized to be sentenced under a non custodial measure, especially a suspended sentence or a community service order. The cut-off line (below one mark) indicates that a non custodial punishment should be imposed only below the line. It is important to note that the Court may depart from the grid by citing reasons for the departure. If a judge fails to follow the grid, that punishment may be challenged by the offender or the prosecution party under 'review of sentencing'. Under this system more violent offenders are liable to imprisonment, while less dangerous ones are more likely to stay outside the prison. [67]

67. http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/resources/file. Last visit 20th November 2013.

State of Victoria in Australia has a Sentencing Advisory Council that from time to time publishes guidelines on a variety of issues related to sentencing, although it has not established a full set of guidelines for the various offences. Nonetheless, the Council also publishes reports on prevailing sentences and sentencing trends in relation to various offences, including robbery.[68] In Western Australia Sentencing Act 1995, was enacted to amend the law relating to sentencing for criminal offences. In this statue, provisions are set out for the principles of sentencing, aggravating and mitigating factors, reduction of the sentence on plea of guilty, mandatory imprisonment and eligibility of parole. In New South Wales, Crimes Sentencing Procedure Act 1999, also was enacted to set out provisions relating to purpose of sentencing, sentencing guidelines, modes of sentencing, aggravating, mitigating and other factors in sentencing, participation of the victim of crime in the senescing process and the sentencing process.

In England and Wales, the types of sentence and maximum level of sentence for each offence that may be imposed for a particular offence are specified by statutes. The statues are known as Acts of Parliament. Prior to 2003, sentencing legislation were spread across twelve separate Acts. Many have been repealed by the Criminal Justice Act 2003, which introduced significant changes to sentencing from 2005. Now the main statute on sentencing is the Criminal Justice Act 2003, which created a framework for sentencing decisions in the courts. Although the Act sets out a number of factors that the court must take into account when passing sentence, the weight to be attached to each factor in a case is a matter for the sentencing judge. This Act introduced new developments to the law relating to police powers, bail, disclosure, allocation of criminal offences, prosecution appeals, double jeopardy, hearsay evidence, bad character evidence, sentencing and release on licence. Part 12 of the Criminal Justice Act made substantial amendments to nearly every part of sentencing practice containing 159 sections and referring to 24 schedules.[69] The 2003 Act sets out provisions for the principles underlying sentencing, punishment, crime reduction, reform and rehabilitation, public protection and reparation which were previously part of the common law. Further, the 2003 Act created the Sentencing Guidelines Council to give authoritative guidance.

The Israeli Penal Law Bill which yet to be passed by the parliament, (Amendment No. 92, Structuring Judicial Discretion in Sentencing) 5766-2006 proposes that a committee be set up to establish sentences that will serve as starting points for judges in their sentencing deliberation (starting sentences) The starting sentence is the sentence which preserves the correlation between the severity of the punishment and the typical case of the offence, when there are no aggravating or mitigating circumstances. Section 40C of

68. However, it is significant to note the New South Wales sentencing laws have become unnecessarily complex, leading to a number of appeals. Appeals delay final judgments and extend the trauma for victims of crime as well as imposing extra, avoidable cost on the system therefore in September 2011, the Attorney General commissioned the NSW Law Reform Commission to review the sentencing laws in NSW and the commission submitted a report to simplify the existing sentencing law.

69. The rules set out in the Powers of Criminal Courts (Sentencing) Act 2000 was almost wholly replaced by 2003 Act though 2000 Act had only been passed three years previously and was itself coming slowly into force.

the bill indicates that in determining the proportionate sentence, consideration must be given to the social value which has been harmed as a result of committing the offence, the degree of harm caused to it, the prevailing sentencing policy, and the fitting sentencing policy. The bill declares that the requirement to preserve the correlation between the severity of the offence and the culpability of the defendant on the one hand, and the severity of the sentence on the other hand, expresses the principle of desert. The starting sentences express the degree of gravity with which society regards the offence, thereby promoting a consistent approach to sentencing.[70]

Conclusion

The object of a criminal trial is to determine whether the accused person is guilty of the offence he is charged with and to impose appropriate punishment if he is proved guilty on the basis of an elaborate system of substantive and procedural criminal law. The determination of the issue; the choice of an appropriate type and degree of punishment out of many permitted by law in a particular situation is of enormous consequence to the individual offender as well as to the victim and to society at large. While the offender's life, liberty, or property and his entire future hinge on the outcome of the sentencing process, it is also bound to have an impact on social interest, which ought to be the primary concern of the criminal law machinery. Various means of punishments are available to the courts under the provisions of law governing a particular kind of offence. The process of punishment should involve the determination of the appropriate degree of punishment in both qualitative and quantitative terms. The determination of the degree of punishment should vary from case to case; it should be appropriate to each offender individually, and at the same time the disparity of punishment for the same offence should be minimized by following formal criteria for determining the appropriate degree of punishment. Therefore, Sri Lanka should consider some reforms in order to prevent anomalies in the sentencing procedure. One of the suggestions is to conduct a research on this topic and introduce a new policy and guidelines through a statute which will provide more clear legal structure for sentencing and bring a better clarity, simplicity, consistency, fairness to the process and finally justice to offender, victim and the society at large.

70. *Federal Sentencing Reporter,* Vol. 22, No. 4, pp. 232–242, ISSN 1053-9867 electronic ISSN 1533-8363.©2010 Vera Institute of Justice; http://www.ucpressjournals.com/reprintInfo.asp. DOI: 10.1525/fsr.2010.22.4.232 last visit on 20th November 2013.

Intellectual Property Law and Criminal Liability: Some important aspects

Dr. D.M. Karunaratna
LL.B.(Hons), M.Phil, Ph.D.
Attorney at Law

The Intellectual Property Act No. 36 0f 2003 has offered the owners of intellectual property rights certain specific opportunities to go before the Court – civil as well as criminal – seeking its intervention to safeguard the protected rights against infringement. The provisions are also available in relation to some other aspects of the enforcement of protected rights such as infringement proceedings by or at the request of a licensee, declaration of non-infringement and customs control. This work pays attention to criminal liability arising under two selected areas in Intellectual Property Law - copyright and related rights and marks. The majority of the instances of criminal prosecution at present comes under these two areas.

A variety of provisions are available in the Intellectual Property Law in relation to the criminal sanctions involving copyright and related rights and marks. They broadly deal with three main areas offences, jurisdiction and procedure.

Offences

(1). Offences involving copyright and related rights

The Copyright concerns the rights of the authors of literary and artistic works whereas the related rights covers the rights relating to performances, production of sound recordings and broadcasts. There are several offences involving these two subjects.

(a). Infringement of rights

Section 178 (1) of the Act declares that any person who willfully infringes any of the rights protected under the provisions relating to copyright and related rights shall be guilty of an offence.[1] It further declares that such a person is liable on conviction after trial before a Magistrate to a fine not exceeding five hundred thousand rupees or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment. In the case of second or subsequent conviction, the fine or the term of imprisonment or both may be doubled.

The 'willfulness' is the mental element of the offence of infringement of the protected rights. With regard to the meaning of the word 'willful' there exist conflicting judicial opinions in the English law. In certain cases it has been expressed that 'willfully' requires no mensreaother than that involved in committing the forbidden act intentionally, even without the knowledge of the circumstances making it forbidden.[2] The other view is that a person does not commit an offence 'willfully' unless he had not only the intention to commit the act but also full knowledge of the circumstances which render his act criminal.[3] In view of the provisions of section 72 of the Penal Code, it is logical to propose that the latter construction is better and valid in the law of Sri Lanka.

(b). Sale, display for sale and possession

Any person knowing or having reasons to believe that copies have been made in infringement of the protected rights sells, displays for sale or has in his possession for sale or rental or for any other purpose of trade any such copy is, under section 178(2), guilty of an offence. Such offender is liable on conviction by a Magistrate to a fine not exceeding five hundred thousand rupees or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment. In the case of second or subsequent conviction, the fine or the term of imprisonment or both may be doubled.

(c). Use of computer programs

Any person knowing or having reasons to believe that he is in possession or has access to a computer program infringing the rights of another person, and willfully makes use of such program for commercial gain is, under section178 (3), guilty of an offence and is liable on conviction by a Magistrate to a fine not exceeding five hundred thousand rupees or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.

1. Section 22(2) (g) provides: " Any person who infringes or attempts to infringe any of the rights protected under this part shall be guilty of an offence and on conviction be liable to any penalty as provided for in Chapters XXX-VIII and XLI of the Act." Thus, the infringement of copyright and related rights is an offence under section 22 (2) (g) as well. However, this section does not refer to the requirement of mensreaas a constituent element of the offences. Consequently, the question as to whether this section recognizes the strict liability arises. It is a well-settled principle in the Criminal Law in Sri Lanka that *mensrea* is always a constituent element of any offence unless the particular statute directs otherwise. See for details the discussion on 'attempted infringement'.
2. Cotterill v. Penn (1936) 1 KB 53.
3. Wilson v. Inyang(1951) 2 KB 799. See G.L. Peiris. General Principles of CriminalLiability of Sri Lanka – 2nd Ed. p. 25.

(d) Attempted infringement

Section 22 (2) (g) declares that any person who infringes or attempts to infringe any of the protected rights shall be guilty of an offence and on conviction be liable to any penalty as provided for in Chapters XXXVIII and XLI of the Act. Consequently, any act of attempted infringement of copyright or related rights constitutes a punishable offence. In terms of sections 22(2)(g) and 178 (1) of the Act the offence of attempted infringement carries the punishment of the fine not exceeding Rupees five hundred thousand or the imprisonment for a period not exceeding six months or both such fine and imprisonment. In the case of second or subsequent conviction, the fine or the term of imprisonment or both may be doubled.

Section 22(2)(g) is silent about the mental element of both the offences of infringement of rights and attempted infringement of rights. Thus, it is relevant to examine whether this section does not require the establishment of mensrea as a constituent part of these offences.

A number of domestic judicial decisions have firmly established the application of Chapter IV[4] of the Penal Code to all the penal statutes in Sri Lanka.[5] These decisions give effect to the 'doctrine of error'[6] as a ground of relief from criminal liability in all the offences. Consequently, the legal system of Sri Lanka recognizes mensrea as an essential ingredient of all the penal offences unless the particular statute provides otherwise.

(2). Offences involving marks

The Intellectual Property Act recognizes two kinds of marks – trademarks and service marks. A mark which is a visible sign serving to distinguish the goods or services of different enterprises. Where a mark relates to goods it is called a 'trademark' whereas a mark relates to services it is called a 'service mark'. The governing legal norms of these two types of marks are the same. In this work also a 'mark' cover both types of marks – trademarks and service marks. A mark receives certain statutory rights upon registration.

(a). Infringement of rights

Section 184 declares that any person who willfully[7] infringes the rights of any registered owner, assignee or licensee of a mark shall be guilty of an offence. Such person is liable on conviction after trial before a Magistrate to a fine not exceeding five hundred thousand rupees or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment. In the case of second or subsequent conviction, the fine or the term of imprisonment or both may be doubled.

4. Which deals with general exemptions from criminal liability.
5. Perera v. Munaweera (1955) 56 NLR 433, Munasinghe v. Peiris (1969) 74 NLR 542 and Thasthakeer v. Jayasekera (1972) 75 NLR 358.
6. This principle is embodied in section 72 of the Penal Code. It states: " Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it."
7. See the reference to 'willfulness' under the offences involving copyright and related rights.

(b). False representations regarding marks

The false representations regarding marks constitute, in terms of section 185, the subject matter of a separate offence. Accordingly, any person who, for industrial or commercial purposes, makes a representation – (i) with regard to a mark not being a registered mark to the effect that it is a registered mark;[8] (ii)to the effect that a registered mark is registered in respect of any goods or services regarding which the registration has not been carried out; or (iii)to the effect that the registration of a mark gives an exclusive right to the use thereof in any circumstances in which, having regard to the limitations recorded in the Register of Marks, the registration does not give that right,is guilty of an offence and is liable on conviction after trial before a Magistrate to a fine not exceeding five hundred thousand rupees or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment.

A person is deemed to represent that a mark is registered if such person uses in connection with the mark the word 'registered' or any word or sign expressing or implying that the registration has been obtained for the mark.[9]

Section 185 is silent about the mental element of the offences concerned. Thus, a question arises as to whether mensrea is not a constituent part of those offences.

A number of judicial decisions of Sri Lanka[10] have held that Chapter IV[11] of the Penal Code, in the light of section 38 (2)[12] of the Penal Code, applies to all the penal statutes. They have also accepted the doctrine of error which is embodied in section 72 of the Penal Code[13] as a ground of relief from the criminal responsibility. Consequently, the defences embodied in Chapter IV of the Penal Code must necessarily apply to all the offences created by the Intellectual Property Act. On this basis, the doctrine of error or the defence of mistake of facts in good faith becomes an important defence in the law of marks as well. In view of the doctrine of error, it is recognized that mensrea is an essential element of all the penal offences of the legal system of Sri Lanka unless the statute concerned provides otherwise.[14] It is therefore observed that the mental element is an essential constituent part of the offences referred to in Section 185 of the Act.

8. 8See Mohamed Cassim v. Yoosoof (1931) 32 NLR 239. The use of the word 'registered is a representation' to the effect that the mark is registered.

9. S. 185 (2) of the Act.
10. Perera v. Munaweera *(Supra)*.Munasinghe v. Peiris *(Supra)* .Thasthakeerv.Jayasekare (Supra).
11. Which deals with the general exceptions from criminal liability.
12. Which states that the word 'offence' denotes a thing punishable in Sri Lanka under the Penal Code or under any other law.
13. It states: "Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it."
14. See Weerakoon v. Ranhamy (1921) 23 NLR 33 – 44, Gunasekera v. Dias Bandaranaike (1936) 39 NLR 17.

(c). Offences as to marks and trade descriptions under section 186

(i) Section 186 (1) provides: "Any person who (a) forges any mark; or (b) falsely applies15 to goods any mark or marks so nearly resembling a registered mark as to be likely to mislead;16 or (c) makes any die, seal, block, machine, or other instrument for the purpose of forging, or to be used for forging, a mark; or (d) applies any false trade description to goods;17 or (e) disposes of, or has in his possession, any die, seal, block, machine, or other instrument for the purpose of forging a mark; or (f) causes any of the things referred to above in this subsection to be done shall, subject to the provisions of this Part and unless he proves that he acted without intent to defraud, be guilty of an offence." In terms of the provisions of section 190, a person who either (a) without the assent of the owner of the mark makes that mark, or a mark so nearly resembling that mark as to be likely to mislead; or (b) falsifies any genuine mark, whether by alteration, addition, effacement or otherwise is deemed to have forged a mark. Any mark so made or falsified is referred to as 'a forged mark'. In any prosecution for forging a mark, the burden of proving the assent of the owner lies on the accused.

(ii) As declared by section 186 (2), any person who sells or exposes for sale, or has in his possession for sale, or any purpose of trade or manufacture, any goods or things to which any forged mark or false trade description is applied, or to which any mark so nearly resembling a registered mark so as to be likely to mislead, is falsely applied, as the case may be, is guilty of an offence unless he proves (a) that having taken all reasonable precautions against committing an offence he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, or trade description; and (b) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or (c) that otherwise he had acted innocently.

The provisions of section 186 (2) are identical to those of section 152 (2) of the Code of Intellectual Property Act No. 52 of 1979 which received the attention of the Court of Appeal in *Jaleel & another v. Officer-in-Charge,Police Station, Kegalle.*[18] The Court has held, inter alia, that the following three defences were available to a person charged with an offence under section 152 (2): (a) that the accused had taken all reasonable

15. Abdul Aziz v. Mohamed Buhary (1937) 39 NLR 364, CaderSaibo& Co. v. Mowlana *(Supra)*, Leelananda v. Earnest de Silva *(Supra)*.
16. The likelihood of deception is sufficient. See Lakhan v. Emperor AIR 1925 Cal 149.
17. See s. 101 for the definitions of 'trade description' and 'false trade description'.
18. (1994) 1 Sri LR 225.

precautions and that he believed that the mark or trade description to be genuine, (b) that the accused furnished to the prosecutor on demand by him, all the information within his knowledge, in respect of the person from whom the accused obtained the goods, and (c) that the accused acted innocently.

The three defences mentioned above were set out in clauses (a), (b) and (c) of section 152 (2) of the Code of Intellectual Property Act. Even though the Court has in this case decided that there are three defences available to an accused, it is arguable that these clauses recognize only two defences and not three defences. The conjunction 'and' has been used between the clauses (a) and (b) whereas the word 'or' has been used between the clauses (b) and (c). The word 'and' is generally conjunctive and therefore it appears that clauses (a) and (b) are interconnected and do not constitute two different defences. On the contrary, clause (c) can stand on its own as a defence independently of clauses (a) and (b). The decision of the Court does not indicate whether or not the Court has paid due attention to the word 'and' which is conjunctive and the word 'or' which is generally disjunctive. It is also not clear whether the Court has defined the word 'and' to mean 'or' for some legitimate reasons. The substitution of words in interpreting the law is permitted only to the extent that the intention of the legislature is properly carried out.

One of the major features of section 186 (1) and section 186 (2) is that the accused may escape the criminal responsibility by establishing certain recognized facts. As held in *Jaleel and another v. Officer-in-Charge, Police Station, Kegalle* those instances should operate as defences that may be established by the accused under section 105 of the Evidence Ordinance and not as constituent elements of the offences which compel the accused to prove that he is not guilty. It is well-settled in the law of Sri Lanka that the overall burden of proof as set out in section 101 of the Evidence Ordinance concerns one's duty to prove one's case as a whole. Thus, the prosecutor is bound to prove that the accused is guilty of the particular offence by establishing all the elements of the offence – *actusreus as well as mensrea.*Once the prosecution duly discharges its duty to prove that the accused is guilty, the accused may establish that the case against him falls within one of those defences.

(iii) Section 186 (3) declares that "any person who imports any piece-goods ordinarily sold by length or by the piece, manufactured outside Sri Lanka, or who sells or exposes for, or has in his possession for sale or any purpose of trade, any piece-goods ordinarily sold by length or piece , whether manufactured within or outside the territory of Sri Lanka, which do not have conspicuously stamped in English numerals on each piece, the length thereof in standard metres, or in standard metres and a fraction of such a metre, according to the real length of the piece, shall be guilty of an offence."

The proviso to this subsection states: "Provided that nothing contained in this subsection shall apply to any piece-goods manufactured within the limits of Sri Lanka by hand labour only."

A person who is found guilty of an offence under section 186, after trial before a Magistrate, is liable to a fine not exceeding Rupees five hundred thousand or to imprisonment for a term not exceeding two years or to both such fine and imprisonment. In the case of second or subsequent conviction, the above fine or term of imprisonment or both may be doubled.[19]

A Magistrate is empowered in this context to make a variety of orders irrespective of the fact whether the accused is found guilty or not. Thus, a Magistrate may, whether the alleged offender is convicted or not, order that every chattel, article, instrument or thing by means of or in relation to which the offence has or might have been committed shall be destroyed or declared forfeit to the State or otherwise dealt with as he may think fit.[20]

Section 189 states that the statutory provisions of the Act in respect of the application of a false trade description to the goods, or in respect of the goods to which a false trade description is applied, extend to the application to the goods (i)of any such figures, words, marks or arrangement or combination thereof, whether including a registered mark or not, as are likely to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are; (ii)of any false name or initials of a person and to the goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description.

The expression 'false name or initials' means, as applied to any goods, any name or initials of a person which – (i)are not a mark, or part of a mark; and (ii)are identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with the goods of the same description, and not having been authorized the use of such name or initials; and (iii)are either those of a fictitious person or of some person not *bonafidecarrying* on business in connection with such goods.[21]

It is also provided that a trade description which denotes or implies that in any goods to which it is applied which contains more metres or standard metres than contained therein, is a false trade description.[22]

Section 192 makes the following provisions with regard to the application of marks and trade descriptions:

A person is deemed to apply a mark or trade description to the goods if he (i)applies it to the goods themselves; or (ii)applies it to any covering, label, reel or other thing in or with which the goods are sold or exposed, or had in possession for any purpose of sale, trade, or manufacture; or (iij)places, encloses, or annexes any goods which are sold or exposed,

19. 19S. 186 (4) of the Act.20S. 186 (5) of the Act.21S. 189 (2) of the Act.22S. 189 (3) of the Act.

20. S. 186 (5) of the Act.

21. S. 189 (2) of the Act.

22. 22S. 189 (3) of the Act.

or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a mark or trade description has been applied; or (iv)uses a mark, or trade description in any manner likely to lead to the belief that the goods in connection with which it is used are designated or described by that mark, or trade description.[23]

The expression 'covering' includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper whereas the expression label includes any band or ticket.[24] A mark or trade description is deemed to be applied whether it is woven, impressed, stamped, branded, or otherwise worked into or annexed, or affixed to the goods, or any covering, label, reel or other thing.[25] A person is deemed to falsely apply to the goods a mark, if he, without the assent of the owner of the mark, applies such mark or any mark so nearly resembling it as to be likely to mislead the public.[26] In any prosecution for falsely applying a mark to the goods, the burden of proving the assent of the owner lies on the accused.[27]

Infringement is a continuing act

Every act of infringement constitutes a distinct and separate offence. As the Supreme Court has decided in St. Regis Packaging (Pvt)Ltd. v. Ceylon Paper Sacks Ltd.[28] the infringement of intellectual property is a continuing act. Even though this case deals with a matter of injunction involving a patent, the decision of the Supreme Court to the effect that the infringement of intellectual property is a continuing act should be applicable to criminal sanctions as well.

Jurisdiction

The Magistrate's Court has the jurisdiction in respect of the offences involving the intellectual property rights.[29]

Procedure and evidence

The Act contains the provisions dealing with certain evidentiary and procedural aspects relating to criminal sanctions. They may be briefly stated as follows:

(i) How a mark is described.

In any indictment, charge, proceedings or document in which any mark or forged mark is required to be mentioned, it is sufficient, without further

23. S. 192 (1) of the Act.
24. 24S. 192 (2) of the Act.
25. S. 192 (3) of the Act.
26. S. 192 (4) of the Act.
27. *Ibid.*
28. *(Supra).* See alsoHoliday Inn Inc. v. AnnemalaiMutthappa (1986) Colombo Appellate Court Law Reports (Vol 1 P III 336).
29. S. 178 of the Act, s. 53 of the Judicature Act (as amended) and s. 9 of the Code of Criminal Procedure Act (as amended).

description and without any copy or facsimile, to state that mark or forged mark to be a mark or forged mark.[30]

(ii) Rules as to evidence.

In any prosecution for an offence referred to above, (a) an accused, and his or her spouse, as the case may be, may, if the accused thinks fit, be called as a witness, and, if called, must be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness; and (b) in the case of the imported goods evidence of the port of shipment is prima facie evidence of the place or country in which the goods were made or produced.[31]

(iii) Complainant and accused

The complainant in criminal proceedings can be the owner of the rights. Otherwise, a duly appointed agent of the owner could be the complainant. Similarly, any member of the public may make a complaint to the police. There can be instances where the police can act on their own even without a complaint or first information.[32] The accused can be the person or persons who committed the alleged offence. If the offender is a body corporate, every person who was a Director, General Manager, Secretary or of similar position is, in terms of section 187 of the Act, liable.

(iv) Costs

In any prosecution under the Act, the Court may order costs to be paid to the accused by the prosecutor or to the prosecutor by the accused, having regard to the information given by, and the conduct of, the accused and the prosecutor respectively, and the sum so awarded as costs is recoverable as if it were a fine.[33]

(v) Limitation

No prosecution under the Act can be commenced after the expiration of three years after the commission of the offence changed or two years after the discovery thereof by the prosecutor, whichever expiration first occurs.[34]

30. S. 194 of the Act.
31. S. 195 of the Act.
32. Arumugamv.OIC, Police Station, Mirihana (1969) 72 NLR 301 (The commission of the offence in the presence of a police officer).
33. S. 198 of the Act.
34. S. 202 of the Act.

(vi) Offences are cognizable and bailable

All the offences under the Intellectual Property Act are 'cognizable' and 'bailable' within the meaning of the Code of Criminal Procedure Act No. 15 of 1979 (as amended).[35]

(vii) Application of the Code of Criminal Procedure Act.

The provisions of the Code of Criminal Procedure Act No. 15 of 1979 are applicable to any offence committed under the Act.[36] Thus, its provisions relating to the areas such as investigation, arrest, search, trial, judgment, appeals and revision are applicable to the offences involving intellectual property rights.

Search, seizure and disposal of counterfeit goods

Section 197 of the Act makes provisions inter alia with regard to search, seizure and disposal of counterfeit goods in certain circumstance. They can be briefly highlighted as follows:

(a) Summons and warrant for arrest

Upon the receipt of information of an offence being committed under Part XI of the Act, a Magistrate may, in terms of section 197 (1) (a), issue either a summons requiring the person alleged to have committed such offence to appear in Court and show cause or where such person fails to appear, issue a warrant for the arrest of such person.

(b) Warrant for seizure

A Magistrate is empowered to issue a warrant for seizure of counterfeit goods. Section 197 (1) (b) provides: "The Magistrate may upon being satisfied by information on oath that there are reasonable grounds to believe that any goods or things by means of, or in relation to, which such alleged offence has been committed are in any house or premises of the person charged on the basis of such information, or in his possession or under his control, in any place, such Magistrate may issue a warrant under his hand"

(c) Seizure

Section 197 (1) (c) provides for seizure of such goods in the following words: "It shall be lawful for any Police Officer, or other person named or referred to in the warrant, to enter such house, premises, or place at any reasonable time of the day, and to search therefor and seize such goods or things; and

35. S. 201 of the Act.
36. *36Ibid.*

any goods or things seized under any such warrant shall be brought before the Magistrate's Court for the purpose of determining whether such goods are liable to forfeiture under this Part."

(d) Forfeiture

The provisions relating to the forfeiture of such goods are available in section 197 (2). They are identified to as follows.

Notice

Section 197 (2) (a) provides for the notice of forfeiture. Accordingly, "if the owner of any goods or things which, if the owner thereof had been convicted, would be liable to forfeiture under this Part, is unknown or cannot be found, any information or complaint may be led for the purpose only of enforcing such forfeiture, and a Magistrate may cause notice to be published requiring reasons to be shown to the contrary at the time and place named in the notice, as to why such goods or things should not be forfeited."

Failure to show cause and forfeiture

Section 197 (2) (b) states: "If the owner or any person on his behalf, or other person interested in the goods or things, fails to show sufficient cause to the contrary at the time and place named in the notice, Magistrate may order such goods or things or any of them to be forfeited." It is further provided that every such order is subject to appeal.[37]

Disposal of forfeited goods

With regard to the disposal of forfeited goods or things section 197 (3) makes the following provisions: "Any goods or things forfeited under this section, or under any other provisions of this Part, may be destroyed or otherwise disposed of, in such manner as the Magistrate who ordered the forfeiture may direct, and the Magistrate out of any proceeds which may be realized by the disposition of such goods (all marks and trade descriptions being first obliterated), may make an award to an innocent party for any loss he may have sustained in dealing with such goods."

Miscellaneous matters

Certain miscellaneous matters relating to the enforcement of the protected rights are referred to below.

(i) Offences by bodies corporate

Section 187 declares that where an offence under the Act has been committed by a body corporate, every person who at the time of the commission of the offence was a Director, General Manager, Secretary or other similar officer

37. The Provisions of the Code of Criminal Procedure Act are applicable to such appeals.

of that body is deemed to be guilty of such offence, unless he proves that the offence was committed without his consent or connivance and that he exercised all due diligence to prevent the commission of the offence.

(ii) Punishment by accessories

Any person who, being within Sri Lanka, abets the commission outside Sri Lanka of any act which, if committed within Sri Lanka, would under the Act be an offence, is deemed to be guilty of that offence, and is liable to be indicted, proceeded against, tried and convicted in any district or place in Sri Lanka in which he may be as if the offence had been committed therein.[38]

(iii) Exception of certain persons employed in the ordinary course of business

Section 193 makes the following provisions in this connection: "Where a person is charged with making any die, stamp, block, machine, or other instrument for the purpose of forging or being used for forging a mark, or with falsely applying to goods any mark or any mark so nearly resembling a mark as to be likely to mislead, or with applying to goods any false trade description or causing any of the things in this section mentioned to be done, and proves;

(a) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, stamps, blocks, machines, or other instruments for making, or to be used in making, marks, or as the case may be, to apply marks or descriptions to goods and that in the case which is the subject of the charge he was so employed by some person resident in Sri Lanka, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(b) that he took reasonable precautions against committing the offence charged with; and

(c) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or trade description; and

(d) that he gave to the prosecutor all the information in his power with respect to the person on whose behalf the mark or description was applied,

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor unless he gives due notice to the prosecutor regarding his intention to rely on the defence specified in this section."

38. S. 196 of the Act.

(iv) Implied warranty on sale of marked goods

On the sale, or in the contract for the sale, of any goods to which a mark, or trade description has been applied, the vendor is deemed to warrant that the mark is a genuine mark, and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of Part XI of the Act, unless the contrary is expressed in writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to, and accepted by, the vendee.[39]

(v) Inapplicability of provisions as to false description

Section 199 makes the following provisions in this regards. "Where, at the commencement of the Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this part with respect to false trade descriptions shall not apply to such trade description when so applied."

"Provided that where such trade description includes the name of a place or country which is likely to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, the provisions of this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there".[40]

(vi) Savings

(a) Part XI of the Intellectual Property Act which deals, inter alia, with civil litigation and criminal sanctions does not exempt any person from any action, suit or other proceedings which might, but for the provisions of Part XI, be brought against him.

(b) Nothing in Part XI entitles any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence under Part XI.

39. 39S. 203 of the Act.

40. S. 199 of the Act.

(c) Nothing in Part XI is construed so as to make any servant of a master resident in Sri Lanka liable to a suit or prosecution due to disclosure of information regarding the servant of the master, when required by or on behalf of the prosecutor who, bona fide, acts in compliance with the instructions of such master.[41]

41. 41S. 200 of the Act. Compare section 169 of the repealed Code of Intellectual Property Act. Section 200 is a verbatim reproduction of it. However, section 200 (3), which corresponds to section169 (3), is confusing and meaningless. This appears to be a drafting or printing error. Even the Sinhala text of s. 200(3) is similarly confusing and meaningless.Section 169(3) is clear and sensible.

USE OF DNA TECHNOLOGY FOR CRIME INVESIGATION IN SRI LANKA.

Ruwan J Illeperuma Ph.D.
Senior Scientist, Head-Molecular Forensics,
Genetech.

The prevalence of violent crimes in Sri Lanka has become more frequent over the past few years. The perpetrators of such crime often evade justice due to the burden of proof of the identity of the criminals.

Forensic genetics, since it was introduced has revolutionized forensic science and enhanced the ability of law enforcement to match perpetrators with crime scenes. Since its introduction to Sri Lanka in 1999 hundreds of criminal cases across the Island are solved with guilty suspects punished and innocent ones freed because of the power of a silent biological witness, DNA at the crime scene. DNA technology has become the most useful investigative tool in the world to law enforcement since the development of chiral fingerprinting over 100 years ago.

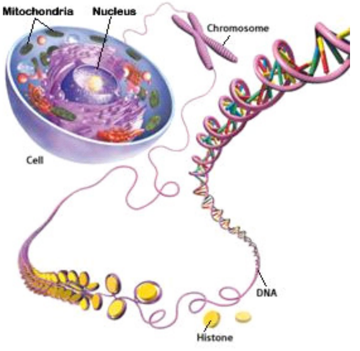
Because each person's DNA is different from that of every other individual (except for identical twins), examination of polymorphisms in our genetic material, by DNA technology is the most powerful method for accurate human identification. DNA can be isolated from a number of biological samples, such as hair, saliva, blood, bone, teeth etc. The technology currently being applied is so sensitive that even a minuscule amount of bodily fluid or tissue can yield accurate DNA information. Therefore this technology has a wide application in identifying perpetrators of crime and in confirming familial relationships of humans. Since 2002 DNA based human identification technology has been successfully applied in more than 2000 criminal cases and 6500 civil cases that have been referred by the Courts of Sri Lanka. The level of accuracy achievable guarantees absolutely no risk of convicting the wrong person and thereby establishing the innocence of those wrongly convicted. Increasing awareness of the power of DNA testing to solve crimes has increased demand for DNA analysis in Sri Lanka.

What is DNA?

Deoxyribonucleic Acid abbreviated as DNA is the blueprint for life. It is a very long molecule that carries genetic information that governs a person's physical characteristics. In all life forms, from viruses to humans, the basis for variation lies in the genetic material called DNA. Every living organism, with the exception of some viruses, has DNA as its genetic blueprint. In every cell of a person, the DNA blueprint is identical—whether it is a white blood cell, a skin cell, a sperm cell, or a hair root cell.

Image: 1

DNA is found within the nucleus of the cell



DNA is an extremely complex chemical that made of five simple chemical elements: carbon, hydrogen, oxygen, nitrogen, and phosphorus.

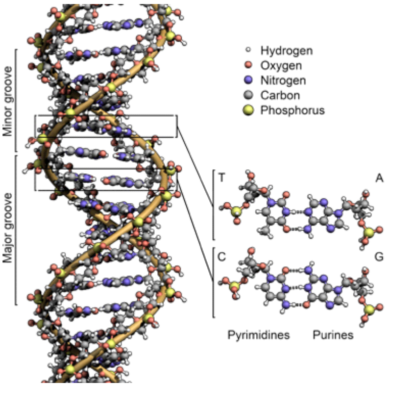
Those five elements then combine to form sugar, phosphate, and nitrogenous base molecules to constitute what is called a nucleotide. Nucleotide is the building block of a DNA molecule.

Image: 2

DNA structure;

(DNA is a double helix composed of sequentially arranged nitrogenous bases)

(A, G, T, and C)



DNA is made up of two strands forming a double helix (similar to a spiral staircase in structure). Nitrogenous bases (A, G, T, and C) pair with each other in a specific way; A always pairs with T and G always pairs with C on opposite strands of the helix. This is called complementary base pairing. Thus if the sequence of one DNA strand is known, then the arrangement of nucleotide in the other strand can be determined. This is one of the fundamental principles behind DNA testing.

The primary task of DNA is to encode information. DNA store genetic information within the molecule using a language of which consists of an alphabet comprising only four letters. Each letter in DNA alphabet stand for the four nitrogenous bases found in the nucleotide and thus in DNA: thymine, cytosine, adenine, and guanine (abbreviated T, C, A, and G). Even though this alphabet is very short, an enormous array of different arrangements of nucleotides (nucleotide sequences) can exist in a strand of DNA, which is normally hundreds of thousands to millions of nucleotides long.

Exactly half of the DNA content within a nucleus of a human individual originates from his/her mother and the other half from the father. Because entire nuclear DNA within a human cell is a 50- 50% mixture of the maternal and paternal genetic material, genetic variation is generated in within the genome of a child. No two people, except for identical twins, even though born to the same parents, will be exactly alike. Even among brothers who are not physically or genetically identical; their DNA is different.

DNA testing procedure

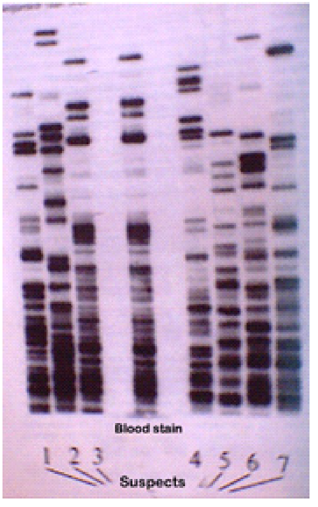
When a biological material that can be considered as a DNA source such as blood, hair or semen is recovered from a scene of a crime it should be collected using proper scientific techniques in order to minimize the damage to DNA.

Once this biological material received in the laboratory, the process of DNA testing begins. The first step is to isolate and purify DNA chemically from the biological material. This is known as DNA extraction. Once a purified DNA sample is obtained there are several methods of performing the DNA analysis. The two most common are designated as Restriction Fragment Length Polymorphism (RFLP) and polymerase chain reaction (PCR).

Restriction Fragment Length Polymorphisms (RFLPs)

RFLP is one of the older methods used in DNA based forensic investigations. It is a technique for analyzing the variable lengths of DNA fragments that result from digesting a DNA sample with a special kind of enzyme. This enzyme, which is known as a "restriction endonuclease", cuts DNA at a specific nucleotide sequence pattern known as a restriction endonuclease recognition site. Thus Restriction Endonucleases act like molecular scissors to cut the DNA into fragments. The presence or absence of certain recognition sites in a DNA sample generates variable lengths of DNA fragments, which is then separated and visualized as DNA banding patterns or DNA profiles.

Image:3
Eight DNA banding patterns (profiles) obtained from Restriction Fragment Length Polymorphisms (RFLP) method



Upon comparison of the patterns, the suspect is then either absolutely excluded as the donor of the biological sample, or a match is made.

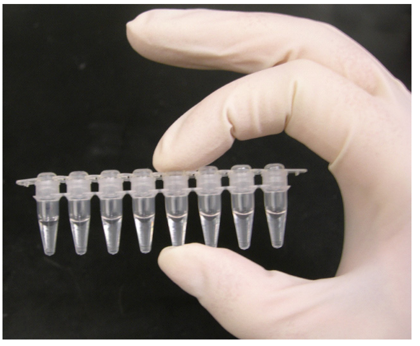
RFLP was one of the first applications of DNA analysis in forensic investigation, and was referred to as "DNA fingerprinting". With the development of newer and more efficient DNA-analysis techniques, RFLP is not much used as it once was, because it requires relatively large amounts of DNA.

Polymerase Chain Reaction (PCR)

Polymerase chain reaction (PCR) is used to make millions of exact copies of DNA extracted from a biological sample. DNA testing with PCR therefore allows the analysis of biological samples with as small as a few skin cells or even from a fragment of a body hair strand.

This copying process or the amplification / replication process allows laboratories to develop DNA profiles from extremely small samples of biological material. PCR is a method of chemical synthesis of identical copies of DNA in a glass tube. A typical PCR chemical reaction will theoretically generate more than a billion DNA copies of a single template DNA molecule.

Image: 4
DNA amplification process in a glass tube: Polymerase Chain Reaction (PCR)
Each small tube contain billions of copies of a DNA sample

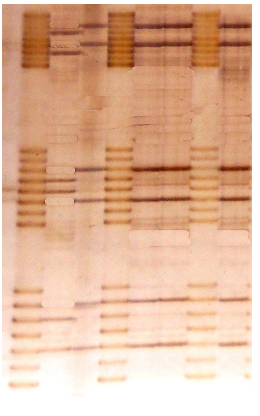


PCR technology is the method currently being used in Sri Lanka for forensic DNA testing. PCR is the most preferred method that is being used in many laboratories throughout the world as an alternative to RFLP because it demands only minute amounts of DNA that are too small for RFLP analysis.

PCR has the capability to chemically amplify DNA in a DNA extract until enough is obtained for analysis. It is particularly useful for DNA analysis of saliva stains, small amounts of tissue, hair samples with hair roots or without roots. A sample of saliva does not contain DNA but does contain epithelial cells detached from the mouth cavity. Evidentiary samples which contain extremely minute DNA; saliva stains left on stamps, envelopes, cigarette butts, and chewing gum can be successfully analyzed by using PCR.

The DNA patterns generated by this method are much clearer than that obtainable through RFLP and can be converted in to numerical DNA profiles for direct comparison with a profile of a known suspect.

Image: 5
Comparison of DNA profiles of post coital biological samples amplified using Polymerase Chain Reaction (PCR) method

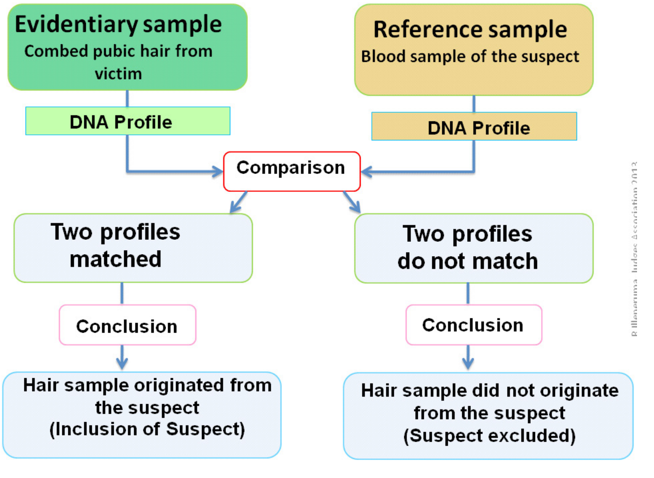


When a match is made between two DNA profiles, the accuracy of the match is determined by consulting human DNA frequency databases; the probability of finding the same match at random is then calculated. Depending on how rare or common the profile is, the probability of a random match of a DNA profile of a Sri Lankan individual can range from 1 in a billion to 1 in 600 trillion.

DNA profiling

Forensic scientists do not look at the entire DNA content of an individual, but rather a set of unique characteristics in DNA. To identify human individuals, 13 regions in human DNA, which are referred to as 'loci', that vary from person to person are scanned in order to create a DNA profile of that individual.

When a DNA sample is analyzed, the resulting DNA pattern is called a DNA profile. Comparison of two such DNA profiles is a powerful means of determining whether two samples may or may not have come from the same person. If two DNA profiles do not match, they must have come from two separate individuals. However, if they do match, there is only a small chance that they come from two different people.



In DNA based forensic investigation the samples can come from either a crime scene or a person; when analyzed they produce either an evidence profile or a known reference profile of a suspect or a victim. The samples used as DNA evidence will be any cell or tissue of the body, except for red blood cells. A second premise in DNA based forensics is that 100% of a person's DNA is the same within and throughout a body of a human either in cells of a person's blood, skin, semen, saliva or hair, the DNA sequence will be the same. In Sri Lanka we have the technology of analyzing more than twenty types of biological samples (as listed in Table: 1) of human origins to be used for forensic investigations.

Table: 1
Biological samples as DNA evidence

Evidentiary sample	**Target biological material for analysis in each sample**
Cigarette butt	Saliva, epithelial cells
Envelopes and stamps	Saliva, epithelial cells
Finger nail clippings	Skin cells
Chewing gum	Saliva, epithelial cells
Bite marks	Saliva
Feces/ vomitus	Epithelial cells of gastro intestinal tract
Vaginal/ anal swabs	Semen
Used condoms	Semen
Clothes with stains	Blood, semen. Saliva, hair, urine
Weapons with stains	Blood, tissue

Because DNA is the same in cells of the body; DNA profiles obtained from different types of biological samples at different times and in different places can be compared to determine whether they may have been originated from a common source. A human biological sample that is found at a crime scene can be tested to check whether a suspect could be a possible source of that sample.

Current methods of forensic DNA testing in Sri Lanka are entirely based on PCR targeting human polymorphic DNA loci, Short Tandem Repeats (STRs). STRs are DNA loci in human genome having tandemly repeated DNA units. These locations consist of repeat units of 1-5 base pairs typically repeated 5-30 times and can be efficiently analyzed by standard PCR techniques. Variability in STR regions in the human genome can be used to distinguish one DNA profile from another. In Forensic Genetics, DNA analysis is performed to obtain a Short Tandem Repeat (STR) DNA profile from an evidence sample from crime scene, which is then compared with the victim and suspect(s) reference sample STR profile, to determine their contribution for that evidence sample.

Sri Lanka uses a standard set of 13 specific STR regions of human DNA which are compliant to CODIS loci of the Federal Bureau of Investigation (FBI) USA. CODIS that stands for Combined DNA Index System is a software program that operates local, state, and national databases of DNA profiles from convicted offenders, unsolved crime scene evidence, and missing persons. The odds that two Sri Lankan individuals will have the same 13 STR loci DNA profile is at least 1 in a billion.

The Chronological Process of DNA Technology, as a tool for forensic investigation

1953 James Watson and Francis Crick describe the structure of DNA

1980 American geneticists discover a region of DNA that does not hold any genetic information and which is extremely variable between individuals- Discovery of Variable Number of Tandom DNA Repeats in humans (VNTRs).

1984 English scientist Alec Jeffreys discovers a method of identifying individuals from DNA - Restriction Fragment Length Polymorphism (RFLP). He named it as "DNA Fingerprinting".

1985 Police in the UK uses forensic DNA profiling for first time.

1986 Kary Mullis discovers Polymerase Chain Reaction (PCR) - method of replicating particular regions of a DNA molecule outside a living cell.

1987 In the UK, police use DNA profiling in a case of two rape murders. Identification of the perpetrator Colin Pitchfork as the world's first to be convicted using DNA technology.

1999 The first use of DNA technology for criminal investigation in Sri Lanka. Introduction by a team of scientists headed by Dr Maya Gunasekara

2002 Genetech the first forensic DNA testing company in Sri Lanka was founded. Currently Genetech is responsible for more than 90% all forensic DNA testing in Sri Lanka.

Applications of DNA based forensics in Sri Lanka

The most widely used application of DNA based forensics is in determination of paternity and establishing family relationships in cases of child maintenance and custody. It is also being used to provid proof of adultery and to establish identity in immigration cases. Since 2003 there were nearly 7000 such tests performed in Sri Lanka. One of the landmark cases is the establishment of the parentage of a baby (Tsunami baby 81) in 2005.

The second important application is for identification of criminals and exoneration of innocent suspects in criminal case work. More than 2500 such cases have been handled in Sri Lanka in cases of homicide, rape, sexual abuse and burglary. The High Court Judge Sarath Ambepitiya assassination case in 2004, and Royal Park murder case in 2005 are among the landmark cases. In the Ambepitiya murder case it was the analysis of a sample of vomit that the police found at the scene of the shooting that led to the positive identification and conviction of one of the suspects.

Hundreds of tests have also been performed to establish the identity of mutilated bodies. After the deadly suicide bombing at Digampathana, Sigiriya in 2007 in which nearly 200 Navy personnel were killed, nearly 70 of the dead could not be identified as they had been blown to pieces. Positive identification of the deceased was achieved upon comparing profiles of them with their close relatives.

For more details on applications of DNA technology- log on to *www.ruwanilleperuma.info*

Related texts:

- Identification, Handing and Preservation of DNA evidence- A field guide. ISBN – 978-955-52504-0-5. A field guide written in Sinhala for Police officers and Judicial Medical officers.
- DNA Fingerprints, Silent evidence in Crime Investigation – ISBN 978-955-52504-1-2 -Sinhala medium

CHILD PROTECTION MECHANISM IN SRI LANKA

Anoma Dissanayake
Attorney at Law
Chairperson, Child Protection Authority

> *"When I approach a child, he inspires in me two sentiments; tenderness for what he is, and respect for what he may become"*
>
> *-Louis Pasteur (1822-1895)*
> *A renowned French chemist and microbiologist*

"Acts of Commission" and "Acts of Omission" of the parents, guardians and other adults can expose children to unnecessary risks of child abuse. Child abuse- physical, sexual, emotional, exploitation or neglect- causes children unnecessary suffering and potentially damages their health and development. Child abuse can take any form varying form of verbal abuse, neglect to rape, prostitution, child trafficking and even murder.

Child Protection is placed at the positive end of the spectrum to counter Child Abuse. According to the United Nation's Convention on the Rights of the Child, and other national and international human rights treaties, the goal of child protection is to promote, protect and fulfil children's rights to protection from abuse, neglect, exploitation and violence.

The United Nations Convention on the Rights of the Child introduced to the world a wide array of civil, political, economic, social and cultural rights which children are entitled to. The Convention also defined a child as 'any human being under the age of eighteen'; unless the age of majority is attained earlier under a state's own domestic legislation (Article 1). Also the Committee on the Right of the Child has emphasized That when States define minimum ages in legislation they must do so in the context of the basic principals within the convention in particular the principals of Non –discrimination (Article 2 for example challenging different marriage ages for boys and girls.)

The Convention was adopted by UN General Assembly in 1989 and came into force in 1990. At present, with 193 States parties who have ratified it, it is the most ratified human rights treaty in the history. United States, and South Sudan are the only states that have not yet ratified this treaty. In May 2000, two Optional Protocols to the Convention were adopted by the UN general assembly: The First Optional Protocol restricts the involvement of children in military conflicts; and the Second Optional Protocol prohibits the sale of children, child prostitution and child pornography. Both protocols have been ratified by more than 150 states to date. A Third Optional protocol was adopted in December 2011 and was opened for signature in February 2012. This Third protocol is aimed at providing a communication of complaint procedure for children, enabling them to seek redress for violations of their rights at international level - if national mechanisms have been exhausted.

Sri Lanka, as a member State of the United Nations, was a signatory to the Child Rights Convention since the year 1990 and ratified it on 12th July 1991. According to the Article 157 of the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978, a duly ratified international agreements shall have the force of law in the country' and no written law shall be enacted and no executive or administrative action shall be taken in contravention of the provisions of such international agreements.

Following the Country's ratification of the Convention, a Children's Charter was developed and approved by Cabinet of Ministers, and a National Monitory Committee to monitor the Government's compliance with the Convention and to report to UNCRC was established. Following the ratification of the United Nations Convention on the Rights of the Child the Government had been under obligation to uphold and promote the rights and obligations inherent in the provisions of the Convention. It is acknowledged that all children should have services and benefits which are universal. These includes access to Health Care, education and children's allowance when necessary.

As a further development subsequent to the ratification of the UNCRC, in December 1996, a Presidential Task Force on Child Protection was appointed with the mandate to review the then existed child care and protection system in the country. This Presidential Task Force recommended a number of legal amendments and administrative reforms. One of the most significant recommendations of this body was to establish an independent authority with extensive powers to monitor and take actions against matters concerning child abuse; to coordinate child protection matters and to advice the government on policy matters relating to child protection. The reason for this recommendation was that, it was highlighted to the Presidential Task Force that the then existed probation and child care services in the country were insufficient to meet the new demands of the UNCRC.

As a result, the National Child Protection Authority (NCPA) was established in the year 1998 through the ActNo.50 of 1998 under the Presidential Secretariat with exclusive and extensive powers to deal with matters relating to child protection in the country.

In the year 2006, a separate ministry was formed by the present President of Sri Lanka to establish a comprehensive protection and welfare system for children and women in the country. As a result the NCPA also came under the purview of the Ministry of Child

Development and Women`s Affairs, to function as the apex body in child protection in the country.

As the principal authority for the protection of children and the promotion of child rights, The NCPA is also entrusted with the task of formulating national policies on the Protection of Children, the Prevention of Child Abuse, and the Treatment of Child Victims.

The NCPA is working with a vision to create a child friendly and protective environment for children in Sri Lanka by protecting them from all kinds of abuse. The NCPA believes the protection of children should be based on four guiding principals.

1. Recognition of children's Best Interests
2. Protection against any forms of harm, exploitation or abuse
3. Cordinated response to child protection
4. Early intervention and prevention

In order to realize this vision, the NCPA is involved in providing a range of services. Legal assistance in cases of child abuse is one of such services. In terms of legal assistance, at present, Police Officers, Investigators and Legal officers work cooperatively together to provide legal assistance for victims of child abuse, tsunami affected children and victims of domestic Violence. The Police Special Investigation Unit of NCPA is networked in such a way to be able to operate in any part of the country at any time in order to protect children from being abused.

1929 ChildLine Sri Lanka – the country's only toll-free 24 hour hotline to receive child abuse complaints from children and adults- is another unique service provided by the NCPA. Established in NCPA in year 2010, the Child Line Sri Lanka is even internationally recognized as one of the best child protection initiatives in the country. Due to this recognition, it was registered as a member of the Child Helpline International in 2011. The ChildLine receives information on incidents of child abuse and refers them to the relevant departments of the NCPA for necessary actions. The ChildLine also provides counselling services for children in need.

The psycho-social unit of the NCPA is also specialized in providing psycho-social services for children, especially to those who are victims of abuse. The psycho-social unit consists of a Clinical psychologist and a team of internationally and locally trained therapists to conduct psycho-social programs for children in communities and institutions.

Special powers are vested in the NCPA by virtue of the Tsunami (Special Provisions) Act No.15 of 2005. The Act makes the NCPA the Guardian of every Tsunami affected child placed under foster care by the surviving parent and of every Tsunami affected child who is left an orphan until the child reaches the age of 18 years. The NCPA is the only place in the country which has video evidence facilities though it is planed to establish the second video evidence unit in Karapitiya Hospital Galle. NCPA is also working on victim protection and also run a safe house for victims to give psychosocial support. The Draft National Child Protection Policy launch by NCPA has received encouraging comments and few concerns and awaiting the Cabinet Approval.

The newly recruited 360 Divisional Child Protection officers attached to the Divisional Secretariats have given fresh hopes to NCPA for the child protection in the country. It will make provisions to develop and implement systematic Guidance for the protection and welfare of Children. The country has a number of responsibilities , obligations and duties in relation to it's younger citizen. Paramount among these is ensuring their safety. No childhood should shattered by abuse. No young life should be lived in the fear of shadow. While it is not possible to prevent all violence, Nor possible to guarantee no child will ever be harmed by neglect or aggression or exploitation or predation it is our duty to do everything in our power as a government and as a society to prevent them. NCPA understand the responsibility and the obligation which was given by the Act No 50 of 1998 taken measures to develop the National guidance for the Protection and welfare of Children and the accompanying Child Protection and Welfare Practice Handbook.

The NCPA also extensively engage in awareness raising programs- ranging from National level mass awareness raising campaigns to Community level programs- on rights of the child, family based protection for children, positive discipline, and child protection and so on. Also the NCPA has proposed amendment to existing Laws including the Bail Act and Children and Young Persons Ordinance.

Evidently, the NCPA is doing its best to ensure children in Sri Lanka are protected from child abuse. But the protection of children is the responsibility of all. The time has come for the public to take an active part in child protection rather than being mere passive observers. As adults, we should ensure that our "Acts of Commission" would not harm any child, rather, would benefit them. And most importantly, we should ensure our "Acts of Omission" would not allow a child's suffering to perpetuate. As the great Irish political philosopher Edmund Burke (1729-1797) once said "All that is necessary for the triumph of evil is that good men do nothing".

The Perspective of Section 81of the Partition Law & It's Applicability

Prasantha De Silva
LL.M [Aberdeen]
Former Secretary Judicial Service Commission
High Court Judge of the North Western Province [Civil]

Partition Actions are instituted for the purpose of Partition or sale of any land or lands belonging in common to two or more owners. It is to be noted that the first statute enacted for division of commonly owned landed properties was ordinance No. 21 of 1844 which came during the British regime. Thereafter in 1863 Ordinance No. 10. was passed providing for the partition and, or sale of land held in common. Ordinance No.10 of 1863 was amended by ordinance No. 10 of 1897 and No. 37 of 1916.

The said Ordinance No.10 of 1863 was repealed by the introduction of Act No.16 of 1951, which was applied to partition cases for more than two decades. There after the administration of Justice Law No. 44 of 1973 replaced Act No. 16 of 1951 and introduced a separate chapter, from sections 632, 663 as being applicable for the partition of lands.

It was finally repealed by Partition Law No. 21 of 1977 which has survived in the statute book for well over three and a half decades and partition actions in Sri Lanka are now governed by the said Partition Law, which has been amended from time to time by Act No's 5 of 1981,6 of 1987 and 17 of 1997.

It is pertinent to note that the Legislature has introduced section 81 to the partition law by amending Act No 17 of 1997 in relation to the appointment of a legal representative in order to expedite and simplify the procedure of appointing a legal representative or substitute an heir of a deceased party to proceed with the action without any delay.

In this respect, the intention of the legislature to introduce section 81 to the partition Act is really noteworthy.

Professor G.L Peiris, minister of Justice and constitutional affairs as he was then, stated in introducing the amendment bill. "….Mr. Speaker, there is another very unsatisfactory feature of the present law relating to partition. This pertains to the question of substitution of legal representatives. If one of the parties dies, it is only at that stage that an application is made to the court for the substitution of parties. As you know there are usually a large number of parties in partition actions and quite often somebody dies in the course of litigation. It is only at that stage that the question of substitution of the party is taken up. We are changing by that means of this amendment. The amendment Mr. Speaker provides for the plaintiff and other parties to the action to file a memorandum nominating a person or a maximum of three persons in order of preference to be substituted in his place in the event of his death during the pendency of the action. So at the very outset that is taken care of. You do not wait till the man dies and then activate the procedure. At the very beginning the party says, "in the event of my death, I want to be represented by so and so, so and so and so." That will short-circuit many of the procedures which are now causing unacceptable delay ."[1]

In this instance, it is submitted that the intention of the legislature is very clear in that one of the main objectives of introducing section 81 by the amendment of Act no 17 of 1997 was to eliminate the undue delay in the disposal of Partition actions.

In view of section 81,[2] it compels parties to nominate a minimum of one and a maximum of three consenting legal representatives in order of preference, who will be substituted in the room of the nominator, in the event of his/her death during the pendency of the action.

The "legal representative" defines for the purpose of section 81 of the Partition Law is as a person who represents the estate of a deceased party or a person for the purpose of the action, by virtue of a nomination, or an appointment by court under this section.[3]

A nominee deemed to be the legal representative of a deceased party [nominator] shall be entitled to take all steps for the purpose of the action as the deceased nominator would have been entitled to take, had he been alive.[4]

A nominee shall not decline to act as the legal representative of the deceased nominator. He may however, with the leave of the court first obtained by way of petition and after notice to the other nominees, if any, of such nominator, apply for permission from court to be released from the office of legal representative of such nominator.In the event of the court granting such permission, the nominee who is next in order of preference in the memorandum filed by the nominator, shall be deemed to be the legal representative of the deceased nominator, for the purposes of the action.

1. Hansard – 27.05.1997- Vol. 110 No. 13 Col. 1590/1 [Page 171 – The Galle Law Journal 2013 Vol. 2, Article by Neil Iddawala]
2. Section 81(1)of the amending Act No. 17/1997
3. Ibib Section 81(14)
4. Ibib Section 81(7)

If the relevant nominee is the sole nominee or sole remaining nominee of a deceased nominator, such nominee shall notice the heirs of such deceased nominator regarding his application and in the event of the court granting permission as aforesaid, such court shall appoint a consenting heir of such deceased nominator to act as the legal representative of such deceased nominator for the purposes of the action.

It is relevant to note that notwithstanding that a party or person has failed to file a memorandum under the provision of this section and that there has been no appointment of a legal representative to represent the estate of such deceased party or person, any judgment or decree entered in the action or any order made, partition or sale effected or thing done in the action shall be deemed to be valid and effective and in conformity with the provisions of this law and shall bind the legal heirs and representatives of such deceased Party or person.[5] It is very clear that, such failure to file a memorandum should also not be a ground for invalidating the proceedings in such action.

When the legal heirs desire to participate in the proceedings on the death of a party who had failed to file a memorandum, they may make an application for that purpose. However, such application shall not be a ground for the postponement of the trial or proceedings. Similarly, no proceedings under this law shall be postponed or adjourned nor any step in the action postponed by reason of the death of a party required to file a memorandum under this Act. The court may, however grant a postponement on the payment of costs by the person making the application, if it is of the opinion that is in the interests of justice to allow such postponement. On such occasions, the court shall take into account the date of the institution of the action and the dates on which trial was held prior to such application and the stage at which the action is and any other matters which the court considers relevant.[6]

It is interesting to note that in terms of section 29 of the Amended Act which stipulates that " every partition action, application or other matter instituted and pending in any court, on the date of commencement of this Act, shall, so far as the circumstances permit, be continued and proceeded with to final judgment and decree under the provisions of the principal enactment as amended by this Act, (including provisions requiring the filing of memorandum, nominating a legal representative by parties to the action and others), in the same manner and in every respect as if the same had been originally instituted after the date of commencement of this Act.

Since the amendment Act No 17 of 1997 came into effect from 12th August 1997, the provisions regarding the appointment of legal representatives are applicable for all partition actions instituted before the relevant date and every Partition action, application or other matters instituted and pending in any court on the date of the commencement of the amendment Act, apparently gives a retrospective effect.

5. Ibib Section 81(9)
6 Ibib Sections 81(10)(b) and (e), Section 81(17)

It was held in the case of **RathnasiriVsKuda Banda & others**[7] that "…. I consider the amendment Act No 17 of 1997 appears that all necessary steps as contained in section 27 which replaced section 81 of the principle enactment and substituting section 81(1) to 81(4), necessarily apply to partition actions tried in the District Court prior to the appeal stage."

It is significant to note that the Supreme Court had taken a contrary view in the case of **Gamaralage Karunawathi Vs Godayalage Piyasena.**[8] It was held that"when a party to a case had died during the pendency of that case, it would not be possible for the court to proceed with that matter without bringing the legal representatives of the deceased in his place.

In the said case, the Appellant had made an application under section 48 (4) a (iv) of the Partition Law to the District Court of Kegalle, which was taken up for inquiry on 23.07.2000 and final order had been made on 20.05.2005. The 15th Defendant died on 30.05.2004 while the case was pending before the District Court and no substitution has been made. The said final order was challenged in the High Court of SabaragamuwaProvince by the 20th Defendant Appellant and High Court rejected the appeal by order dated 13.10.2009. When the case was pending before the High Court the 2nd Respondent had died on 06.09.2007 and no steps were taken for substitute in place of the deceased Respondent. The appellant went before the Supreme Court seeking leave to appeal against the said judgment of the High Court and obtained leave to appeal.

It was held in the Supreme Court byHer Ladyship Dr.Shirani A. Bandaranayake C.J "in the said appeal, as clearly stated earlier, prior to the judgment of the District Court dated 20.05.2005, the 15th respondent who was the 16A respondent as well, had died on 30.05.2004, no steps were taken for substitution of parties."

Thereafter, an appeal was taken before the High Court and its judgment was delivered on 13.10.2009. However the 2nd respondent had died prior to that on 06.09.2007. Accordingly it is evident that both these judgments are ineffective and therefore each judgment would be rejected as a nullity. For the said reason the judgment of the High Court dated 13.10.2009 and the judgment of the District Court of Kegalle dated 20.05.2005 were both set aside.

Furthermore the case was sent back to the District Court of Kegalle for the appellant to take steps according to law for substitution and also directed the District Court to hear the matter expeditiously.

In this instance, it is submitted that, none of the parties had brought to the notice of Court that section 81 (9), 81 (10) and 81 (12) of the amending Act no 17 of 1997 which are relevant to the issue in the said case **Gamaralage Karunawathi Vs GodayalagePiyansena**[Supra].

7. C.A. No. 256/1997 decided on 03.02.2012
8. S.C. Appeal No. 09A/2010 decided on 05.12.2011/ [2012. B.L.R. at page 81], [2011(1) S.L.R. 171]

In this respect it is relevant to note that the mandatory Provisions envisaged in section 81(9), 81(10) and 81(12).

"81 (9) Notwithstanding that a party or person has failed to file a memorandum under the provisions of this section, and that there has been no appointment of a legal representative to represent the estate of such deceased party or person, any judgment or decree entered in the action or any order made, partition or sale effected or thin done in the action shall be deemed to be valid and effective and in conformity with the provisions of this law and shall bind the legal heirs and representatives of such deceased party or person. Such failure to file a memorandum shall also not be a ground for invalidating the proceedings in such action.

(a) On the death of a party or person who had failed to file a memorandumas required by this section, any party or person may apply to court by an ex-parte application, requesting that a person be appointed as the legal representative of such deceased party or person and the court may, on being satisfied after inquiry that such appointment is necessary, appoint a suitable person to be the legal representative of such deceased party or person for the purpose of the action. Such legal representative shall be bound by the proceedings had up to the time of such appointment.

(b) Such application and appointment shall not be a ground for the postponement of the trial or proceedings;…."

"81 (12) No proceedings under this law shall be postponed or adjourned nor any step in the action postponed by reason of the death of a party or person required to file a memorandum under this law."

"Maxwell on the Interpretation of Statutes (12th Edition) p.29 states that,Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise."[9]

Further it is stated that, 'Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be'

ShiraneeTilakawardane, J. held in **W.M. Mendis and Co., Ltd.v. Commissioner-General of Excise** that-[10]

> *"It is a well-accepted rule of interpretation that where a statutory provision is clear and unambiguous, the words should be interpreted accordingly".*

9. 12th Edition page 29
10. 2002(3) S.L.R. 305

Partition Law as amended by Act No. 17 of 1997 is very clear on the matter that no trial or proceedings or action under this Law shall be postponed for want of application for substitution or such appointment. It also clearly states that no judgment or decree entered in the action or any order made, shall be valid and effective. Failure to file a memorandum shall also not be a ground for invalidating the proceedings in such an action.

According to the above-mentioned provisions Stipulated in Section 81, no trial, proceedings or action shall be postponed or adjourned until action is taken to substitute the deceased party or parties. All judgments and orders made shall be valid and shall be binding on legal heirs and representatives of such deceased party or personas well.

And it also worthwhile to note that the section 48(4)(a)(iii) has been repealed and section 48(4)(a)(iv) amended by the Amending Act No. 17 of 1997.

The Amendment Act No. 17 of 1997 repealed section 48(4)(a)(iii) of the Partition Act. Whenever a party to a partition action dies before judgment is entered and no substitution of his heirs or legal representatives has been made or no person, has been appointed to represent the estate of the deceased party for the purpose of the action and as a result of which the entitlement or claim to the land which was the subject of the original judgment delivered in the trial has been revoked, not withstanding what is said in the original ruling, the heirs or executors or administrators or a person duly appointed to represent the estate of the deceased can file an application in the courts seeking special permission to prove the entitlement to the relevant land.This entitlement has been repealed from the aforesaid Amendment Act No. 17 of 1997.

Therefore, it is clear that Section 48 of the Partition Law No. 21 of 1977 as amended by the Act No. 17 of 1997 is drafted to ensure the final and conclusive nature of a decree in a partition action, even if no substitution has been effected to represent a deceased party in such an action.

In the case of **W. Jane Nona and others Vs H.D. ChaloSingho, D. Surabiel and others.**[11] It was argued that the impugned judgment could not stand since it had been delivered without substituting heirs in place of the 8th, 10th, 16th, 19th and 20th Defendants who had died whilst the case was pending in the lower court, citing the Supreme Court judgment, **GamaralalageKarunawathieVsGodayalagePiyasena [Supra]**.

In the said judgment **"W. Jane Nona and others Vs H.D. ChaloSingho, D. Surabiel and others"** was examined the principle governing the decisions given per incuriamand its application to the doctrine of stare decisis.

Halsbury's Laws of England describes the rule of per incuriam as follows,[Halsbury's Laws of England, 4th Edition Volume 26 Para 578 at pages 297 and 298]

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11. C.A 499/98(F) & 499A/98(F) [C.A Minutes 25.07.2013]

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords Decision, in which case it must follow that decision; or **when the decision is given in ignorance of the terms of a statute or rule having statutory force".**

Professor Rupert Cross in his Book "Precedent in English Law" explains the rule as follows:[12]

> *"The principle appears to be that a decision can only be said to have been given per incuriam if it is possible to point to a step in the reasoning and show that it was faulty because of a failure to mention a statute, a rule having statutory effect or an authoritative case which might have made the decision different from what it was".*

In the case of **Young v BristonAeroplane Company Ltd**[13] held that,

> *"But where the Court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the Court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own.*

It was observed in **RamanathanChettiarVs. Wickramarachchi and others, Soza J with Tambiah J agreeing,**[14] sitting in the Court of Appeal had observed thus:

> *"The doctrine of stare decisis is no doubt an indispensable foundation upon which to decide what the law is and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely on the conduct of their affairs as well as a basis for orderly development of legal rules. Certainty In the law is no doubt very desirable because there is always the danger of disturbing retrospectively the basis on which contracts, settlement of property and fiscal arrangements have been entered into. Further there is also the especial need for certainty as to the criminal law. While the greatest weight must be given to these considerations, certainty must not be achieved by perpetuating error or*

12. [3rd Edition – 1977 at pages 143 and 144]
13. Reported in [1944] 2 All E.R. 293, Lord Green M.R. at page 300
14. [reported in 1978 – 1979 (2) SRI L.R. 395, at pages 410 and 411]

> *by insulating the law against the currents of social change……… However ………., a decisions given per incuriam by the former Supreme Court is, if I may say so respectfully, not absolutely binding on the present Court of Appeal."*

Furthermore, in the Indian case of **Government of A.P and another V.B sathyanarayanRao (dead) by L.R.S and others,**[15] held as follows:

> *"The rule per incuriam can be applied where the court omits to consider a binding precedent of the same court or a Superior Court rendered on the same issue or* ***where the court omits to consider any statute*** *while deciding the same issue."*

Basnayake J (as he then was) in the case of **Alasupillai v. Yaverpillai**[16] gave the following definition:

> *"A decision per incuriam is one given when a case or a statute has not been brought to the attention of the Court and* ***it has given the decision in ignorance or forgetfulness of the exsistence of that case or that statute."***

It is imperative to note that in **GamaralalageKusumawathie Vs. GodayalagePiyasena[Supra]** had not made any reference to the provisions of Section 81 of the Partition Law No. 21 of 1977 as amended by the Act No. 17 of 1997. In that decision the provisions in the Civil Procedure Code as well as the Supreme Court Rules had been much elaborated with reference to Indian authorities.

It must also be mentioned that by the Partition (Amendment) Act No. 17 of 1997, a new section was substituted in place of Section 81 of the Partition Law No. 21 of 1977 whereby a new process had been introduced for the appointment of legal representatives to represent the parties in a partition action upon their death. Under section 81(1) to section 81(8) of the said Act, it has been made mandatoryto file a memorandum by every party to a partition action or any other person, nominating at least one person [but not exceeding 3] to be his legal representative in the event of his death pending the determination of the partition action. The manner in which the parties are added as a party in such an instance is described in Section 69 of the Partition Law as amended by the Act No. 17 of 1997.

More importantly, it is section 81(9) whichis directly relevant to the question of failure to substitute a legal representative in place of a deceased party. It is significant to note that section 81(9) starts with the failure to file a memorandum to nominate a person in termsof section 81 and it specifically deals with the question of failure to appoint a legal representative.

15. [2000(4) S.C.C 262]

16. [1949 (39) C L W 107 and 108]

Therefore, with the introduction of the new section 81 by the Partition (Amendment) Act No. 17 of 1997, it is crystal clear that a Judgment shall be deemed to be valid and effective and in conformity with the provisions of the Law and shall bind the legal heirs and representatives of such deceased party or person, despite the non-appointment of a legal representative in place of a deceased party.

In the circumstances Chitrasiri J emphasized that the decision in GamaralalageKusumawathieVs. GodayalagePiyasena is not absolutely binding the Court of Appeal since there had been a failure to consider specific provisions in the partition law in respect of non – substitution, in the room of deceased parties in partition actions.

However the Court of Appeal decided that they are not bound to follow the said judgment, since it had been given per incuriam, on the assumption that the supreme Court had failed to consider section 81(9) of the Partition Law No. 21 of 1979 as amended by Act No. 17 of 1997 on the question of substitution of heirs in place of the deceased parties to the action.

In the circumstances, the Court of Appeal had considered that the said decision in **GamaralalageKarunawathie vs. GodayalagePiyasena (supra)** was given in per incuriamand accordingly to consider it as an exception to the application of the doctrine of stare decisis. This is absolutely because the case law cannot overrule statutory provisions laid down by an enactment of the Legislature.

In conclusion, it is submitted that in Partition Actions, courts have to adhere to the relevant provisions in the Partition Law in respect of an appointment of a legal representative or substitute an heir of a deceased party irrespective of the provisions envisaged in the Civil Procedure Code regarding substitution and also appointment of a legal representative.

“They are no longer two, but one”

Thus, can you betray your spouse.....?

(An illustration on admissibility of spousal evidence)

Lanka Jayaratne
BSc. Business Administration
MSc. Management (Uni. Of Sri J’Pura)
Magistrate Watthala.

Marriage is a legal bondage entered between a man and a woman whereby each bound to live together as one person throughout life. Although society donates a legal validity to a spousal union by a written document named ‘Marriage Certificate’ the conjugal relationship between a man and a woman existed from the origin of the world. Man and women relationship is considered as the supreme union among all other associations as the generation formation process stems from it.

Since marital union forms the basis of the society, law too grants special evidential privileges to the parties to a marriage. These marital privileges are exceptions to the general rule that all relevant evidence is admissible at trial. Marital privileges exclude spousal evidence from the trial on the basis that marital relationship is given a greater weight than the need for evidence to resolve legal disputes.

Marital privileges have developed along two lines, i.e. **adverse testimony privilege** and **confidential communication privilege.** The first to develop, the adverse testimony privilege has generally been thought to have flowed from two tenants of medieval jurisprudence; first that wife has no legal identity independent of her husband and second than an accused could not testify on his own behalf. The confidential privilege by contrast shields communications made in confidence during a valid marriage. This was emerged for the need of explicit protection of confidential marriage relationships between each other.

The two privileges has related but two distant purposes. The adverse testimony privilege embodies society’s desire to protect viable marriages from the potential irreparable rifts that may result from compelled disclosure or commentary before a court of law. The confidential communication privilege by contrast provides assurance that all private statements between spouses aptly called the “best solace of human existence” will be forever free from public exposure.

Public policy behind the privileges

The law of privileges is based upon policy considerations that exist independently from the usual evidentiary concerns of the accuracy and reliability of evidence. Because privileges limit admissibility of evidence, the courts or the legislature must consider the privileges to be necessary to protect some other compelling interests.

The protection of marital relationship was considered to be more important than the truth finding process engraved in the evidential rules. On the other hand the law believes that wife and husband is one person and that either spouse cannot stand alone and testify against each other. As Blakstone stated in his Commentaries on Law of England (1765 – 1769) if the married couple were admitted to be a witness for each other, they would contradict the maxim of law "Nemo in propria causa testis esse debet (No one ought to be a witness in his own cause).

Statuary provisions relating to adverse testimony rule

According to section 118 of the Evidence Ordinance all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. In addition to the above section, section 120 addresses specifically about the spouse's capacity in testifying against the other. Sub section (1), (2), (3), (4), and (5) of section 120 states as follows;

-120(1): In all civil proceedings the parties to the suit and the husband or wife of any party to the suit shall be competent witnesses.

-120(2): In criminal proceedings against any person the husband or wife of such person respectively shall be a competent witness if called by the accused, but in that case all communications between them shall be ceased to be privileged.

-120(3): In criminal proceedings against a husband or wife for any bodily injury or violence inflicted on his or her wife or husband, such wife or husband shall be a competent and a compellable witness.

-120(4): In criminal proceedings against a husband or wife for any attempt to cause any bodily injury or violence on his or her wife or husband, such wife or husband shall be a competent witness for the prosecution.

-120(5): In criminal proceedings against a husband or wife for an offence punishable under section 362b or 362c of the Penal Code, the wife or husband of the accused shall be a competent witness for the prosecution.

When one examines section 120(1) it is clear that our law identifies a distinction between civil and criminal law in spouse's capacity to give evidence. In civil proceedings there is no barrier whatsoever, either party is competent to give evidence against his or her marital partner. However in criminal proceedings husband or wife is barred from testifying against each other except in few instances. The reason behind this is no strange to human understanding. Criminal proceedings results in penal sanctions as opposed to civil cases. Therefore no spouse should be put forward to betray his or her wife or husband to undergo drastic consequences which will in return affect their family life too.

According to the provisions of the Evidence Ordinance, in criminal proceedings husband or wife can be called on behalf of the accused, but in that case all communications between them shall be ceased to be privileged. In this context it is pertinent to mention section 122 which speaks of the spousal communication during marriage. The section says,

> "no person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married, nor shall he be permitted to disclose any such communications unless the person who made it or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other, and except in cases mentioned in section 120(2)."

Sri Lankan law relating to rule against adverse testimony follows the English Common law principles that were available before the enactment of Police and Criminal evidence Act in 1984. Earlier in English Common law a party's spouse was incompetent as a witness for or against him. This rule extended to testimony concerning events occurring before as well as during the marriage and it endured even after the marriage was dissolved. However certain statutory amendments were brought in to the system to enable the spouse to be a competent (but not a compellable) witness for the prosecution or for the defense. Still then the Law remained to be confused and certain criticisms were made by renowned academics which resulted the British Parliament to introduce statutory reforms. Accordingly, Police and Criminal Evidence Act was introduced in 1984 making the accused's spouse a competent and compellable witness, a competent witness for the co accused and a generally competent but sometimes compellable witness for the prosecution.

However Indian law departs drastically from Sri Lankan and English Common law. Section 120 (2) of the Indian Evidence Act merely states that in Criminal proceedings against any person, the husband or wife of such person respectively shall be a competent witness.

Having understanding the above legal provisions of different jurisdictions it is pertinent to examine provisions of our Evidence Ordinance on spousal evidence under the light of related decisions of the superior courts.

In the case of Arumugam vs Seethavi (55 NLR 162), Justice K. de Silva explains the basis under which the adverse testimony privilege was formed citing in his judgment the following paragraph of Best on Evidence (12th edition p 164):

"Husband and wife say our books, are considered as one and the same person in law, and to have same affections and interests: from whence it has been established as a general rule that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias and the extreme hardship of the case."

However this principle in certain circumstances was calculated to cause injustice and hardships and therefore its applicability was relaxed by creating exceptions to it.

Section 120(3), 120(4) and 120(5) provides exceptions to the general rule due to the need of preventing injustice caused by spouse to each other. Section 120(3) makes wife or a husband a competent and compellable witness in criminal proceedings against any of them for bodily injury or violence inflicted on the wife or husband. Section 120(4) makes wife or husband a competent witness for the prosecution in criminal proceedings against a husband or wife for any attempt to cause any bodily injury or violence. Section 120(5) makes wife or husband a competent witness for the prosecution in criminal proceedings against husband or wife for offences of bigamy and bigamy with concealment of former marriage.

Prior to the analysis of these sections it is important to clarify the meanings of the terms 'competent' and 'compellable' that are in section 120(3). Competency entails the validity of evidence given by a witness who wishes to testify; compellability involves an added element i.e. a witness may be forced to testify against his or her wishes. Section 120 (3) speaks of both whereby in cases where a bodily injury or violence was inflicted towards a spouse as unlike in the case of 120(4) he or she can't opt to be silent but must testify against though she dislikes or hesitates. This compellability rule is well found in the English law too. Best in his book on Evidence at page 165 justifying the existence of the above rule says as follows:

"To this branch also exceptions are not wanting. When one of the married parties used or threatened personal violence to the other, the law would not allow the supposed unity of persons in husband and wife to supersede the more important principle that the state is bound to protect the lives and limbs of its citizens."

In Arumugam vs Seethavi (55 NLR 162) it was held by Justice K.d.de Silva that under Section 120(4) of the Evidence Ordinance the wife is a competent witness for the prosecution where the husband is charged under section 486 of the Penal Code i.e. intimidation. In that case the plaintiff was married to the fourth defendant and they lived in separation at the time of the alleged offence. While Arumugam, the brother-in-law of the plaintiff was passing by the first accused's house, the group who were with the accused shouted that Arumugam be killed. In order to rescue Arumugam got into his sister, the plaintiff's house. Accused too entered to the plaintiff's house and intimidated both Arumugam and the plaintiff while causing mischief to the plaintiff's house. Except the fourth defendant who is the husband of the plaintiff, all others assaulted the plaintiff in the course of the incident. They were charged under Section 433, 314, 486 of the Penal Code. Here Justice De Silva held the view that the charge of intimidation would come under the subsection 4 and is covered by the word "attempt to cause any bodily injury or violence". His further opinion was that if sub section 4 of section 120 of the Evidence Ordinance is not wide enough to include a charge of intimidation, the provisions of section 100 of the Evidence Ordinance can be invoked to bring in the English law of Evidence to operate on this point.

Meaning of 'Marriage'

In this point it is interesting to examine whether a legally registered marriage is necessary for a spouse to come within the ambit of the section. The case of King vs Arumugam (51 NLR 384) is illustrative on this point. There it was held that a spouse who entered into a marriage according to Hindu customs is deemed to be a wife within the meaning of the section although she is not legally married. The facts in this case was that the accused's wife was carrying on an intimate relationship with deceased husband and the issue was that whether she would be competent to give evidence against the perpetrator who is her husband. There had been a Hindu customary marriage between parties but it was not registered. Her father was called to establish the fact that there was a marriage between them. He testified that his daughter was married to the accused according to Hindu customary rites many years ago and the usual customary ceremonial was observed. According to him there was a public reception and his daughter lived together as man and wife and was so received amongst their relatives. However their union was dissolved thereafter but there was no action for divorce and there was no decree dissolving the marriage. What appears to have happened is that the lady left the accused and thereafter became the mistress of the deceased. In that case it was decided that even parties engaged in a customary marriage can also be included within the meaning of husband or wife under section 120 of the Evidence Ordinance. The following dictum of Dias J in this case is worthy mentioning here:

"Marriage according to customary Hindu rites is lawful and is acknowledged to be a marriage by our law. Neither council has been able to cite authorities for the proposition that such a marriage can be dissolved in any way other than by a decree of court. There is no proof that the union is dissolved. Therefore applying the presumption of continuance, I think the customary marriage continues and if that be so, the lady being the lawful spouse of the accused cannot under section 120 of the Evidence Ordinance be called as a witness for the prosecution. I therefore hold that the witness is incompetent to testify for the prosecution."

However English law on this point is different as held in the case of R vs Veloo (1943) 24 CLW 119. There it says that the mere fact that there was a marriage ceremony and celebrations of some sort that the two lived together as man and wife is not a sufficient bar for a party in giving evidence against the other partner.

In the case of Queen vs Alwis (62 NLR 236) the accused in collusion with the Registrar of Marriages forged the signature of a woman so as to make it believe that she was lawfully married to him. In that case it was held by Pulle J. that the woman was a competent witness against the man in a prosecution for forgery of the marriage certificate. In such a case it is not necessary that the marriage should first be declared null and void in a civil action instituted by the wife.

Admissibility of a divorced partner's evidence against the other

The judicial view regarding this point is clearly enumerated in the case of Queen vs Assen Mohideen (58 NLR 548). In that case it was held that such evidence is admissible. Basnayake J. held that in criminal proceedings for violence inflicted on a person other than the accused's wife, a witness who was the wife of the accused at the time of the non summary inquiry is competent to give evidence for the prosecution at the trial, if prior to the date of the trial she obtained an order of nullity in respect of her marriage with the accused. Dias J. went on further saying that the fact that her marriage has not been dissolved at the time she was examined in the Magistrates court does not in our view render her evidence inadmissible at the trial when the bar against her competency as a witness no longer existed. The effect of a decree of nullity is that the marriage is regarded as never have taken place.

Section 80(5) of the Police and Criminal Evidence Act in England too states that in any proceeding a person who has been but no longer married to the accused shall be competent and compellable to give evidence as if that person and the accused has never been married. This section changed the earlier position in English Common law. The earlier position was enumerated by the famous case of R vs Alger (1954) 1 QB 279) where it was held that where a marriage has been lawfully contracted but is voidable at a suit of one of the party and a decree of nullity is subsequently pronounced, one spouse is not competent to give evidence against the other in respect of criminal offences committed by the other spouse during the marriage.

However the present position in Sri Lankan Evidence law is very much clear with the above mentioned decision of Assem Mohideen's case. The author believes that even in the absence of case decisions the provisions of Section 100 of the Evidence Ordinance can be applied to bring in the English Law, particularly section 80 (5) of the Police and Criminal Evidence Act to operate at this point.

Parties married subsequent to the offence

Where the parties were not married at the time of commission of the offence, but if the marriage took place during the interval between the commission of the offence and the holding of the trial, the general rule excluding the accused spouse as a witness for the prosecution would apply. This principle was exemplified in the case of Saman Kumara Vs The Republic (2009) 1 SLR 18). In this case the accused was indicted for raping the prosecutrix. Two years after the incident but before the trial commenced, both the accused and the girl got married. It was contended that as the prosecutrix is now the wife of the accused, is not a competent witnesses and therefore her evidence cannot be taken into account in convicting the accused. Here Sisira De Abrew J. further held that she cannot be called as a witness until the marriage is declared void by the District Court.

Regarding this point the critical remarks make by Wigmore is also worthy mentioning here:-

"….the lofty object from protecting from invasion the sanity of marital peace is deemed to extend to those only who legally and technically are husband and wife, whatever their honest and innocent belief may have been as to the validity of their relationship. Hence there is no privilege to persons whose marriage is void; their domestic peace may be shattered at any litigant's discretion. Again as the innocent unmarried are not deemed to deserve the benefit of the rule, so, too, conversely, its benefits are gained by the ingenious wrongdoer who brings himself within its formal terms by marrying the witness 'after service of subpoena' and thus creating ad hoc a domestic peace which is to be jealously safeguarded."

One should pay a deep concern on the above expression of Wigmore as certain relaxations in rules directly pave ways for the perpetrators to escape from the law.

However it is now understood that the relevant point of time which the relationship should exist for these rules to come into play is the commencement of trial. It should also be noted that the applicability of this rule is unaffected by the existence of a judicial separation.

Testifying against the co-accused

According to section 120(6) of the Evidence Ordinance, an accused shall be a competent witness only on his own behalf. In the case of Queen vs Thompson (1872) 1 CCR 378) Bovill CJ contended that the 'wife stands in the same position as the husband'. Therefore wife can also be called only on behalf of the accused husband and she cannot be offered as a witness against the accused other than the husband. This point was argued in the case of King vs Marathelis Perera (11 NLR 29). There Wendt J. categorically stated that the wife of an accused who is tried jointly with others is not a competent witness for the prosecution even against the accused other than the husband.

Statutory exceptions to the general rule

There are special provisions in Sri Lankan statutes which provide exceptions to the general rule that a spouse cannot testify against his or her wife or husband. For the convenience of the reader they are mentioned below in point form:

- Section 120 of the Evidence Ordinance itself provide exceptions in sub sections (3) and (4) whereby it says that a spouse is competent to testify against the other for bodily injuries or violence caused or attempt to cause by the other spouse.

-Section 120(5) of the Evidence Ordinance makes spouse a competent witness against the offences of bigamy (362B) and bigamy with concealment of former marriage (362C).

-Section 81 of the Children and Young Persons Ordinance says that notwithstanding anything in the Evidence Ordinance contained, the wife or husband of a person charged with the following offences shall be a competent witness for the prosecution:

-any offence under section 308 or section 360 of the Penal Code

-any offence against a child or a young person under sections 296, 297, 343, 345, 357, 360A, 364, 364A, 365, 365A of the Penal Code

-any offence under any of the sections 71, 72, 73, 74 of the Children and Young Persons Ordinance

-any other offence involving bodily injury to a child or a young person

In the discussion of spousal evidence it is pertinent to mention a special reference pertaining to spouse's evidence in the Criminal Procedure Code. Although a spouse can give Evidence on behalf of his or her partner in criminal cases, according to section 271 (3) of the Criminal Procedure Code, at any trial the failure of any accused, or the husband or wife of any accused to give evidence shall not be made the subject of adverse criticism by the prosecution.

In conclusion, when one examines all the provisions regarding spousal evidence with special emphasis to section 120(2) of the Evidence Ordinance, it is apparent that the society's interest towards the marital peace overrides the truth finding process in law. Though certain rules leads certain wrongdoers to exert undue benefits to escape from the law, absence of such rules may lead to drastic sociological effects due to the breach of trust placed by the marital parties on each other.

Protection of Natural Environment during International Armed Conflicts

Pradeep Hettiarachchi
LL.M (London)
District Judge
Colombo.

It is apt to begin this article with the following excerpt from the judgment of the International Court of Justice in its Advisory Opinion on legality of the threat or use of nuclear weapons.

> *...the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn* **[1996] ICJ Rep. 226, 241.**

Further, the ICJ went on to say:

> *States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.* [**Page 242**]

Damage to the environment in wartime is inevitable. It is evident in the history that war has left its scars, sometimes long-lasting, on the natural environment. Even today some battlefields of the world wars remain unsuitable for cultivation and also dangerous to the population due to the unexploded devices, land mines and other harmful projectiles embedded in the earth.

Further, in countries like Vietnam and Japan, emission of nucleic and other poisonous agents used in war still exists and creates serious health issues not only to the present population but also to the generations to come.

During the Iran Iraq war, hundreds of oil tankers were attacked by both sides in the Persian Gulf. As a result, millions of tons of oil were spilled into the sea, which had devastating impacts on the marine life. When an oil storage facility or a refinery is struck, not only the oil seep into the ground and pollute water but also releases toxic gas to the environment.

Likewise, if a nucleic reactor is damaged, its impact on the environment would be of unprecedented and inconceivable magnitude. The above factors clearly warranted a requirement of comprehensive and effective set of rules, which can deal with the issue of the protection of environment internationally as well as locally.

The objective of this article is to discuss the provisions of international law which are designed to protect the environment during international armed conflicts.

In view of the potential threats posed to the environment by the parties at war, many states and specialized agencies were compelled to adopt constitutional rules in order to protect environment.

Hence, environmental protection has become an issue of paramount importance on the agenda of many institutions and organizations which involved actively in the field of international law.

The emergence of international environmental law relating to armed conflicts becomes significant mainly owing to the past and present conduct of the nations involved in hostilities.

The international environmental law covers a wide range of issues, including the prevention of environmental damage and the promotion of international co-operation among the nations.

There are 3 major treaties, and three supplementary texts, which are directly appropriate to the protection of environment in international armed conflicts.

1. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD).

The ENMOD convention came into being at a time of growing international concern about the environment. Widespread use of various chemicals such as Agent Orange for the destruction of forests and crops in Vietnam was highly criticized by the nations. In July 1974, in Moscow, the USA and USSR agreed to hold discussion to consider the dangers of environmental warfare. On 21st August 1975, the USA and USSR tabled identical drafts of a convention at the Conference on the Committee on Disarmament (CCD) in Geneva. On 10 December 1976, the General Assembly passed a resolution referring the Convention to all states for signature and ratification.

Article 1 of the ENMOD states:

> Each state party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread,long-lasting or severe effects as the means of destruction, damage or injury to any other State Party. (Emphasis added)

For the purpose of this convention, the Committee interpreted the terms 'widespread', 'long-lasting', and 'severe' as follows:

> Widespread: encompassing an area on the scale of several hundred square meters;
>
> Long-lasting: lasting for a period of months, approximately a season;
>
> Severe: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

Article II of the ENMOD reads:

> As used in article I, the term environmental modification techniques refers to any technique for changing- through the deliberate manipulation of natural processes-the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or outer space.

The possible phenomenon that can be caused by environmental modification techniques, are earthquakes, tsunamis, an upset in the ecological balance of a region, changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the Ozone layer; and changes in the state of the ionosphere.

However, the provisions of the ENMOD shall not obstruct the use of environmental modification techniques for peaceful purposes. Only military or any other hostile uses of environmental modification techniques are prohibited.

Article III of the ENMOD states:

> The provision of this convention shall not hinder the use of environmental modification techniques for peaceful purposes and shall be without prejudice to the generally recognized principles and applicable rules of international law concerning such use.

Article III of the Convention clearly permits the parties to use environmental modification techniques for peaceful purposes. Further, it is discernible that the prohibited action must be deliberate. In other words, the manipulation of natural processes must be intentional and mere collateral damage resulting from an attack against a military object does not fall within the purview of the Convention.

Article I of the convention specifically laid down the requirement of 3 elements in environmental modification techniques used in armed conflicts namely, 'widespread', 'long-lasting' or 'severe effects' to bring the alleged act within the prohibition stipulated by the ENMOD.

Therefore, if such effects are not produced, the use of environmental modification techniques is allowed even though it is used for a military purpose. In other words, environmental modification techniques could be used to gain an anticipated military advantage so long as it does not create the aforementioned effects to the environment.

Further, the proscribed conduct must cause destruction, damage or injury. If the environmental modification techniques, though used for military or hostile purpose, do not cause destruction, damage or injury,still it would not fall under Article I. For instance, an environmental modification technique is used to disperse fog above critical and important enemy area may be harmless as such.

Protocol I of 1977

The other major treaty which deals with the protection of environment during armed conflicts is the Additional Protocol I of 1977.

Article 35(3) of the protocol is very much similar to the Article I of the ENMOD where it states:

> It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

Article 55 of the Protocol provides that:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby prejudice the health or survival of population.

2. Attacks against the natural environment by way of reprisals are prohibited.

The first sentence of Article 55(1) reflects the underlying concept i.e. the requirement to protect the natural environment in warfare while the second sentence in essence replicates Article 35(3). It is noteworthy, that the Article refers to the 'health or survival of the population.' When the health of the population is prejudiced irrespective of whether they are civilians or combatants the prohibition is applicable. In other words the protection guaranteed by this Article is not limited to the civilians but covers the combatants as well.

Supplementary texts:

a. The Rome Statute

Article 8(2) (b) (iv) of the 1988 Rome Statute of the International Criminal Court stigmatizes damage to the environment as a war crime:

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to concrete and direct overall military advantage anticipated.

A careful examination of the above provision shows that the Rome Statute requires both intention and knowledge as opposed to the expectation or intention required by the Protocol. Also, it requires to strike a balance between the incidental loss of life or injury to civilian objects and the anticipated military advantage, thus exemplifies the principle of proportionality.

b. Protocol III, annexed to the Weapons Convention:

Article 2(4) of Protocol III, annexed to the Convention, states:

> It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

It could be observed that, the above provision is limited in scope because it relates only to a minor part of the natural environment and also, it refers to specific kind of weapon i.e. incendiary weapons. Furthermore, the protection granted by the above provision ceases when the enemy is using the forests for cover. Thus, it becomes a military objective.It could therefore, be argued that this provision has little or no significance in protecting the environment during hostilities.

A military objective is defined in Article 52 (2) of Protocol I as follows:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

In light of the above Article,even a non military object which forms a part of the environment could be attacked if by its nature, location, purpose or use contributes to military action. Thus, it is evident that Article 2(4) of Protocol III, annexed to the Convention, offers little or no protection to the environment during armed conflicts.

- **Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.**

In Article I of this convention, States Parties are never obligated under any circumstances to use chemical weapons, to engage in military preparations for such use, or to develop, produce, acquire, stockpile, retain or transfer them; and they undertake to destroy chemical weapons what they possesses.

The term chemical weapon is defined in Article II. The paramount part of the definition is that the chemical is toxic, i.e. its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.

Following treaties also limit or prohibit the use of certain methods of warfare, which would also contribute to the protection of the environment in armed conflicts.

i. 1925 Geneva Protocol for the Prohibition of the Use in war of Asphyxiating, Poisonous or other Gases and of bacteriological Methods of Warfare, adopted in Geneva on 17.06.1925

ii. The Convention on the Prohibition of the Development, Production and stockpiling of Bacterial (biological) and Toxin Weapons and on Their Destruction, adopted on 10.04.1972

iii. 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects adopted on 10.10.1980

It could be noted that although the International Environmental Law provides for many provisions to protect the environment, still there are several areas which need further attention in order to minimize the damage to the environment during armed conflicts. One such area is transnational air pollution. There may be physically demarcated boarders between States but polluted air or water neither identifies such boundaries nor does it concern when crossing borders. For instance if a nucleic reactor is attacked and damaged in an armed conflict its impact would not be limited to a particular country but would extend beyond boarders and may cause severe, widespread and long-lasting damage to the environment. Similarly, destruction of a forest in order to facilitate the movement of the forces or for easy detection of the enemy force would create climatic changes globally or, if not, at least regionally.

The other intriguing point, which needs much attention and discussion, is the non-availability of a reliable and acceptable method to assess the extent of damage that could be caused to the environment by any impending attack. More importantly, a destruction of a rain forest,though does not fall within the definition of environmental modification technique,may take months or perhaps years to unleash its real impact on the environment.

Special emphasis must therefore be placed on compliance with and constant development of the rules for the protection of the environment during hostilities. Hence, it is incumbent on the States to make every endeavour to ensure the implementation of and respect for the existing rules, if not, future generations will face with insuperable problems resulting from damage caused to the environment by parties at war.

JUDICIAL ACCOUNTABILITY

Aruna Aluthge
LL.B. (Colombo), LL.M. (Colombo)
LL.M. (American University), Fulbright
Judicial Fellow (Federal Judicial Center, USA)
Magistrate, Kalutara

Introduction

The theme selected for the 2013 Annual Conference of Judicial Officers is 'Judicial Accountability and Challenges Ahead'. It is highly appropriate, timely and contextual to deal with accountability issues of the judiciary in the first ever law journal published by the Judicial Service Association of Sri Lanka to mark the Annual Conference 2013.

At the inter-governmental level, there has been a notable failure to deal with the judicial accountability issue in any systemic way, until recently. Despite this initial failure, a progression in more recently promulgated international standards of judicial independence has been a greater focus on issues of judicial accountability. The Bangalore Principles were developed by the Judicial Group on Strengthening Judicial Integrity in 2002.[1] It is significant that judges get together to formulate rules for themselves to ensure judicial independence and integrity. These principles of judicial conduct aim at safeguarding judicial independence while ensuring integrity and accountability. Who then judge judges and how?

This paper focuses on the accountability mechanisms that safeguard judicial integrity. In the first part, the paper discusses the tension between judicial independence and judicial accountability. In the Second Part, the paper looks at the internal judicial review / appeal

1. The Bangalore Principles were the work of a Judicial Group on Strengthening Judicial Integrity convened by the U.N. Centre for International Crime Prevention. At its first meeting, held in Vienna in April 2000 in conjunction with the Tenth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, the Group, consisting mainly of Common Law judges and the U.N. Commission Human Rights Special Rapporteur on the independence of judges and lawyers, identified the need for a code against which the conduct of judicial officers may be measured. A draft code was adopted at the second meeting in Bangalore (February 2001), by the Group. The Group felt that to have full international status, the draft needed to be scrutinized by judges of other legal traditions. After a consultative process a revised draft was adopted by a Round-table Meeting of Chief Justices from the civil law system. A number of judges from the International Court of Justice also participated.

mechanisms within the judicial hierarchy and expands the discussion to external review mechanisms such as public discussion review of individual cases and judgments of public interest. The Third Part examines the legal framework and practices that prevent the public and media from bringing judicial corruption issues to light. Discussion comes to the conclusion that broad civic participation in the administration of justice system discourages not only corruption but also undue interference from other branches of government.

Background

Independence vs. Judicial accountability

Safeguarding the independence of the judiciary vis à vis the state was considered more of a priority than judicial accountability,[2] given its catalytic role in ensuring the protection of individual rights, upholding the rule of law and combating corruption. Given this context, and the tension that exists between the principles of independence and accountability, efforts to address judicial accountability have been perceived as problematic.[3]

This tension derives from different conceptions of accountability.[4] In everyday terms accountability is simply the ability to hold an individual or institution responsible for its actions. Several international standards concentrate on securing judicial independence by insulating judicial processes from external influence. The question is how to deal with situations where judicial independence is undermined not because of external influence, but because of internal weakness. Balance between judicial accountability and judicial independence is a necessary condition for achieving success in enforcing laws against justice-sector corruption. Judicial independence means that the decision-making autonomy of an individual judge can be ensured by introducing mechanisms that block the influence of undue pressures from inside or outside the justice system. Holding the judiciary accountable to an external body raises questions as to whether that same process could be used to undermine judicial independence. Accountability mechanisms, particularly those using external bodies, expose the judiciary to the risk that its processes will be used by aggrieved parties for the purposes of harassment or intimidation. Internal judicial accountability mechanisms, while they protect judicial independence, raise issues of legitimacy and transparency, apparent or otherwise.

Ensuring judges of their independence, while subjecting them to effective accountability mechanisms, will deter corruption. The question for the judiciary is accountability to whom and for what? Broadly speaking the judiciary, like other branches of government, must be held accountable directly or indirectly to the general public it serves. This is a

2. Judicial independence does not mean that judges and court officials should have free rein to behave as they please. Indeed, judicial independence is founded on public trust, and to maintain it, judges must uphold the highest standards of integrity.
3. Greg Mayne, Accountability and competence of judges, TI Global Corruption Report 2007 p.41
4. Ibid.

vital step towards ensuring the overall integrity of the judiciary. However, public oriented accountability mechanisms cannot properly function without civic participation. If the people themselves derelict their duty and are not up to the challenge, not educated, not determined and not organized to challenge corrupt practices, accountability mechanisms[5] will have little impact.

Internal Accountability Mechanisms

a. Appeals and judicial review of judgments

Clear and well known procedures by which a judicial decision is taken and the well rooted rules of evidence present an important basis for evaluating judicial performance.[6] They are useful because they delimit the discretion of a judge and provide a legal basis for judicial scrutiny by a higher forum. Invoking the appellate jurisdiction, litigants can trigger a process whereby corruption is made more difficult and easier to detect.[7] However, controls of this sort are costly in terms of resources and their impact on the overall performance of the judicial system. For example appeals imply not only more judges, but also a more complex and long decision-making process with negative consequences for court delay.

Appeals process in Sri Lanka is unreasonably time and money consuming. For example partition actions which comprise the majority of cases in outstation District Courts took 5 to 40 years for final resolution. Decentralized special high courts with civil appellate powers that were established to clear up backlogs have not shown much result. Due to delays in the appeals process, litigants tend to refrain from lodging appeals even where there is a clear cause to appeal. Judges whose judgments have been reversed or quashed in appeal hardly get an opportunity to learn the mistake he or she had made due to backlogs in appeal courts and routine transfers of judges. Opportunity to highlight or identify systematic errors that may amount to abuse of authority or impropriety in decision making of a particular judge is lost in the delayed appeal process. This situation has given rise to a situation where aggrieved parties tending to petition the Judicial Service Commission, whose intervention can be seen by judges as unwarranted or undue interference.

It is only through a detailed research of case records that one can identify the phenomenon and draw concrete conclusions in regard to corruption. One point worth noting is that the judicial verdict itself should not be the subject of disciplinary proceedings (provided, of course there are no irregularities in sentencing and that the sentence is timely and

5. 'The tyranny of an oligarchy is not so dangerous to the welfare of the public as the apathy of the citizen of a democracy' - Montesquieu.
6. Most frequently perceived corrupt judges and prosecutors were found to abuse their substantive and procedural discretion by slowing down or obstructing law enforcement while violating rules of evidence. See: Edgardo Buscaglia and Jan van Dijk, 'Controlling Organized Crime and Public Sector Corruption: Results of the Global Trends Study', in United Nations Forum (Vienna: United Nations Press, 2003).
7. Public adversarial proceedings allow for the 'ventilation' of evidence that needs to be weighed by all parties, based on clear and narrow criteria provided by the rules of evidence.

based on the facts submitted before the judge). If the facts in a case suggest that the law has been misapplied then the judicial decision may be appealed, but this is not tantamount to an accusation of misconduct. In other words, appealing a decision is not a mechanism for disciplining a judge, although it can be a means of identifying misconduct since the habitual overturning of decisions issued by a particular judge might indicate bribe-taking, or at the very least a poor understanding of the law.

Apart from the final appellate and supervisory jurisdiction over lower courts, The Supreme Court of Sri Lanka is vested with sole and exclusive jurisdiction to hear and determine violations of fundamental rights guaranteed in Chapter III of the Constitution. No appeal can be lodged to challenge decisions of fundamental rights cases even though the Supreme Court exercises first instance jurisdiction.[8] While some kind of accountability is guaranteed by the appellate procedure, effectiveness of this process is conditioned upon the quality of superior court judgments.

In the common law model, courts built on precedent in their effort to interpret the law and apply it to new situations. Political/policy concerns are a straightforward part of courts' decisions and give superior court judges some degree of discretion. Thus, independence does not imply isolation from policy, although judges must use legal arguments to justify their decisions.

b. Disciplinary Controls

In many states that recognize the need for judicial discipline, as well as for systems of appointment, promotion and deployment that as far as possible are based on structures in which the judiciary has a major, if not controlling role. Usually the judiciary itself will not be in a position to establish such structures unilaterally. Indeed, in many countries, the Constitution itself will lay down at least the framework for such systems. As it happens, Sri Lanka is no exception. Its Constitution provides for the establishment of a Judicial Service Commission (JSC) that, in practice, runs the judiciary below the level of the High Court. The JSC manages the large workforce employed in courts[9] and its purpose is to ensure integrity in judicial administration, the independence of judges in the lower judiciary and the prevention of corruption.

There may be instances where one judicial officer influencing another in the decision making process. The Bangalore Principles are alert to this issue. "In performing judicial duties," Principle 1.4 affirms, "a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently." This Principle reflects the notion that judicial independence requires judges being independent from each other. Without a system capable of guaranteeing this dimension of judicial

8. Nallaratnam Singarasa v Sri Lanka, Communication No. 1033/2001: Sri Lanka. 23/08/2004. CCPR/C/81/D/1033/2001. (Jurisprudence) http://www.alrc.net/doc/mainfile.php/un_cases/259/
9. Scheduled public officers described under Article 114 of the Constitution.

independence, a state like Sri Lanka in the Common Law tradition is then left only with the remedy of parliamentary impeachment, a blunt instrument that, far from guaranteeing independence and impartiality, is capable of being abused as a vehicle for political interference in legitimate judicial functions.

c. Codes of conduct and ethical standards

Another option is to regulate disciplinary failure through codes of conduct for judges and judicial officers. Countries such as the United States penalize breaches of the code of conduct at federal and state levels.[10] Sri Lanka does not have established Code of Conduct for Judges. Even though India has one, the Attorney General of India argued before the New Delhi High Court that such a Code has no legal force.[11]

The adoption of a code of judicial ethics appears in principle to be an ideal route to establish clear rules and make judicial activity transparent. A code of judicial conduct while providing the judiciary with standards against which it can measure its performance can inform the public about standards of conduct that judges are expected to uphold.[12] Ethic codes help judges resolve questions of professional ethics giving them autonomy in decision making and guaranteeing their independence. While providing protection to judges against arbitrary and capricious charges of misconduct they signal the serious commitment of a concerned judiciary to meet its responsibilities in this regard.

There are two main arguments against judicial ethics codes.[13] The first asserts that they jeopardize judicial independence; the second, that they are ineffective. According to the first argument, judicial independence can be jeopardized by the imposition of a code of conduct from outside the judiciary. What is more, such a code could be used by superior courts to control dissents and differences in judgments by lower courts. Both are dangers that could be mitigated by a committed civil society that acts as watchdogs and reinforces of judicial independence and by the consolidation of the judiciary as an independent body of ethical practitioners, not rivals pitted against each other.[14] In sum, this first argument against judicial codes of conduct is weak since ultimately judicial independence is reinforced, rather than curtailed, by a rigorous sense of judicial ethics. With respect to the second argument, it is true that explicitly defining the standards of behavior expected of judges orients them and focuses social expectations, facilitating early detection of judges whose behavior deviates from the standards. But the existence of clear rules of conduct does not guarantee their adoption in practice.

10. The Judicial Code of Conduct of The United States was passed in 1995. Accordingly, a judge should uphold the integrity and independence of the judiciary; avoid impropriety and the appearance of impropriety in all activities; regulate extra judicial activities to minimize the risk of conflict with judicial duties; and, regularly file reports of compensation received for law-related and extra judicial activities.
11. See the discussion of Right to Information Act of India below.
12. Ibid.
13. See: Emilio J. Cardenas and Hector M. Chayer, Corruption, Accountability and the discipline of judges in Latin America.
14. Ibid. Note 31

d. Systematic review of guidelines for judicial performance

A recent trend is for civil society and media to develop oversight mechanisms and indicators to evaluate, in a systematic way, the impartiality of judicial decisions and performance.[15] The initiative could be used to strengthen the evaluation system of the Judicial Service Commission. These mechanisms gathered key information about the best criteria to evaluate their performances. The indicators seek to evaluate judges, according to the number of decisions per month, their attendance record, administrative skills and the quality of decision making. The Judicial Service Commission, (JSC) has has adopted similar criteria to evaluate judicial performance. This mechanism if properly and objectively applied can bring good results. That said it can also be used to undermine the quality of justice. For example, there may be instances where Judges tended to employ 'short cuts' such as imposed settlements, summery disposals and hurriedly written poor quality judgments to meet a high disposal rate.

External Accountability Mechanisms

a. Supervision of Judicial decisions by International mechanisms

Judicial decisions of national courts are increasingly coming under scrutiny by regional and international treaty bodies established under international agreements, especially human rights treaties. Sri Lanka is a party to number of international agreements that provide for treaty body supervisory mechanisms.[16] The Human Rights Committee (HRC), on number of occasions has found that the courts of Sri Lanka have failed to meet fair trial guarantees or standards established by the ICCPR.[17] Views expressed by these treaty bodies afford an opportunity to improve the quality of justice.[18]

International mechanisms generally rely on certain domestic conditions prevalent in the state party and are subsidiary and complementary to national courts. In many respects, the complaints mechanisms established by treaties defers to state sovereignty and based on the premise that primary responsibility and capability of safeguarding human rights are placed in domestic courts. The rationale for the exhaustion rule has been designed to give the national authorities /courts the opportunity to prevent violations or to bring national

15. In El Salvador, the NGO Projects designed indicators to evaluate the transparency, independence and performance of Salvadoran judges.
16. Optional Protocol 1 to the International Covenant on Civil & Political Rights (ICCPR) ; Optional protocol to CEDAW.
17. See:Victor Ivan Majuwana Kankanamge v Sri Lanka, Communication No. 909/2000 : Sri Lanka. 26/08/2004 CCPR/C/81/D/909/2000. (Jurisprudence) http://www.ruleoflawsrilanka.org/cases/un-cases-for-sri-lanka/human-rights-committee-victor-ivan-majuwana, Tony Fernando v Sri Lanka
18. Nallaratnam Singarasa v Sri Lanka, Communication No. 1033/2001:Sri Lanka. 23/08/2004. CCPR/C/81/D/1033/2001. (Jurisprudence) http://www.alrc.net/doc/mainfile.php/un_cases/259/ Pursuant to section 24 of the Sri Lankan Evidence Ordinance, confessions extracted by "inducement, threat or promise" are inadmissible and that in the instant case both the High Court and the Court of Appeal considered evidence that the author had been assaulted several days prior to the alleged confession. The HRC also noted that the burden of proving whether the confession was voluntary was on the accused; the willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate suggested that this threshold was not complied with.

laws and practices in conformity with treaty commitments. If the national judiciary is endemically corrupt or is unable to ensure basic fair trial guarantees, then the exhaustion of domestic remedies may not be a pre-condition to invoke international jurisdiction. Both the Sri Lankan Government and the Supreme Court have asserted the supremacy of national courts and commissions over international supervision mechanisms despite treaty obligations.[19] there can be no argument in this contest that to assert national sovereignty and supremacy of national court, establishment of independent, impartial and clean judiciary is a prerequisite.

b. In-depth review of controversial cases

When internal mechanisms like appellate process is not provided for by law or when existing appellate process is fundamentally flawed or inadequate to evaluate the correctness of judgments, there must be some kind of a review mechanism to hold judges accountable. One tactic used by civil society targeting judicial corruption or unethical behavior is to 'audit' individual cases. External case reviews, however, often produce negative reactions. While 'auditing of individual' cases can be a useful way of external scrutiny to discourage corruption, it is extremely important to ensure that the authority, independence and the integrity of the courts and judges are not undermined by the process. Complete perception of facts, evidence, and demeanor of witnesses that the presiding judge is presented with at the trial may not be available to an external review mechanism seeking to judge judges. On the other hand, public perception of courts and judges is extremely important to maintain the authority of courts and rule of law in general. Judges must be protected against unfounded or sensationalist media coverage or criticisms instigated by lack of competency or corruption on the part of media. Judges view any kind of review mechanisms outside the judicial process as undermining their authority, and infringing their independence and impartiality. Influential and wealthy corporations and also criminal elements can manipulate external review processes by buying corrupt media personnel. To minimize skewed journalistic coverage, care must be taken to ensure that such studies are unbiased, factually accurate and pertain to issues that affect all citizens.

Only the respectable academics and eminent lawyers must be bestowed with the privilege of publically to criticizing judgments and that too must strictly be on a valid basis. Unfortunately, academics and legal luminaries in Sri Lanka hardly come out publically to discuss judgments even if they are of public interest. Lawyers seem to be conscious of negative consequences that 'antagonizing a judge' may have on their career prospects

19. Nallaratnam Singarasa vs. Attorney General. SC (Spl) L.A. No. 182/99 www.humanrights.asia/news/ahrc-news/AS-223-2006 -, the Supreme Court of Sri Lanka held… "The resulting position is that the petitioner cannot seek to 'invalidate and enforce' his rights through the Human Rights Committee at Geneva, which is not reposed with judicial power under our Constitution. A fortiori it is submitted that this court being "the highest and final Superior Court of record in the Republic" in terms of Article 118 of the Constitution cannot set aside or vary its order as pleaded by the petitioner on the basis of the findings of the Human Rights Committee in Geneva which is not reposed with any judicial power under or in terms of the Constitution" www.srilankahr.net/pdf/sc_judgement1.pdf

or the contempt of court penalties. While 'auditing' of individual cases does not always bring about the desired response, it is valuable tool for obtaining and disseminating information about a case of national interest.[20] At the same time, it must be recalled that the law does not always easily yield an answer to an issue. If it did, benches of several judges would not need to decide a question, often by a majority. In other words, even the most highly qualified professionals may disagree on the correct legal outcome of a case. The disagreement may flow from genuine differences in evaluation of the evidence. They may also result from disagreement about what the applicable law is. Insured, there must be clear guidance as to what criteria may be helpful in identifying decisions that are unsustainable on the facts or the law or both.

c. Role of the Media

Freedom of expression underlies the importance of public scrutiny of the processes of governance, which in present day thinking, encompasses the administration of justice. The primary justification for public scrutiny of the judiciary is that it constitutes a democratic check on judges who are not elected but who exercise public power.[21] Importantly, responsible free media are a method of scrutiny that is appropriate in a country like Sri Lanka.

International human rights law has maintained that when balancing rights of free speech with the principle of the authority of the judiciary, the question should be whether the prohibition is strictly necessary in a democratic society.[22] The freedom to debate the conduct of public affairs by the judiciary does not however mean that unwarranted attacks on the judiciary as an institution can be condoned. At all times, comment should be fair and without personal bias.

It is damaging to keep mum over media exposures that bring corrupt practices into light. If the allegations are found to be truthful, it is important to take prompt actions against the errant judge in order to sustain public faith in the judiciary. On the other hand, if the media exposure is malicious or unfounded, stringent actions must be taken to rectify the error and remove the 'sword of Damocles' hanging over the judge. When no action is taken, the image of the judiciary as a whole would be badly affected.

20. Positive role of Indian media in regularly highlighting important decisions of Central Information Commission has been of great help in achieving success of right of Information Act. Press-agencies and newspapers have deputed special correspondents to cover news related to RTI Act. A private news-channel of repute (NDTV) has been lauded for being the champion amongst electronic media to make effectiveness of RTI Act reaching to masses. Timely campaign of this channel prevented diluting of the Act by a tactic move to remove essential 'file-notings' from 'Information' as defined under the RTI Act.

21. Some advocates for the election of judges in the USA argue that it was the founding fathers intent to have the people keep the judiciary branch in check. President Thomas Jefferson declared "the exemption of the judges from that [elections] is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves…". Jefferson, among other founding fathers, favored the election of judges periodically for then the people could hold judges accountable for their decisions. Judges know when they make politically biased decisions. The election of judges would keep them honest, fair, and impartial. Jefferson also believed that "It [was] necessary to introduce the people into every department of government…" and if you appoint judges rather than elect them, you take away the people's participation in the judicial branch of government

22. See: Judgments of European Court of Human Rights on freedom of expression.

Laws and Practices that prevent public discussion of corruption

a. Limits to Freedom of Expression

The reason why media exposure of corruption is so important is that in many, if not most, countries corruption is rarely exposed in the courts or by anti-corruption commissions. Limits to freedom of expression, contempt of court legal regimes, and criminal defamation laws generally inhibit the exposition of corruption in the media. In consequence, and as a result of the secretive nature of corrupt deals, it is next to impossible to assess true levels of corruption. It must be emphasized that media investigation of judicial corruption is difficult as it calls for reporters knowledgeable about law, judicial systems and procedures, and for editors and proprietors prepared to stand up to threats, fines and imprisonment. It calls for media practitioners skilled not only in reporting the courts but in presenting legal issues comprehensively for the general public. If the media personnel are properly trained, knowledgeable, and tell the truth in honest belief in fare comment and reporting, it is not easy to target them as violators of freedom of expression.

b. Law Relating to Contempt of Court

The role of the court cannot be fulfilled unless they win the confidence of the people. The courts, as an institution must win the love and the admiration of the people. This love and admiration is based on its capacity to create the willingness of the people to come before it. It is the people that come before the courts that create opportunities for the courts to do justice. Word 'justice' loses its meaning when it is associated with fear. It is only those policemen who torture people or those politicians that are corrupt, or the underworld figures and others who live by unscrupulously breaking the law that should fear the courts. The ordinary citizen, particularly the poor and humble people need to come to court with a sense of confidence that here is our last resort. They must believe that intelligence resides among those who adjudicate on them. They should believe that the highest principles of ethics and compassion exist and that they can trust that the outcome is always right and just. This is not possible in an atmosphere where the citizens begin to fear the courts. The purpose of the Contempt of Court jurisdiction was to give it the power so that the other branches of the government, police and the executive should respect the authority of the courts and that no one should consider themselves above the law.[23]

The United States which concedes greater latitude to freedom of speech has encouraged the media to engage in a broad discussion of courts, judges and judgments. Courts in the United Kingdom have, in recent times, allowed greater latitude to the public to criticize (constructively) judges and the administration of justice. Sri Lankan law developed by

23. "[A]lthough criminal contempt of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice, either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it". AG v. Leveller Magazine Ltd., [1979] AC 440, p. 449 per Lord Diplock

courts on contempt of court[24] has often been subjected to controversy. What amounts to contempt has been subjected to differing interpretations by the courts, the majority of which have inclined towards conservative views.[25] This has had an inevitable impact on public discussion of vital public interest issues due to fears that journalists or citizens voicing their opinions on particular judgments of the Court or with regard to pending adjudications will be cited for contempt.

c. The Sub-Judice Rule

The *sub-judice*[26] Rule is an issue that is highly relevant to public discussion and publications in Sri Lanka. The concept of *sub judice* has been used in the past in Sri Lanka not only to limit freedom of the media in reporting and commenting on matters relevant to on-going court proceedings, sometimes curtailing legitimate public interest and discussion, but also to stifle discussion about Parliament.[27] Criticizing a judgment which convicted a journalist who reported a speech made by a Member of Parliament, Mr. Kadiragamer[28] said ... "is the exclusive judicial function of the Court to determine cases really usurped by an unbalanced and patently partisan opinion expressed by some politician? I cannot believe that is so. Is the expression of such an opinion really a pre-judgment of the pending case? Is that be so, then in every home and on every street corner every day, thousands of contempts will be committed…"[29]

d. Criticism of Judges

In contrast to the *sub judice* rule, which is only applicable to pending legal proceedings, this form of contempt of court is applicable at any time. Its aim is more general, namely to prevent the undermining of public confidence in the administration of justice. As with other forms of common law contempt of court, the doctrine of "scandalizing the court" is rooted in English common law. The primary rationale for this form of contempt law is the maintenance of public confidence in the administration of justice. In *Ex parte Fernandez,* Erie, C.J. said:

24. The English law of contempt, modified to some extent in its application in Sri Lanka, was in operation immediately prior to the coming into force of the 1978 Democratic Socialist Republican Constitution. See: Contempt of Court in Sri Lanka: Recommendations for Codification by ARTICLE 19 Global Campaign for Free Expression http://www.article19.org/pdfs/analysis/sri-lanka.contempt.03.pdf
25 The case law in Sri Lanka can broadly be categorized into three areas of contempt, consistent with those referred to in the St. James Evening Post case, (1742) 2 At. K. 469, p. 471, namely commenting on ongoing legal proceedings (sub judice), criticism of courts and judges and expression in court.
26. The term sub judice is derived from the Latin phrase adhuc sub judice lis est, which means "the matter is still under consideration" no one should interfere with legal proceedings which are pending. In practice, this rule is usually used to prohibit publication of matters which are likely to prejudice the right of a fair trial when legal proceedings are pending, or in a more colloquial sense, to prevent "trial by media"
27. A case in point is the abduction and killing of the journalist Richard de Zoysa, whose body was found on the beach at Moratuwa in late 1989. The parliamentary discussion of the whole episode, even after the magisterial proceedings had been concluded, was prohibited on the grounds of sub judice as the suspect police officers had filed civil actions claiming damages from De Zoysa's mother.
28. One time Foreign Minister and eminent President's Counsel of Sri Lanka
29. Lakshman Kadirgamar, P.C., Freedom of Expression and Sub Judice, OPA Journal, Vol. 15, 1992-3

"…According to my experience, the personal feelings of the Judges have never had the slightest influence in the exercise of those powers entrusted to them for the purpose of supporting the dignity of their important office; and so far as my observation goes, they have been exercised for the good of the people.[30]

Numerous examples from countries all over the world have clearly demonstrated that judges, like all of us, are manifestly human and fallible. The idea that they can fairly assess criticism, even directed at themselves, assumes that they have an almost superhuman level of intellectual objectivity, a notion which history and common sense shows is not warranted.

e. Expression in Court

It is well-established, and fairly obvious, that courts need to be able to sanction those who obstruct their processes, for example by shouting in the courtroom or other unruly behavior. Questions have been raised, however, about the process by which such cases are judged, as well as sentences in some such cases.

The law must be accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[31] This is a fundamental consideration in codifying contempt of court rules and a problem with the law as it presently stands, given that it is excessively vague. The offence should be clearly specified and the law should also set out the procedure to follow in the event of an act of contempt, mitigating circumstances, defences and so on. Furthermore, careful consideration should be given to what specific legitimate aims are being protected. Ensuring a fair trial is clearly a legitimate aim, but maintaining the authority of the judiciary may be legitimate only if a failure to do so will lead to a situation where individuals fail to rely on the courts as the final arbiters of disputes. In essence, it does not really matter whether or not the public hold the courts in high esteem; what is relevant is whether attitudes towards courts are so negative that people are reluctant, or lack the confidence, to use them to settle their disputes. The situation in the United States, United Kingdom and Canada, where the offence of criticizing judges and courts is effectively a dead letter, suggests that criticism of the courts does not actually undermine their authority as final decision makers.

Conclusion

The judiciary is the watchdog of the rights of citizens and the independence of the judiciary is crucial in its role. However, the emphasis on ensuring independence of the judiciary has raised the question of 'who will watch the watchdogs'. Holding the judiciary accountable to an external body raises questions as to whether that same process could be used to undermine judicial independence. Ensuring judges of their independence, while

30. 30 L.J.C.P. 321, p. 332.
31. The Sunday Times v. United Kingdom, Application No. 6538/74, 14 EHRR 229, para. 49 (European Court of Human Rights),

subjecting them to effective accountability mechanisms, will deter corruption. Broadly speaking the judiciary, like other branches of government, must be held accountable directly or indirectly to the general public it serves. This is a vital step towards ensuring the overall integrity of the judiciary.

If the judiciary must be held accountable directly or indirectly to the general public it serves, then the role is enormous the general public is expected to play in ensuring that the accountability mechanisms work properly. The level of tolerance is one of the most powerful forces abetting corruption. Where tolerance is high, even a case where an abuse of office has become public knowledge need not result in communal condemnation and exclusion. Progressive role of the media and the public spirited litigation of civic minded citizens have amply demonstrated how the corruption in the judicial branch can be brought to light and to create an environment to fight corruption without undue influences from other branches of government.

Legal and judicial measures for deterring corruption are only a part of the solution. The long-term solution lies in the realm of education at all levels — whereby the importance of personal integrity and the spirit of public service will be imbibed in our citizens. Such an education has to take place not only in classrooms but in a variety of social settings — namely, the family, the workplace and the public discourse shaped by the mass media. Just as some of the distinguished persons have transformed the lives of people around them by setting strong personal examples, we need to re-build a culture where examples of integrity, personal sacrifice and innovation are given due recognition.

Fiction and Poetry in Judgments

Chanima Wijebandara
Magistrate Mathugama.

Abstract

The propriety of citing literature in judgments is a debatable issue the world over. Nevertheless, many Judges of Superior courts and a few judges of courts of first instance have, at times, resorted to citing popular literary works such as Drama, Novels and Poetry for various purposes in their Judicial opinion. This paper is a study on how the judges of both Sri Lanka and other countries have utilized English Literature in achieving these goals and discusses the advantages and disadvantages of this technique. Several interesting judgments are referred to, with a brief reflection on the significance of its literary citation in conveying the opinion of the judge.

"Writing Judgments is an art, not a science"
- Lord Hope of Craighead[1] -

Introduction

Judges refer to a wide variety of resource documents in their judgments such as Dictionaries, Legal text books, Historical accounts and also popular literary works. Among these, perhaps, the most debatable resource could be popular literature. Though usage of literature is comparatively rare, some Judges are seen to utilize popular literature in order to achieve various goals such as interpretation of a particular word or an idea or to evoke an emotional response in the mind of the reader. A "Literary" use of a fictional account in a judgment is where an author's name, a title of a book, a quote or an idea of a literary work is used to evoke an image that helps color the argument.[2] Though such

1. Deputy president of the Supreme Court of United Kingdom, 2009
2. M. Todd Henderson, Citing Fiction, The Green Bag, An Entertaining Journal Of Law, Second Series. Winter 2008, Volume 11, Number 2, page 174 , Available at www.law.uchicago.edu

citations could be a powerful tool in judgment writing, the skepticism with which it is treated by many, creates a debatable issue worthy of academic research. This paper is a preliminary study on this issue that aims to identify the impact and appropriateness of citing English literature in judgments.

The methodology adopted for this study is explained in Part I of this paper while Part II briefly discusses the relationship between law and literature. In Part III, several judgments rich in citations of fiction and poetry are compiled with a discussion on the function of the work cited in each case. The advantages and disadvantages of resorting to popular literature in court cases are discussed in Part IV. In the conclusion, it will be shown that despite controversy, some judges are well capable of using literature to achieve remarkable results in their judgments and it is suggested that it is not a technique to be totally discarded as unsuitable.

Part I

Methodology

The judgments selected for analysis were mainly traced by searching online databases of judgments such as www.bailii.org.uk, www.federalcircuitcourt.gov.au, www.supremecourtofindia.nic.in, www.lawnet.lk, www.paclii, www.caselaw.lp.findlaw.com. Searches were carried out by using specific words such as the name of an author (ex. Shakespeare, Tennyson, Gibran, Tagore, Dickens etc.) and the name of literary works (ex. Lolita, Les miserables etc.) and also by general words such as poem, poet, novel, novelist etc.. In selecting authors and literary works for the study, several Law and Literature syllabuses of Universities (ex. Duke University school of Law, George Washington University Law School, etc) and Articles and research papers in legal Journals (ex. Yale Journal of Law and the Humanities, The Green Bag - An Entertaining Journal of Law, Indiana Law Journal etc.) were referred to. Some of the judgments cited in these articles and other news items (ex. "Court cites nonsense poem in ruling Gitmo detainee"[3], "Guantanamo as Alice in Wonderland"[4], "Justice Khosa should not have used poetry in judgment; Aitzaz Ahsan"[5] etc.) have also been selected for the study. The complete texts of all selected judgments have been traced in order to analyze the significance of the citation.

In relation to Sri Lanka, as there is no online database of judgments of courts of first instance this study is limited to our appellate court decisions. It is also limited to English Literature due to the difficulty in identifying legally significant Sinhalese literary works that our judges have cited.

3. International CNN.com, www. edition.cnn.com/2008/POLITICS/06/30/Court.Poem
4. www.andyworthington.co.uk, 2008.07.01
5. The express Tribune with the International New York Times, www.tribune.com.pk

Part II

Relationship between Law and Literature

The debate whether it is appropriate to use creative literature in a court case arises with the question "What does literature has to do with law?" Infact, Justice Cardozo in the book *"Law and literature and other Essays and Addresses"*, begins the first chapter by stating "I am told at times by friends that a judicial opinion has no business to be Literature"[6]. However, the connection between Literature and Law has been recognized as far back as two thousand years ago in the time of Greek Philosopher Plato. Plato's famous words that "A society's Law book should, in right and reason prove, when we open it, far the best and finest works of its whole Literature" is cited as proof of this fact.[7]

The emergence of the Law and Literature Movement in the 1960s and 1970s has also largely contributed to the development of the argument that there is an inter-relationship between the two disciplins. The modern "Law and Literature Movement" is founded by Legal scholar John H. Wigmore and Justice Benjamin N. Cardozo.[8] Wigmore has noted the prevalence of trials and legal themes in many of the world's famous novels in 1908. In 1925, Justice Cardozo has examined the literary styles of judicial opinion in his book titled "Law and Literature"[9]. However, a recent study on the impact of the Law and Literature Movement on judges of Federal Appellate Court in USA, which has consisted of a comprehensive survey of over 2 million judgments over the past 100 years, has revealed that citations to works of fiction in judicial opinions are extremely rare.[10] It is reported that instances where judges have employed literature rhetorically to evoke an emotional response in the reader occurs in only about 1 out of every 10,000 federal appellate opinions.

Today, Law and literature is an interdisciplinary study taught as a comparative studies course in many Universities of the United States of America and United Kingdom. The existence of a rich body of literature that centers on legal themes has been identified in these academic studies.[11] Some of the most famous works that are studied extensively in these courses and are most often referred to by judges can be listed as follows; The Trial by Kafka, Novels of Charles Dickens including *Bleak House, Great Expectations, To kill a mocking Bird* by Harper Lee, *Animal Farm* by Orwell, *1984* by Orwell, Many Plays of Shakespeare such as *Hamlet, Measure for Measure, Merchant of Venice, Richard II, Lolita* by Vladimir, *Chronicle of a death foretold* by Garcia Marquez, Novels of George Eliot such as *Adam Bede* and *the mill on the floss,* poems of khalil Gibran, Rebindranath Tagore.

6. Benjamin Nathan Cardozo, Wm. S. Hein Publishing, page 03
7. Law and Literature, www.legal-dictionary.thefreedictionery.com
8. ibid
9. supra note 6
10. supra note 2 at page 174
11. Deji Olukotun "Going Mad by Grains" Reflections on Law and Literature" www.worldliteraturetoday.org

Part III

Judgments with Literary Citations

The Pen is a mighty Sword – a two edged weapon

In the Fundamental rights application *Victor Ivan v. Sarath N. Silva, Attorney-General and another*[12] Shakespeare's play *"Measure for Measure"* has been cited to emphasise the fact that though one may possess immense power it should not be used tyrannously. The case had been filed by the petitioner, the Editor of the Ravaya Newspaper, alleging that he had been indicted by the Attorney General for criminal Defamation indiscriminately, arbitrarily, without proper assessment of the facts as required by law, and without regard to the constitutional guarantees given to journalists, thus, violating his fundamental rights guaranteed by Article 12 (1). It was also alleged that the petitioners right to freedom of speech and expression including publication has been violated contrary to Article 14 (1) (g) of the Constitution. In deciding whether to grant leave to proceed, Justice Mark Fernando has commented as follows:

> *"I do not think that a newspaper enjoys any greater privilege of speech, expression and publication, or immunity from prosecution, than the ordinary citizen. The freedom of the press is not a distinct fundamental right, but is part of the freedom of speech and expression, including publication, which Article 14 (1) (a) has entrenched for everyone alike. It surely does allow the pen of the journalist to be used as a mighty sword to rip open the facades which hide misconduct and corruption, but it is a two-edged weapon which he must wield with care not to wound the innocent while exposing the guilty. As Shakespeare put it:*
>
> *" O! it is excellent*
> *To have a giant's strength,*
> *But it is tyrannous*
> *To use it like a giant."*
>
> (Measure for Measure, II, ii, 107)"

The Hunting of the Snark

The case of *Parhat V. Gates*[13] of the United States Court of Appeal, District of Colombia Circuit was a petition filed against an order of a Combatant Status Review Tribunal. The tribunal had decided that petitioner Huzaifa Parhat, a detainee at the United States Naval Base at Guantanamo Bay, Cuba, is an enemy combatant and was being detained for more than 6 years. The government had suggested that several of the assertions in the intelligence documents are reliable because they are made in at least three different

12. 1988 IV SLR 340
13. (06-1397)

documents. In his judgment, the Chief Judge Sentelle has cited the poem *"The Hunting of the Snark"* by Lewis Carol, the author of popular children's book *Alice in wonderland,* in slamming the reliability of U.S. government intelligence documents and criticized the government for offering unsubstantiated evidence.

> *"First, the government suggests that several of the assertions in the intelligence documents are reliable because they are made in at least three different documents. We are not persuaded. Lewis Carroll notwithstanding, the fact that the government has "said it thrice" does not make an allegation true. See Lewis Carroll, The Hunting of the Snark 3 (1876) ("I have said it thrice: What I tell you three times is true."). In fact, we have no basis for concluding that there are independent sources for the documents' thrice-made assertions. To the contrary, as noted in Part III, many of those assertions are made in identical language, suggesting that later documents may merely be citing earlier ones, and hence that all may ultimately derive from a single source."*

Grim Realities of the Criminal Courts

The State v. Allan Woila[14] is a judgment of National Court of Papua New Guinea that addresses the issue of whether an accused may stand trial other than from the dock. In this case, Kearney J states that there is nothing magical about a dock and describes it as a small enclosure within a courtroom, part of the criminal court architecture developed in England some centuries ago. Stating that "the dock and other grim realities of the criminal courts first became widely known through the writings of Charles Dickens in the 19th century", he quotes from the novel *Oliver Twist*[15] in support of his contention.

> *"Thus Oliver Twist found himself:*
>
> *"jostled among a crowd of people, chiefly women, who were huddled together in a dirty, frowsy room, at the upper end of which was a raised platform, railed off from the rest, with a dock for the prisoners on the left hand against the wall, a box for the witnesses in the middle, and a desk for the magistrates on the right; the awful locality last named, being screened off by a partition, which concealed the Bench from the common gaze, and left the vulgar to imagine (if they could) the full majesty of justice."*

Having cited this description, he draws a similarity between the courts of today and the courts of Dickens's era.

> *"Sadly, it is sometimes not so very different today; court architecture has not changed a great deal. A notable defect is that it does not cater for the need for close contact between an accused person and his counsel."*

14. [1978] PGNC 55; [1978]PNGLR 113
15. Penguin popular Classics, Chapter 43, page 409

Pity the Nation

Justice Asif Saeed Khan Khosa, Judge of the Supreme Court of Pakistan, in the Judgment of Contempt proceedings against Syed Yousaf Raza Gillani, the Prime Minister of Pakistan,[16] has cited two poems *"Pity the Nation" and "Crime and Punishment"* by famous poet Kalil Gibran and the poem *"For whom the bell tolls"*[17] by Johne Donne. In this case, the Prime Minister of Pakistan/ Chief executive of the Federation, Syed Yousaf Raza Gillani was found guilty and convicted of contempt of court for willful flouting, disregard and disobedience of directions made by court in the judgment of another case. It is stated in the Judgment that the contempt committed by him is substantially detrimental to the administration of justice and tends to bring the Supreme Court and the judiciary of the country in to ridicule. While agreeing with the judgment of Justice Nasir-ul-Mulk, Justice Khosa has written an additional note in which having cited the poem *"Pity the nation"* by Kalil Gibran, he goes on to add a new part written by himself that expresses his judicial sentiments on the stark reality of India's present social and political status in a remarkably creative manner.

> *"With an apology to Khalil Gibran, and with reference to the present context, I may add as follows:*
>
> *Pity the nation that achieves nationhood in the name of a religion*
> *but pays little heed to truth, righteousness and accountability*
> *which are the essence of every religion.*
>
> *Pity the nation that proclaims democracy as its polity*
> *but restricts it to queuing up for casting of ballots only*
> *and discourages democratic values.*
> *Pity the nation that measures honour with success*
> *and respect with authority,*
> *that despises sublime and cherishes mundane,*
> *that treats a criminal as a hero and considers civility as weakness*
> *and that deems a sage a fool and venerates the wicked.*
> *Pity the nation that adopts a Constitution*
> *but allows political interests to outweigh constitutional diktat.*
> *Pity the nation that demands justice for all*
> *but is agitated when justice hurts its political loyalty.*
> *Pity the nation whose servants treat their solemn oaths*
> *as nothing more than a formality before entering upon an office.*
> *Pity the nation that elects a leader as a redeemer*
> *but expects him to bend every law to favour his benefactors.*
> *Pity the nation whose leaders seek martyrdom*

16. Suo motu case No. 04 of 2010, order dated 08.05.2012, Full text Available at www.supremecourt.gov.pk
17. It is reported that this was not originally written as a poem but as prose in the book *Devotions Upon emergent Occasions Meditation XVII,* 1964 by Johne Donne.

through disobeying the law
than giving sacrifices for the glory of law
and who see no shame in crime.
Pity the nation that is led by those
who laugh at the law
little realizing that the law shall have the last laugh.
Pity the nation that launches a movement for rule of law
but cries foul when the law is applied against its bigwig,
that reads judicial verdicts through political glasses
and that permits skills of advocacy to be practiced
more vigorously outside the courtroom than inside.
Pity the nation that punishes its weak and poor
but is shy of bringing its high and mighty to book.
Pity the nation that clamours for equality before law
but has selective justice close to its heart.
Pity the nation that thinks from its heart
and not from its head.
Indeed, pity the nation
that does not discern villainy from nobility.

A Nymphet or a Victim?

In the case *State v. Guta*[18] of the National Court of Papua New Guinea, Doherty AJ has referred to *"Lolita"*, one of the most controversial classic novels by Vladimir Nabokov, a Russian-born novelist, written in English and published in 1955. It is cited to draw a distinction between the offence committed by the accused and the main character of the novel. In Lolita, Humbert, an English Literature teacher who is obsessed with sexually desirable and sexually aware young girls whom he calls nymphets, forms a pedophiliac relationship with a twelve year old girl.[19] The reference to the novel helps to highlight the gravity of the crime committed by the accused. The accused, had pleaded guilty to the charge of attempted unlawful carnal knowledge of a three year old girl. The girl had been abducted, sexually abused and abandoned with bleeding injuries at a swamp.

In mitigation, among other things, the Counsel stated that at the time of the offence, the accused had an **'overpowering sexual urge'.** While deciding that this statement only aggravates the situation, court comments as follows:

> *"In considering the case before me I find that this is a bad case, the worst possible case of attempted unlawful carnal knowledge, the child's perineum was torn from the vagina to the anus, the tear was 10 centimeters deep. The child was 3 years of age - these can be no suggestion here of the precocious young girl luring the older man - the* **"Lolita"** *type of fiction."*

18. [1900] PGNC 2: N841 (27th March 1990)
19. www.sparknotes.com

Sex workers are also human beings

The judgment of *Budhadev Karmaskar v. State of West Bengal*[20] delivered by the Supreme Court of India, upholding the conviction and the sentence of life imprisonment imposed on the accused for the murder of a sex worker, has referred to a number of literary works to convey the message that sex workers are also entitled to a life of dignity in view of the Article 21 of the Indian Constitution and that society should not look down upon them.

> *"In the novels and stories of the great Bengali writer Sharat Chand Chattopadhyaya, many prostitutes have been shown to be women of very high character, e.g.,Rajyalakshmi in 'Shrikant', Chandramukhi in 'Devdas' etc.*
>
> *The plight of prostitutes has been depicted by the great Urdu poet Sahil Ludhianvi in his poem 'Chakle' which has been sung in the Hindi film Pyasa "Jineh Naaz Hai Hind Per wo kahan hain" (simplified version of the verse 'Sana Khwane- taqdees-e-Mashrik Kahan Hain').*
>
> *We may also refer to the character Sonya Marmelodov in Dostoyevsky's famous novel 'Crime and Punishment'. Sonya is depicted as a girl who sacrifices her body to earn some bread for her impoverished family.*
>
> *Reference may also be made to Amrapali, who was a contemporary of Lord Buddha."*

In this case, the Supreme Court went a step further and directed the Central and the State Governments to prepare schemes for giving technical/vocational training to sex workers and sexually abused women in all cities in India.

Les Miserables

The case of *Pawel Bachanek v. Regional Court in Warsaw*,[21] Poland, , had been filed in the High Court of Justice, Queens Bench Division of England against the order of the District Judge that the appellant be extradited to Poland on a conviction warrant. Poland had requested to extradite the appellant for breaching the conditions of a suspended prison term imposed 14 years ago by a Polish court for a minor offence of burglary of pigeon lofts at the age of 17 years. Court identified a similar plight in a famous literary work and stated as follows;

> *"The case, in my view, has some parallels with the story of **Victor Hugo's** great novel, **Les Miserables,** where the hero is pursued in his respectable middle age for having stolen a loaf of bread many years ago."*

The court commented on the unfairness of the request but held that it was bound by a previous authority which stated that it is not for the English Court to impose its view of

20. Criminal Appeal No. 135 of 2010, decided on 14.02.2011
21. [2013] EWHC 258 (Admin)

seriousness or its view of sentencing policy on the authorities of the requesting State. While expressing its regret, Court dismissed the appeal.

Marriages are made in heaven.

In the Indian case of *Hitesh Bhatnagar v. Deepa Bhatnagar*[22] the Indian Supreme Court comments that though Marriages are made in heaven, as it is said, we are more often than not made to wonder what happens to them by the time they descend down to earth. In dealing with a divorce action, court stated that "though there is legal machinery in place to deal with such cases, these are perhaps the toughest for the court to deal with". In this case, the parties had filed a petition before the District Court, for dissolution of their marriage by grant of a decree of divorce by mutual consent. However, before the stage of second motion and passing of the decree of divorce, the respondent had withdrawn her consent, and in view of this, the petition was dismissed. The appellant who insisted for passing of the decree, being aggrieved by the dismissal, has appealed to the High Court. The appeal was dismissed by the High Court and the appellant had filed this appeal. The Supreme Court, in dismissing the appeal, concludes the judgment by citing from Eliot's novel *"Adam Bede"*:

> *"We conclude by quoting the great poet George Eliot "What greater thing is there for two human souls than to feel that they are joined for life – to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in all pain, to be one with each other in silent, unspeakable memories at the moment of the last parting."*

Dawn Wind

Digicel Fiji LTD V. Lateef and four others[23] court dealt with the legality of a decision to erect a mobile based station in an area zoned for recreational purposes close to residential areas. The judgment of the Court of Appeal of Fiji islands at Suva begins with a poem.

> "[1.0] Rudyard Kipling began his poem the "Dawn Wind" with these lines:
>
> ***"At two o'clock in the morning, if you open your window and listen,***
>
> ***You will hear the feet of the Wind that is going to call the sun."***
>
> *[2.0] At two o'clock on any morning if some of the owners of residential properties of the pleasant Fiji suburb of Flagstaff in Albert Lee Place open their windows and listen they too may hear the feet of the Wind that is going to call the sun but if they look across the greensward in front of their homes close to Flagstaff Park Reserve they will see not only the green turf in front of their homes but also a telephone tower 25 meters high inside the park reserve and not very far from their residences."*

22. Civil Appeal No. 6288 of 2008

23. [2010] FJCA 43; ABU0005.2009 (13th August 2010)

This introduction indicates at the inception what is forthcoming, the issue discussed in the case – the plight of the affected residents due to the construction referred to, and creates a visual image in the mind of the reader. Having so started, the Court of Appeal has upheld the decision of the High Court that the tower erected by the first appellant is an illegal structure because the respondents (the residents) were given no opportunity to be heard or of expressing their views on the proposal to build the tower.

The Trial

Federal Magistrates Court of Australia, in the case of *Saba Bros Tiling Pty Ltd v. Minister for Immigration and Anor,*[24] quoted Merkel J's citation of one of the most famous literary works that has a strong legal implication in *Chun Wang v Minister for Immigration* (1997 FCA 70).

> *"…..where his Honour said by way of introduction to the facts of that case:*
>
> *In "The Trial" Franz Kafka tells the story of a man who comes from the country to gain admittance to the Law. Before the Law stands a door-keeper who says that he cannot admit the man at the moment. The man had not expected to meet this difficulty as he thought that the Law should be accessible to every man and at all times. But he decides that he had better wait until he gets permission to enter. He waits for days and years. Finally the man asks how does it come about that in all these years no one has come seeking admittance but me? The door-keeper perceives that the man is at the end of his strength and his hearing is failing, so he bellows in his ear: "No one but you could gain admittance through this door, since this door was intended only for you. I am now going to shut it."*
>
> *Occasionally a case arises which makes the word Kafkaesque appear to be a description of fact rather than fiction. The present is such a case."*

Lawless Science of our Law

In *Chellappa v. Kanapathy,*[25] where the issue was with regard to inheritance of property under *Tesawalamai* law, Pereira J. referring to a poem by Alfred, Lord Tennyson states that.

> *"The matter at issue is whether under Tesawalamai the heirs of a woman who dies leaving children-males and females-are only her undowried daughters, or the sons as well it would be a hopeless task to attempt to answer this question by means of the collection the laws and customs of the Tamils of Jaffna known as the Tesawalamai. It is a crude and primitive compilation, which may fittingly be described in the words of Tennyson,*

24. [2010] FMCA 598 (10th December 2010)
25. 17 NLR 294

> *used with reference to another collection of Laws, as no other than a " wilderness of single instances" …."*

A reading of the complete poem would show how well this single line helps in conveying the exact situation faced by court.

> *"Mastering the lawless science of our law,*
> *That codeless myriad of precedent,*
> *That wilderness of single instances,*
> *Through which a few, by wit or fortune led,*
> *May beat a pathway out to wealth and fame."*
>
> *Aylmer's Field (1793)*

It is said that Tennyson was correct in writing this as in 1793, law has indeed been a "lawless science" because the information that constituted "the law" had been largely inaccessible.[26]

Paradise Lost

In the decision of *Uratemp Ventures Limited v. Collins*[27] the House of Lords of United Kingdom had resorted to Literature in interpreting the word "dwelling" under the Housing Act of 1988. The question for decision was whether a part of a house can constitute a dwelling if cooking facilities are not available or cooking is prohibited by the terms of the letting. Lord Millett stated that the idea that one must also cook his meals in a dwelling is found only in the law reports and finds no support in English literature.

> *"According to the Book of Common Prayer, "the fir trees are a dwelling for the storks" (Psalm 104); while W. S. Gilbert condemned the billiard sharp "to dwell in a dungeon cell" (where it will be remembered he plays with a twisted cue on a cloth untrue with elliptical billiard balls): The Mikado Act II. It is hardly necessary to observe that Victorian prison cells did not possess cooking facilities. Of course, the word "dwell" may owe its presence to the exigencies of the rhyme, but it does not strike the listener as incongruous. If faintly humorous, it is because the occupation of a prison cell is involuntary, not because of the absence of cooking facilities. As I shall show hereafter, Gilbert, who had qualified at the Bar, had got his law right. An earlier and greater poet wrote of Lucifer being hurled "to bottomless perdition, there to dwell in adamantine chaos and penal fire": (Paradise Lost Book I l.47).*

26. David G. Post, The Law is where you find it, www.temple.edu/lawschool
27. (Ap) [2001] UKHL 43 (11th October, 2001)

Part IV

Advantages and Disadvantages of Citing Literature

One of the main advantages of resorting to literature is that unlike Law, Literature appeals to the emotions as well as to the intellect.[28] Thus, literary citations can be used to help the reader understand the definition of a legal term, sometimes to make the reader laugh and occasional to create a feeling of pity in the reader for the plight of a party or issue in the case.[29] It is believed that while Dictionaries attest to meaning, Literature that is historically enduring can also do the same thing. But literature can create meaning and an emotional response in ways unachievable by other citations. For example when Judges cite to Dickens to comment on the prison conditions or Orwell to characterize government behavior, the citation evokes not only the richness of the novel and its place in our collective history, but also reader's full experience with the novel and its meaning.[30]

Literary works can give insight into the struggles and tensions created by law as the regulation by society of the lives of individuals.[31] The experience of viewing the world of the text and its inhabitants empathetically can be transformed in to a norm for judging human relations in general.[32] In the book *Poetic Justice: The Literary Imagination and Public Life,* it is shown that Judicial decisions informed by "the literary imagination" are likely to be sounder and wiser than judgments reached by other means".[33] It is said that the lessons of literature for law are unequivocally moral lessons, lessons that are both indispensable for those who claim to do justice and unlikely to be learned in other ways, such as through social interaction. This impulse and conviction has lead Nussbaum to accord training literature an essential role in the cultivation of empathy and to accord empathy an essential role in judging."[34]

It is the opinion of Lord Craighead that quotations from poetry and literature though can embellish a judgment when used sparingly and with care, it is doubtful whether they are appropriate in an opinion that is being delivered at first instance. Referring to a U.S. Judge who delivered a judgment in lyrics adopted from a song by Beatles, his Lordship suggests that it is best to leave the technique of citing poetry and literature to the senior judges, and if one happens to regard oneself as a senior judge, to leave it to those who can use it without any risk of inviting the suspicion that they are showing off.[35] His Lordship goes

28. Jeanne Gaakeer, *Law and Literature,* IVR encyclopedie, http//ivr-enc/index.php
29. supra note 2 at page 184
30. ibid at page 176
31. supra note 28
32. Martha Nussbaum cited by Gaarkeer ibid
33. Nussbaum cited by Thomas Morawetz, *Empathy and Judgment,* Yale Journal of Law and the Humanities, Vol.8 [1996], Issue 2, Art.8, page 519
34. Thomas Morawetz, *Empathy and Judgment,* Yale Journal of Law and the Humanities, Vol.8 [1996], Issue 2, Art.8, page 519, 520
35. *Writing Judgments,* Annual Lecture 2005, Judicial Studies Board, London, page 09. Available at www.judiciary.gov.uk

on to state that writing a judicial opinion is not, after all, an exercise in self advertisement, but in the end of the day, its function is to serve the public interest, and in particular that of the litigant.[36] This argument finds its justification when considering the disadvantages of the technique.

At times, by reference to fiction or poetry the, the parties might feel that court has undermined the gravity of the issue or that the Judge has acted on emotions. As Justice T. S. Sivagnanam has stated at a lecture on the art of writing orders and judgments, "Flowery language and, literary allusion maybe avoided and such indulgence may detract from the seriousness of the judgment."[37] The ability to grasp the exact meaning intended to convey by the Judge would depend on the readers experience with the particular work cited and if a reader is not familiar with the work cited, there is high possibility of it being misinterpreted or of not being understood at all. It is believed that "A work of literature exists on the printed page, but it gains life and meaning only when individual readers bring their knowledge, beliefs, feelings and values to the reading experience".[38] Thus, the way each person responds to literature may differ considerably. There could also be a possibility of misquoting a literary work if a deep study of the complete work has not been done by the Judge. It is argued that it takes an extremely well read judge to go beyond obvious quotes to famous works. For example, there are judgments that refer to Shakespeare to find definitions of a term or a phrase in the same manner a dictionary is refers to.[39] However, referring to Shakespeare is different to referring a dictionary as it is not easy or efficient to look up quotes in Shakespeare's plays unless one has an idea of what one is looking for. The richness of Shakespeare requires close study and devotion before ideas from his work can be meaningfully applied to a court case.[40] These disadvantages makes it a difficult task not only to cite but also to understand literature in a judgment.

Part V

Conclusion

Creative Literature has long been recognized as an important, though unconventional, source that can be used in judicial opinion in a similar manner as legal text books, Dictionaries and other formal reports are used. Studies show that the ability of literature in creating meaning and emotional responses is very much higher than conventional sources. Despite controversy with regard to this technique, there are instances where judges of many countries including Sri Lanka, have successfully utilized popular fiction and poetry for a variety of purposes. The examples cited in this paper provide ample

36. ibid
37. *"The salient features of the Art of Writing Orders and Judgments",* Lecture delivered on 11th April 2010 at Tamil Nadu State Judicial Academy, available at, www.hcmadras.tn.nic.in/jacademy
38. Judith A. Stanford, *Responding to Literature,* Mayfield Publishing Company, California, 1992, Third Edition, at pages 3 and 4
39. Coy v. Iowa 487m US 1012, 1016 (1988), cited in *Citing Fiction,* ibid note 2
40. ibid, at page 175

evidence in support of the contention that literature can be used as a powerful tool in judgment writing to introduce empathy and creativity to otherwise cumbersome legal jargon which might put off a layman reader. In conclusion, it can be said that citing Literature in judicial opinion proves to be a versatile technique, which if used sparingly with care, can embellish a judgment.

E-Filing of documents with the District Court

Priyantha Liyanage
LL.B (Colombo), LL.M
Additional Magistrate, Colombo.

Some devices have gone archived when other sophisticated devices are embraced by the society. So are the type writing machines and papers. These devices are replaced by Computers and electronic documents.

Expounding the importance of moving away from paper-based system as a means for improving access to justice Lord Justice Neuberger MR said;

> *"It's practically inconceivable that the current paper-based system will continue…. The sheer speed and growth of technology over the past quarter century, over the past decade, even over the past 12 months, speaks for itself. We should therefore be looking to reformulate our rules of court and court processes in order to fit with this world"* [1]

It is important to examine how this reality is valid in respect of filing process in the District Court Of Sri Lanka.

Paper Filing Vs Electronic Filing

The technological replacement for paper filing is the Electronic Filing System. Generally Electronic filing is the filing of information in electronic form, as opposed to paper form.[2] When it comes to justice system e filing is transmission of documents including pleadings in electronic form as opposed to paper form with courts. In terms of Practice Directions of Civil Procedure in United Kingdom filing or sending a document 'electronically', means to communicate with the court by e-mail; and to file specified documents by e-mail.[3]

1. Hector Fix Fierro- Courts Justice and Efficiency-Hart Publishing ,2003 p15
2. William A. Fenwickt and Robert D. Brownstone—"ELECTRONIC FILING: WHAT IS IT? WHAT ARE ITS IMPLICATIONS?" - 19 Santa Clara Computer & High Tech. L.J. 181
3. Practice Directions 5B Sec.7 read with sec.1

Naturally Production and retention of voluminous documents are involved in the civil justice system. Traditionally these documents exist in paper form. The litigant or the attorney is required to walk to the court during the court hours from 8.00 a.m. to 4.15 p.m. in order to file the initial documents and make payments in currency as required by law. One of the important persons in court is the court clerk. He has historically an important role in accepting organizing it, cataloguing, retrieving, photocopying and making the mountainous documents available for access by interested parties. Generally the documents are deemed to be filed once the date stamp is imposed on the document by the court clerk. Before the file being sent for the inspection of the judge the services of various subject clerks and peons are necessary followed by the binder's duty to arrange and compile it. This transmission consumes hours, perhaps a day. The way back to the respective subject clerk is no difference. Ultimately the case record is supposed to lay in the record room till the trolley comes on the date allocated for the case to be called in the open court. The record keeper is obliged to locate the file and send it to the open court. In the meantime the record may be accessed by interested parties on the dates and hours allocated for the same before an officer of the court after necessary payments being made. The clerk has to pull the file and send it to the registrar of the court on every occasion when certified copies of the file are claimed by interested parties. The file becomes huge when documents are filed for several years and the court staff is supposed to handle it. The judge must be able to locate any document in the file when it is discussed in the court.

Whenever the progress reports are called by the Judicial Service Commission or Justice Ministry the court staff has to conduct the survey manually by pulling all the case records from the shelves, count them and measure the progress. Whereas the E –filing System eliminates this process since it uses a technology called XML tagging (Extensible Markup Language) which transfers the data directly into the CMS[4] ,generate progress reports and to ensure efficient case management as a result of successful e filing system.

As opposed to filing of paper documents e filing facility allows law firms and attorneys to file 24 hours a day, 7 days a week from their office. An instructing attorney in Colombo can institute an action or file an answer to a case in Jaffna or Ampara from his office. The lawyers and litigants can be present in court at the trial stage only.

Court clerks are benefited tremendously from the implementation of EFS. "Reduction of the labour intensive nature of modern litigation by reducing the reliance on court clerk and process servers for manual filing and service of pleadings is one of the aims of the E filing system"[5]. The time and labour spent for performing tasks such as organizing cataloguing, retrieving, photocopying reviewing; retrieving, copying and re-shelving of files are eliminated.

4. Content Management System (CMS) is a computer programme that allows publishing, editing and modifying contents as well as maintenance from a central interface.
5. THE CONFLUENCE OF LAW AND POLICY IN LEVERAGING TECHNOLOGY: SINGAPORE JUDICIARY'S EXPERIENCE Richard Magnus12 Wm. & Mary Bill Rts. J. 661 2003-2004

Electronic Filing on the other hand emphasizes the importance of the timely resolution of cases. Postponement of hearings due to unavailability of case files or required documents frequently takes place in courts. With the use of E filing the judges can handle files since electronic files are immediately and readily available and there is no need to wait till the court clerk traces the file. Therefore the litigants need not to turn back due to the postponement of hearing of cases or issuing certified copies which resulted in due to misplacement or misfiling of documents. Hence Convenience and comfort is derived as a result of E Filing. Since the documents are filed in electronic format there is no jumble of piles of documents within judges' or clerk's table and office. Notably electronic filing or, electronic case records create the beginning of a new era that will render the administration of justice a less formal, but more effective and efficient, process.

One important purpose of physical presence of lawyers in filing a document is payment of this duty. The pleadings and affidavits filed with courts are subject to revenue levied by way of stamps under the Stamp Duty Act no 71 of 1988. However revenue can be paid by way of credit card through internet in the process of e- filing.

E filing is capable of eliminating the requirement of physical presence of parties until the trial stage. Attendance to court is undoubtedly cumbersome and expensive. It becomes worse for the litigants from remote areas since courts are located in urban areas. Much time and labour of the litigants and lawyers are wasted. The "calling cases" as frequently used by civil court practitioners consume nearly three hours a day. This time is used entirely by the judge to accept documents. The attorneys exchange their documents. For this purpose their presence in court is required despite the distance where they come from. The function of the judge in pre trial proceedings is no more that of a clerk. Therefore judges hardly find any time to implement an effective case management system within the court. The fresh morning hours of the day are spent to exchange documents and the rest of the day is spent for hearing of cases. The whole court staff has to get together every day to do this function, whereas the whole entire task can be taken over by a single computer which can accept or exchange multiple of documents simultaneously without manual intervention except to decide whether the document is acceptable according to law. Thus time saved, resources and labour can be utilized to dispose of cases in trial stage. Usually the trial proceedings take less time than the pre trial proceedings. This is very applicable to partition actions which consists long pre trial procedure.

The litigants are the best beneficiaries of a justice system. This traumatized pre trial procedure for the litigants has created an impression that the civil court an inefficient and lagging institution. The ultimate consequence is the diminishing of confidence towards justice system.

E- litigation system creates a paper less environment which helps to eliminate inherent problems such as misfiling, loss of documents, delays in file retrieval, and shortage of storage space. It saves labour of court staff and allows facilitating for more litigation. It naturally reduces the extensive reliance on court clerks and court fiscals for the manual filing and service of summons, notices and documents and applications.

There are significant features in E filing system as opposed to the filing of paper documents.

- The service is available 24 hours a day.
- The ability to file at your own convenience
- The option of selecting a court date to suit the litigant's personal circumstances
- The ability to see all documents on the file and view the hearing date online.
- The ability to save the partly completed application and come back to it for up to a certain given period.
- Payment of fees by credit card (law firms can be granted a direct debit arrangement by contacting the court)[6]

Tom Smith, a consultant hired by the California Administration of the Courts to assist it in implementing e-filing across the state's courts, has identified that the ideal judicial electronic filing system should have at least the following functionality:[7]

1. As a Universal service i.e. EFS should support for any type of filing, and for any type of case
2. Should be comprehensive i.e. anything that needs to be filed should be fileable electronically;
3. Consistent end user experience, i.e. the user should not be troubled by different interfaces for each jurisdiction or case type;
4. End user support, i.e. like any other IT, there is demand for support, marketing, billing, etc.; and
5. Multi-jurisdictional practices, i.e. accommodations must be made for filers with practices in multiple jurisdictions.

EFS is experienced in many Asian and European countries. In India EFS is available only for Supreme Court matters whereas in Singapore While filing through EFS has been made mandatory for almost all civil proceedings, litigants who do not have computing facilities can turn to the service bureau.[8] In India a unique Reference number is allotted at the

6. www.familycourt.gov.au last visited 20th Feb 2013
7. Tom Smith, Presentation, "California Electronic Filing Technical Standards Program"(July 18, 2002), available at http://www.courtinfo.ca.gov/programs/efiling/ documents/cefts3 Tom Smith is an e-filing consultant working with the California Administrative Office of the Courts. As reproduced by William A. Fenwickt and Robert D. Brownstone
8. Richard Magnus "THE CONFLUENCE OF LAW AND POLICY IN LEVERAGING TECHNOLOGY: SINGAPORE JUDICIARY'S EXPERIENCE" 12 Wm. & Mary Bill Rts. Journal 661 2003-2004

time of filing of the case through E-Filing. Every Advocate-on-record is given a password by the Registry. Since the pass word is known only to the concerned Advocate, it is not possible for any other person to file any matter or document on his behalf. The password can be changed by accessing the website. Court fees can only be paid through any 16 Digit Credit Card issued by any bank. Money orders or Demand Drafts are accepted for payment of the court fees.

Barriers in current Legal frame work

The paper based system is established by Civil procedure law itself. Chapter VII of the CPC deals with mode of institution of a civil action. Sec.39 says that action in regular procedure should be instituted presenting a duly stamped written plaint to the court. The terms "written" and "writing" include "printed" and "print" and "lithographed" and "lithograph" respectively as it is defined in Sec.5 of the CPC. The requirement of documents and pleadings to be written on good and suitable paper is a significant feature in CPC. Petitions filed under Sec.374 to institute an action in summery procedure, answer of the defendant[9] applications filed by way of motions in the course of proceedings[10], affidavits filed as evidence[11] are required to be written upon good and suitable paper. Hence the procedure of the civil court has not departed from paper from its origin with respect to filing an action. Service of summons is no difference to the filing process.[12]

Electronic Transactions Act

All legal barriers to use ICT were removed with the introduction of the Electronic Transactions Act No 19 of 2006(ETA). One of the objectives of the Act is to facilitate electronic filing of documents with government and to promote efficient delivery of government services by means of reliable forms of electronic communications.[13]

On the other hand Sec 8 of the Electronic Transactions Act welcomes electronic filing of documents with court which is a government institution. Sec. 8 deals with the filing of documents in electronic form with government institutions. Therefore it is arguable that notwithstanding the legal barriers in the CPC one can file documents with the District Court electronically. However there can not be two regimes which govern the Civil Procedure Law of the country. Therefore Civil Procedure Code is required to be amended enabling the documents to be filed electronically with the District Court. It also should be noted for the sake of any counter view that EFS is not affordable to a country like Sri Lanka yet the Government is currently allocating a considerable sum of money from its budget for papers, toners etc .

9. Sec 75 of CPC

10. Sec.91

11. Sec.440

12. Sec.59 and sec 60.The print media is method used for service of summons.

13. Sec 2 OF the ETA

In conclusion I wish to quote Scott J. Silverman from his book "Funding Technology and Automation for the Courts in a New Millennium"

> *"Judges and court administrators must install technology to help them handle their increased case loads without jeopardizing litigants' rights or increasing the time it takes to resolve cases".*[14]

14. Scott J. Silverman, "Funding Technology and Automation for the Courts in a New Millennium"2000p15

Doctrine of Confirmation by Subsequently Discovered Facts and The Concept of Torture:

From Human Rights Perspective

J.Trotsky LL.B (Hons), Mphil
Additional Magistrate, Colombo

It has been made clear through the judicial pronouncements of the Courts and international forums that when a confession is not made voluntarily or not recorded according to the procedure established by law, it would have no evidentiary value. However, since the 'Doctrine of Confirmation by subsequent facts' is an exception to this rule, this article specifically focuses on the impact the 'Doctrine of Confirmation' has on the issues of right to freedom from torture, fair trial, prevention of crime, and the protection of society.

It is an important question as to how far subsequent facts discovered in consequence of a confession can be allowed as evidence in criminal proceedings to show that the inducement had not in fact elicited a false confession but brought forth the truth.[1] For this reason, can we justify illegal means to find out the truth? Thus, the Law of Confession has been subjected to deep critical studies, especially, in comparison with other aspects of the Law of Evidence. Criminals should be detected, and to that extent all available evidence should be used. However, the state "should not itself foster and pay for other crimes, when they are the means by which the evidence is obtained."[2] Thus, concept of fair trial should not be hindrance for the prevention of crime and the protection of society.

The 'Doctrine of Confirmation' is a significant and old rule of evidence. Wigmore defines the doctrine of confirmation as follows:

> " .. *theory is that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered which confirm it in material points, the possible influence which through caution had been*

1. R.W .Barker, 'The Hearsay Rule', Sir Isaac Pitmans & Sons Ltd, page 58.
2. Olmstead Vs United States 277, U.S. 438 at page 470 (1928). Quoted by G.L Peiris 'The Admissibility Of Evidence Obtained Illegally Comparative Analysis' Ottawa Law Review [Vol.13:2) 1981 page 309.

> *attributed to the improper inducement is seen to have been nil, and the confession may be accepted without hesitation."3 "[In] the case of the confession of stealing goods and their subsequent discovery, there is the one hypotheses on which jury may stop short of believing the confession after this confirmation, mainly, the accused may know of the stealing place of hiding, but he may still not be the thief. Therefore… so much of the confession as relates strictly to the fact discovered by it may be given in evidence."*[4]

Taylor has also expressed a similar view. He states: "where in consequence of information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statements as to his knowledge of the place where the property or other articles was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. But it would not be competent to enquire whether he confessed that he had concealed it there."[5]

Cross explains that according to English authorities the facts discovered in consequence of inadmissible confessions may certainly be proved in evidence if their relevance can be established without resorting to any part of the confession.[6] However, Phipson with a caution stated that "so much of confession as strictly related thereto the facts and documents disclosed in consequence of inadmissible confessions, the property which has been discovered or delivered are admissible in evidence."[7] Thus, at common law, the fact that a confession was inadmissible did not affect the admissibility of any incriminating facts discovered in consequence of the confession.[8]

The 'Doctrine of Confirmation' has been used at different measures at various times. The following growth pattern has been observed: earlier it was considered that if a fact was discovered due to the confession, then the whole confession would be accepted as evidence against the accused. The cases decided during the eighteenth century and in the early decades of the nineteenth century adopted the rule that evidence is admissible notwithstanding that it was illegally procured.[9] It matters "not how you get the evidence; if you steal it, even it would be admissible."[10] Accordingly, relevant evidence was admitted although secured by unlawful means."[11] Indeed, "evidence produced through an illegal search or seizure was admitted in evidence if relevant.[12]

3. John Henry Wigmore , A Treatise On The Anglo – American System Of Evidence In Trials At Common Law , Third Edition Vol. 3 , § 856 – Page 338
4 Wigmore op.cit , Page 338 .
5. quoted in Field's Commentary on Law Of Evidence Vol. 2, 12th Edition Delhi Law House at page 1727.
6. G.L Peiris, Recent Trends In The Commonwealth Law Of Evidence, PAGE. R. Cross, op. cit., p. 280.
7. Phipson on Evidence, page 255 and see also R.W .Barker, The Hearsay Rule, Sir Isaac Pitmans & Sons Ltd.
8. Adrian keane, The Modern Law Of Evidence, Fifth Edition , Butterwoths , London 2000 page 315.
9. Prof G.L Peiris supra note 2 at page 311.
10. Ibid page 311, see Regina Vs Leatham 8 Cox CC 498 (1861 – 73) All ER 1646.
11. Elias Vs Pasmore [1934] 2KB 64
12. Z Cowen & P. Carter , Essays On The Law Of Evidence , 82, (1956)

Torture "has been an instrument of the judicial process since the ancient times. In fact it was seen as the natural means of obtaining evidence."[13] In the *Greek* case European Commission of Human rights described torture as an aggravated form of inhuman treatment which has a purpose such as the obtaining of information or confessions or the inflicting punishments.[14] The doctrine of right against self-incrimination in the human rights law demands that an accused should not be compelled to bear testimony against himself through torture, inducement, threat, promise. If any trace of these elements discovered that confession should be rejected.

Convention Against Torture 1984 strongly requires to exclude the evidence despite the fact that confessions and other evidence extracted by torture may reinforce the truth-finding function of criminal procedure; confessio regina probationum.[15] The Wickersham Commission[16] in its Report of Lawlessness in Law Enforcement, published in 1931, has expressed its disapproval of the "third degree" practices of police, including all "'methods which inflict suffering, physical or mental, upon a person, in order to obtain from that person information about a crime." This report rejected the 'third degree' methods for reasons, including: **"increased potential for false confessions; less effective administration of criminal justice, both by law enforcers and in the court system; and damaged relations between police and the public."** (emphasis added)

CCPR General Comment No. 20 declares that "The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. Thus, it is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.[17]

In Saunders v UK[18] Walsh J observed that **"a man could not be made the deluded instrument of his own conviction."** Hence, no person accused of any crime is under the smallest obligation to help the authorities by supplying information.[19] In this way the "use of violence and the threat of it are not any civilized country recognised as legitimate aids to interrogation."[20]

In Scotland, no part of an inadmissible confession can be received however much of it is confirmed.[21] In Canada, if an evidence is obtained in breach of the provisions of

13. Jeyampathy Wicramaratne " Fundamental Rights In Sri Lanka" Second edition Stamford Lake Publication 2006 at page 209.
14. Ibid page 208
15. Luca v. Italy (Application no. 33354/96)
16. Wickersham Commission Reports: No. 11: Report On Lawlessness In Law Enforcement 3 (Patterson Smith 1968) (1931)
17. CCPR General Comment No. 20. (General Comments)
18. Saunders v. UK (1997) 2 BHRC 358.
19. Phipson and Elliot, Manual of Law of Evidence 11th edition 1980 – Sweet & Maxwell- London p 170.
20. Lord Delvin, The criminal procedure in England' London (1960) Quoted in The Queen v. Liyanage and others (1966) 67 N.L.R 193 at page 262.
21. Chalmers v HM Advocate 1954JC66.

the Charter which would be likely to bring the administration of justice into disrepute must be excluded.[22] In Australia it was held in *R v Scott*[23] , that the discretion to exclude such parts of a confession is governed solely by considerations of fairness to the accused. Section 76 of the Police and Criminal Evidence Act 1984 of UK provides: "the fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence of any facts discovered as a result of the confession. And further provides that if a fact discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.

Thus, according to the decisions, statutes and views of the scholars, if a statement is obtained and a fact is discovered as a result of torture, inducement etc., it must be rejected. For this purpose the term "torture" has been interpreted so widely as to include any sufferings, physical and mental, of the suspect. The Criminal Law Revision Committee in its 11th Report recommended that, the discretion of the courts to exclude confessions[24] may extend also to the subsequently discovered facts. Thus, the Judge should have discretion to exclude such evidence, if it is obtained in unfair circumstances.[25]

The Human Rights Committee has unanimously declared that the rational interpretation of fair trial as worded in Article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities on the accused with a view to obtaining a confession of guilt.[26] Therefore, in human rights law the 'doctrine of confirmation' by subsequent facts, is not an alternative technique of justifying the acts of torture in the law of evidence.

At present, the view that *only the portion of the confession that led to the discovery of the fact could be admitted* is considered as an appropriate approach. However, on many occasions this approach has caused prejudice in the minds of the judge and the jury. Thus, in certain circumstances to avoid prejudicial effect to the accused, the courts have developed a practice of editing the statement of the accused, and it is suggested to be better that the judge or the jury should not know the other part of the confession.[27] Here again the following questions can be raised: Why should *the statement of the accused,* which is produced by the prosecution with a view *to obtain a conviction against the accused,* be edited in order to enable the prosecution to submit the statement in favour of the latter? When the confession of the accused is edited, it may give an unsuitable impression or meaning that is not intended by the accused. Hence, can it be said that the

22. R v Black [1989] 2 SCR 138.
23. A-G [1993] 1 QB 537
24. Ibid at p 69.
25. Section 78 of the Police and Criminal Evidence Act 1984
26. Uzbekistan - CCPR/C/86/D/915/2000 [2006] UNHRC 9 (19 April 2006)
27. E. R. S. R. Coomaraswamy, The Law Of Evidence (With Special Reference to The Law of Sri Lanka) Volume 1 Lake House Investments Ltd, Book Publishers, 41 W.A.D. Ramanayake Mawatha, Colombo 2,Sri Lanka page 445.

edited part is the real view of the accused? Therefore, the editing may cause unwanted interpretations adverse to the accused. In any event there is no justification in editing a statement without the consent of the one who gave it.

HRC's General Comment No. 20 (para 12) concerning prohibition of torture and cruel treatment or punishment (Art. 7) (10/03/92) declares: "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."

Mr. Alvaro Gil-Robles, the Council of Europe, Commissioner for Human Rights states : **"Torture is torture whoever does it, judicial proceedings are judicial proceedings whatever their purpose – the former can never be admissible in the latter.**[28] Sir William Holdsworth also expressed a similar view. He says **"Once torture has become acclimatized in a legal system it spreads like an infectious disease.** It saves the labour of investigation."[29] Thus, the use of 'doctrine of confirmation' is very much limited by the proper use of the concept of torture. Hence, Human Rights Committee has recommended that any evidence found to have been obtained by violence, threats of violence, torture or inhuman or degrading treatment' by police should be excluded automatically by the trial judge.[30]

The contemporary tendency of the human rights based investigative process, advocates the phenomenon that "men are not to be exploited for the information necessary to condemn them."[31] Therefore, the **"state which has a responsibility to investigate and punish criminals in the community must produce the evidence against him by the independent labour of its officers, not by the simple, cruel expedient of forcing it from his own lips."**[32] (emphasis added)

Doctrine of confirmation by subsequently discovered facts and the Concept of Torture in Sri Lanka

In Sri Lanka, if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true; therefore, it can be allowed to be given in evidence.[33] This conceptual phenomenon is recognized in Sri Lanka under Section 27 of the Evidence Ordinance which provides;

28. Eileen Skinder The art of confessions , *op.cit 31*
29. Ibid 30.
30. Colin Taper, Cross and Tapper on Evidence, Eighth Edition, Butterworths -London Edinburgh- 1995 at page 673. Commnt No 4.132
31. Eileen Skinnider *op.cit* supra note page 34
32. Ibid at p 35.
33. T. S. Fernando J. in Piyadasa (1967) 72 N.L.R. 434 .See also The v Packeer Thamby 32/262 1931.

> *"…when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered may be proved"* [34]

In the case of *Petersingham v The Queen,*[35] the settled opinion of the judicial pronouncements of Sri Lanka in respect of the legal application of Section 27 was expressed by Alles J:

> *"…even though evidence relating to confessional or other statements made by a person, whilst in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is, therefore, declared provable in so far as it distinctly relates to the fact thereby discovered. Only that portion of the information can be proved which relates distinctly to the facts discovered."*

Sarath N Silva CJ has expanded the scope of application of the theory and states: "the rationale of the proviso in section 27 (1) is that even a confessional statement to a police officer, which is outside the pail of evidence could be proved where it contains information that is confirmed by the discovery of a fact."[36]

The next question is whether a fact discovered in consequence of the statement of more than one accused is admissible against all the accused. In this regard, three major arguments can be found in Sri Lanka :) 1. The section was not intended to enable the production of a part of a confessional statement for the purpose of re-discovering what had already been discovered.[37] 2) "Only the part of the statement; leading to the discovery of a fact, made by the first person interrogated and the Police Officer concerned acts immediately on that information and discovers the fact is admissible;[38] 3) "The plurality of statements which led to the discovery of the same fact will not preclude him from producing under section 27."[39]

It was argued in the case of *De Seram*[40] that, admitting in evidence a portion of the statement of the accused, made to the Police regarding the place of burial of the body, under Section 27 (1) of the Evidence Ordinance was incorrect as the same information was available to the Police from the two other witnesses. His Lordship Sarath N Silva CJ rejected this argument. The question of the admissibility of the statements given by more

34. 27(2) Subsections (1) shall also apply mutatis mutantis, in the case of information received by a forest officer or an excise officer, respectively.
35. (1970) 73 N.L.R 537
36. Sarath N Silva CJ, De Saram V The Republic Of Sri Lanka , SLR - 2002 Vol.1, Page No – 288 .
37. *K. M. Punchi Banda v. The State,* 76 N.L.R p 293,
38.
39. *Ibid* 293
40. *De Saram v. The Republic Of Sri Lanka* , SLR - 2002 Vol.1, Page No - 288

than one accused was raised in the case of *Krishanthy Kumarasamy*[41] but, the point was left unsettled.

Sri Lankan Judiciary and the academic writers are right through very mind full of the directions given to juries in criminal trials.[42] Whenever a statement which sought to be proved under section 27 reasonably leads the jury to infer that a confession may have been made to a Police Officer, the trial Judge should clearly warn the jury that the law prohibits such an inference.[43] Thus, in Sri Lankan context, the basis for the admissibility of the statement of the accused under section 27, is "not that the accused confessed to the crime but the he has the knowledge of the whereabouts of the fact."[44] Hence, the trial Judge should direct the Jury that such a statement is an admission only of the fact stated and of nothing more.[45]

At the outset, to invoke section 27, it is required that the fact discovered must be the direct consequence of the information given by the accused. Therefore, "whatever the inducement that may have been applied, or made use of, towards the accused, there is nothing in the law to forbid the admissibility.[46] However, in the case of *Regina v. Perera,*[47] the court departed from its earlier stance and held that "the court may exclude the illegally obtained evidence."

A major departure was made, in the case of The *Queen v. Tennakone Mudiyanselage Appuhamy* where it is held:

> *"if a police officer acts contrary to Section 123 of the Criminal Proce¬dure Code and forces an accused person, by the use of violence or threats of violence, to make statements which, are not his own, but the contents of which have been put into his mouth, such statements will not fall within the meaning of the word " information " in Section 27 of the Evidence Ordinance."* [48]

The Court further held that "the Legislature does not enact laws on the assumption that the guardians of the law will themselves break them. When construing a legislative instrument regard must therefore be had to this fundamental assumption. An accused who is detained in Police custody cannot in law be forced to go from place to place and help the Police to discover evidence against him."[49] Therefore, Section 27 must be

41. SC Appeal No.20/2002(TAB) published in News Letter – Judicial Service Association Sri Lanka July- September 2007 p 10.
42. *Queen vs. O. A. Finadasa,* (1960) 59 C.L W. 97 quoted by ERSR Coomarasuwamy op.cit at p 444.
43. SLR - 1983 Vol.2 page 418 see *wijewantha and another v Attorney General,* 74 NLR 438 at 439. See also A. krishnapillai v. The Queen 74N.L.R page 438.
44. *De Saram v. The Republic Of Sri Lanka,* SLR - 2002 Vol.1, Page - 288
45. *Etin Singho* (1965) 69 N. L. R. 353.
46. *Supra Pakeerthamby*
47. (1955) 57 N. L. R. 35.]"
48. (1959) 60, NLR – page 313.
49. Ibid p 333 The Court used the maxim *Nihil consensui tarn contrarium est quam vis atque metus* (nothing is so destructive of consent as force and fear)

interpreted to discourage the bad interrogation methods by the police. Because, it is contrary to justice to convict the accused on the basis of a statement obtained from him.[50] The close scrutiny of this decision of this case moved the Sri Lankan judiciary to adopt new human rights based approach.

In the case of *Sudath Silva v Kodituwakku*[51] Justice Atukorala has taken a very progressive view and has expressed the dictum which can be certainly an imperative guiding principle for the construction of Section 27. His Lordship states "the police force, being an organ of the State, is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances….This court cannot, in the discharge of its constitutional duty, countenance any attempt by any police officer however high or low, to conceal or distort the truth induced, perhaps, by a false sense of police solidarity. Such methods [third degree] can only be described as barbaric, savage and inhuman. They are most revolting to one's sense of human decency and dignity, particularly at the present time when every endeavor is being made to promote and protect human rights."

In Sri Lanka Article 11 of the constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment of punishments. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, though he is a criminal, is entitled to this right.

In many cases when the police officers are unable to find any other evidence they resort to section 27. The serious problem is that in narcotics or fire arms or offensive weapons cases, the police may produce some persons before the Court alleging that some articles have been discovered as a result of statements made by the accused. Then the accused must go to the higher forums to get bail and wait for a long time to obtain bail. The accused will have to be in jail till the bail is granted.

In recent times there have been instances where the accused had been shot dead while in police custody. The police say that when interrogating the accused, he had revealed that he had hidden some arms or offensive weapons somewhere; then the police acted according Section 27, and they had taken him to that place; also that the accused had tried to use the weapons discovered from that place against them, and that they, acting in self defense, had shot him dead. This is the usual excuse given by the police. The recent incidents in Batticaloa and Trincomalee regarding the abduction of school students and subsequent killings of suspects while in the police custody confirm this attitude.[52]

Thus, Justice Sharvanada correctly states: …this provision reflected the 19th century view of English law but does not represent the modern law. it is to be noted that though the

50. E.R.S.R Coomarasuwamy *op.cit* 404.
51. [1987] 2 SLR 119.
52. Trincomalee Magistrate Court Case No. BR4216/2009(12.03.2009). Abduction and Murder of Schoolgirl Varsha. And Magistrate Case No. BR540/2009 Abduction and Murder of School girl Dhinushika .

aforesaid section 27(1) of our Evidence Ordinance is inconsistence with the presumption of innocence and the principle of immunity from self-incrimination, a basis of fair trial, postulated by Art 13(5) and 13 (3) of the constitution, this section survives the constitution and continues to be and operative by virtue of Art 16(1) of the constitution which provides that all existing written law shall continue in force, notwithstanding any inconsistency with any fundamental right."[53]

Doctrine of confirmation by subsequently discovered facts and the Concept of Torture in India

The doctrine of confirmation by sub¬sequent facts is integrated in section 27 of the Indian Evidence Act which provides:

> *"... when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

Section 27 is considered to be one of the most important but, controversial sections in the Evidence Act. "It has tremendous bearing upon criminal proceedings in the Courts of India."[54] **No section has raised so much controversy and doubt as sec. 27.** Therefore several judges have recommended the redrafting of section 27.[55]

Section 27 of the Indian Evidence Act is founded on a principle that even though the evidence relating to the confessional or other statements made by a person while he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore provable in so far as it distinctly relates to the fact thereby discovered.[56]

The rules necessary for the application of Sec.27 of the Evidence Act are; the fact of which evidence is sought to be given must be relevant to the issue, the fact must have been discovered in consequence of some information received from the accused, the person giving information must be accused of any offence, and he must be in the custody of a police officer and only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused ; and the discovery of the fact must relate to the commission of some offence.[57]

Owing to the sophisticated arguments 185th report of the Indian Law Commission recommended the following amendments, to sec. 27:

53. Justice Sharavananda *op.cit p 158*
54. 185th Report Of Indian Law Commission.
55. Sarkar , Law of Evidence, 15th Ed., 1999, page 534.
56. Sarkar *op.cit* page 523.
57. *Jaffer Husain Dastagir v. State of Maharashtra,* AIR 1970 SC 1934 at 1937 .

> *"Notwithstanding anything to the contrary contained in sections 24 to 26, when any relevant fact is deposed to as discovered in consequence of information received from a person accused of any offence, whether or not such person is in the custody of a police officer, the fact so discovered may be proved, but not the information, whether it amounts to a confession or not:*
>
> *Provided that facts so discovered by using any threat, coercion, violence or torture shall not be provable."*[58]

Indian judiciary, while interpreting section 27 has provided safeguards in order to minimize the practice of torture. Accordingly, Court held that the investigating officers must record the statement of an accused in the presence of independent persons; they may or may not be from the locality.[59] Also, the disclosure statement must be signed by the accused.[60] The absence of signature or thumb impression of the accused on the disclosure statement recorded under s. 27 will detract the statement materially from its authenticity.

Indian Supreme Court ruled that the discovery under "Section 27 must be made in the presence of two independent witnesses; otherwise, a police investigating officer will make a fake discovery, and on the basis of that, he will bring on record a confession created by himself and not made by the accused."[61] Thus, the investigating Officer must prepare the site-plan of the places from where the alleged recoveries were made.[62] The fact discovered includes not only the physical object produced but also the place from which it was produced and the knowledge of the accused as to this.[63] The oral statement of witnesses without corroboration by any written record is unsafe to rely on, because of the very nature of the evidence.[64] When all the accused jointly showed the place where object was found the evidence is not relevant against any of them unless it can be shown who made the discovery first.[65] Section 27 of Evidence Act on its plain language does not, exclude the interpretation as to plurality of information received from persons accused of any offence.[66]

58. 185th Report of Indian Law Commission.
59. Batuk Lal , Law Of Evidence , 5th Edition , Orient Publishing Company , 2006 at page - 499
60. *Jaikaran Singh v. State of Punjab,* AIR 1995 SC 2345. See *Fellix Joannas v. State of Karnataka,* (1998) Cri LJ 2479 (Kant)].
61. Batuk Lal, op.cit at page 502. The Indian courts as a rule of prudence developed the requirement that if a recovery was made in the absence of an independent witness the court rejects the evidence of recovery as suspicious
62. *Maharaj Deen v. The States,* 1996 Cr.L.J. 506 at p. 512, (All.).
63. *Vasudevan v. State,* 1993 Cri LJ 3151 at 3154 (Ker).
64. *Panchu Gopal Das v. State,* A.I.R 1968 Cal. 38.
65. *Faqira v. Emperor,* AIR 1929 Lah 665, it is held a fact discovered on joint statement of many accused is not relevant against any of them. See *Poshaki v. State,* AIR 1953 All 526. further in *Mahendra Mondal v. State of Bihar,* 1991 Cri LJ 1030 (Pat),it is held that statements leading to discovery of incriminating articles, such statement by one accused cannot be used against a non-maker co-accused .
66. *Ramkishan vs. Bombay State* [AIR 1955 SC 104]. In section 27 the words "a person" will take in more than one person and that information received from more than a accused will be admissible against all the informants.

The rationale, in rejecting the statements received from more than one accused is based on sound reason. "Because, the practice of the police recording wholesale confession running into several pages incorporating most incriminating statements against a co-accused and getting at attested by witnesses should be curtailed and condemned."[67] However, the conflict of opinion remains unsettled in spite of the obiter dicta of the Supreme Court.[68]

With the renaissance of human rights thoughts in both international as well as in domestic level, the Indian Supreme Court has taken a considerable departure from its original stance and held, if a disclosure was made under duress, pressure or threat given by the police, that evidence is not admissible in law in terms of Article 20, of the Constitution which provides "no person, accused of an offence, shall be compelled to be a witness against himself'.[69] Discovery of a fact on information from an accused obtained by third degree methods violates Art 20(3).[70] Therefore, if the fact discovered as the result of non-voluntary information it must be excluded from evidence otherwise in effect, the accused would be compelled to be a witness against himself. Article 20(3) of the Indian Constitution, prohibits the use of compelled information and testimony in Court.[71]

In India the danger of admitting the statements under section 27 is apparently enlightened.[72] Accordingly there are four possibilities which have to be guarded against in the case of any recovery:

1. **The complainant might have been persuaded by the police to state in the first information report that property which in fact was not stolen had been stolen and to hand over such property to the police to be used in fabricating the recoveries from the accused persons.**
2. **The police might have obtained property similar to the stolen property from the complainant or some one else and used it for the purpose of fabricating the recoveries.**
3. **The police might have suppressed some of the stolen property recovered from an accused person and utilized it in inventing a recovery from another accused person.**
4. **The property might have been recovered from a third party and used by the police in one of the impugned recoveries.[73]**

67. *S v. Karunakaran,* 1960, 2 Ker LR 247
68. Sarkar op.cit p 555 and 557
69. Shankar *Raju Banglorker v. State of Goa,* 1992 Cri LJ 3034 at 3038 (Bom).
70. *Amin v. S, A* 1958 A 293; Radhakishin v. S, A 1960 Pu 294;
71. *Amrut Soma v. State of Bombay,* AIR 1960 Bom 483.
72. *Shera v. Emperor,* A.I.R. 1943 Lah. 5 .
73. *Uma Kishana v. State of Ajmer,* 1956 Cr. L.J. 1134.

In the case of Kartarsing, the Supreme Court observed the facts that police officers practice atrocity and brutality on the suspects, and they have resorted "to inhuman, barbaric, archaic and drastic method of treating the suspects in their anxiety to collect evidence by hook or by crook and wrenching a decision in their favour."[74] Ramaswamy J correctly pointed out: **"Today when we see how the Indian Police are conducting the trials, we are able to notice that the use of the 'Doctrine of Confirmation' is highly dangerous. Section 27 has frequently been misused by the police and courts should be vigilant about the circumvention of its provisions. The protection afforded by the wholesome provisions of ss 25 and 26 is sought to be whittled down by the police by their ingenuity in manipulating the record of the information given by the accused in the case-diary in such a manner as to make it appear that it led to the discovery of some facts although the police might have made such discovery from other sources."[75]**

Hence, at present, the scope of Section 27 of the Evidence Act is restricted by Article 20 (3) of the Constitution and the discoveries which follow a confession brought about by compelling an accused person cannot be used against him.[76] If a fact disclosed, the accused having been subjected to 'third-degree' prior to the discovery, "the discovery becomes worthless as a piece of evidence."[77] Indian Supreme Court explains that if it is allowed to give "evidence from compelled information then it would deprive the accused of the Fundamental Rights protection. Secondly, a court should not allow the law enforcing officers to violate the Constitution to seek the advantage of their own wrong doings, because such conduct is subversive of the respect for the law which is at the basis of orderly society."[78] In invoking S. 27 the Court should be very vigilant to ensure the credibility of evidence by the police because this provision is so vulnerable to abuse.[79]

In view of the above it is obvious that some of the rules related to law of confessions cannot be reconciled with the concept of torture and right for fair trial. Therefore, Cowen & Carter conclude that **"all improperly obtained confessions, whether reliable or not, should be excluded, as this is the only effective sanction against improper police practices. Therefore, confirmation by subsequent facts should not have any effect in a criminal trial.[80]**

74. *kartar Singh v. State of Punjab* [1994] INSC 172 (11 March 1994)
75. Ibid INSC 172
76. *Amin v. State,* AIR 1958 All 293.
77. *Dhoom Singh v. State,* A.I.R. 1957 All. 197 at p. 203.
78. Sarkar op.cit 531, 534
79. *Pang Chee Meng v. Public Prosecutor,* (1992) 1 Malayan LJ 137 (SC Malaysia)].
80. Quoted in R.W .Barker, op.cit 61 see E.R.S.R Coomarasuwamy *op.cit* page 441.

Medical Negligence in Sri Lanka in the light of Prof. Priyani Soyza v Rienzie Arsecularatne Case:

A Comparative Analysis with Recent Trends in the United Kingdom & Australia

Gayantha Hemachandra
LLB (Hons)(Colombo) LLM(Queensland)
Former District Judge – Attanagalla
(currently on overseas study leave in Australia)

Introduction

Professional responsibility in relation to medical negligence in Sri Lanka has not attracted considerable attention among the professional institutions as well as the general public for nearly a century. The members of the medical profession enjoyed privileged position in the society. It shows that service receivers in poor communities in urban and rural levels face immense hardship to bring litigation against negligent doctors as they have to depend on them in their illness and also it requires a certain amount of financial and social sacrifice in the present context in Sri Lanka.[1] However in this backdrop the very first allegation of medical negligence was brought against a well known paediatrician by a senior state law officer.[2] This is the only case that came up before the highest court of the country so far.

This case has opened flood gates in relation to medical negligence among medico-legal bodies, as well as the general public though the final outcome of the case was against the plaintiff defendant (the plaintiff).[3] This paper intends to examine the law on medical negligence in Sri Lanka with particular reference to the *Arsecularatne* case. At the same time it is expected to discuss comparatively the recent trends and approaches on medical negligence in the United Kingdom and Australia.

1. Nimal Attanayake & Laxman Siyambalagoda, 'An inquiry into the regulations of pharmaceuticals & medical practice in Sri Lanka' (Working Paper No 05-03, Health Economic & Financing Programme, Ministry of Health, 2003) 17.

2 *Prof. Priyani Soyza v Rienzie Arsecularatne* (2001) 2 SLLR 293.

3. *Editorial, 'Heal Thy Profession', the Island,* (Colombo), 30 January 1994, 5.

History of the introduction of the Roman Dutch Law and its acceptance as a part of the common law

It is briefly required to touch the history of the introduction of the Roman law and its acceptance as part of the country's common law as in the Arsecularatne case the Supreme Court considered the applicability of the Roman Dutch law principles on medical negligence.[4]

The Dutch first introduced the Roman Dutch law into Sri Lanka (then Ceylon) during the time they controlled the Maritime Provinces in the island from 1692 to 1796.[5] When the British captured these provinces in 1796, the administration of justice continued to be exercised in conformity with the laws and institutions that subsisted under the Dutch.[6] Therefore, even after the independence from the British in 1948 the Sri Lankan courts have adopted a conservative approach and continued to apply the Roman Dutch law principles considering it a part of island's common law.[7]

Facts of the *Arsecularatne* case

Since Arsecularatne case discusses the law on medical negligence, it is useful to examine the facts of the case briefly.[8]

In this case the daughter of the plaintiff was a four year old girl of quite normal health. During the school vacation in April 1992 the plaintiff took his daughter along with other family members to the hill country for a holiday where he noticed that the child was dragging a leg while walking. He immediately brought her back to Colombo on 18th of April and she was committed to the care of the defendant appellant (the defendant). After initial examination, the defendant ordered three tests, ASOT, ESR and TELECHEST and prescribed some drugs. On the 23rd April, the plaintiff on his own account had his daughter examined by a senior neurologist who was of the view, after examination, that the symptoms indicated some features of chorea but noted that there were also some signs that did not confirm his opinion.

During the whole period the child was under the defendant's care, it was found that she did not maintain a proper history of the patient and the clinical records in the Bed Head Ticket (BHT). The defendant willingly allowed her house officer in charge to maintain the BHT. While the child was under her care the defendant could not discover any symptoms and she also failed to consult the senior neurologist regarding proper management of the patient.

Having not satisfied with the clinical management of the child by the defendant, the plaintiff caused her treatment and care taken off and given to another senior paediatrician.

4. (2001) 2 SLLR 293, 301-6.
5. L J M Cooray, Constitutional Government in Sri Lanka (1st ed 1984) 15.
6. Ibid.
7. *De Costa v Bank of Ceylon* (1969) 1972 NLR 457, 461.
8. (2001) 2 SLLR 293, 297-9.

The same day he noted "clinical features suggestive of rheumatic chorea..." and prescribed some drugs. However within a few days time the child's condition worsened and on 24th April he requested a CT scan to exclude the possibility of space occupying lesion (SOL). The test was done on 26th April and it was found that the child was suffering from a 'Brain Stem Glioma' (BSG). Thereafter, on the request of the paediatrician a consultant neurosurgeon advised that the lesion was in the middle of the brain stem and inaccessible for biopsy and therefore no surgery was possible. He recommend "stereotactic radiotherapy" available at the Sheffield Hospital, UK under the care of another Sri Lankan doctor.

On 1st June the plaintiff took the child to the Sheffield hospital and was examined by that doctor, but no operation was performed on her. On 12th June she was brought back to Sri Lanka and was admitted to the Neurosurgical unit of the Colombo General Hospital. On 18th June a consultant oncologist examined the child and found that the BSG covered the entire brain from the mid brain to the medulla and inaccessible for surgery. The child passed away on the following day.

Issues of the case

Both the trial court and the Court of Appeal decided in favour of the plaintiff and found that the defendant's negligence caused the death of the child. The Supreme Court granted the defendant special leave to appeal on the following grounds;

a. whether the Court of Appeal erred in its finding on the defendant`s professional negligence in relation to the death of the child.

b. whether the plaintiff is entitled to be awarded damages other than expenses.[9]

The answers to the above issues can amount to a comprehensive treatment to the law in relation to medical negligence in Sri Lanka. It is expected to examine the relevant Roman Dutch law and Common law principles on medical negligence in the preceding headings with reference to the *Arsecularatne* case in particular and the other decided cases of the United Kingdom and Australia in general.

Necessity of nexus between negligence and causation

In the *Arsecularatne case* the Court emphasised the significance to establish a nexus between negligence of the defendant and causation of the death of the child to answer the issue (a) of the above. The Court was of the opinion that the mere proof of the fact that the defendant was negligent in not ordering a CT scan on the plaintiff`s child (which ultimately caused to the non-diagnosis of the BSG) did not establish a nexus between the defendant's negligence and the causation of the death of the child. The Supreme Court further held that the burden should be with the plaintiff to prove that such non-diagnosis caused and in fact contributed to the deterioration and the death of the child which caused wrongful loss to him. On this issue, Dheeraratne J said:

9. Ibid 300.

If the death would have occurred in any event unconnected with the defendant`s breach of duty, the defendant is not liable in damages. In other words, the plaintiff must prove on a balance of probabilities the existence of the causal connection between the defendant`s breach of duty and the damages he suffered.[10]

The Court noted that firstly both the trial court and the Court of Appeal had answered in the affirmative in favour of the defendant that the child was found to be suffering from a rapidly progressive extremely malignant (cancerous) incurable tumour of the brain stem in an inaccessible site. Secondly, they also held that the death of the child was necessarily a part of the nature of the disease which was never preventable at any stage and with an inevitable fatal outcome. Though they held in the affirmative in favour of the defendant with regard to the above two issues, both the trial court and the Court of Appeal had been of the opinion that the plaintiff could have maintained the action against the defendant and further stressed the fact that with proper diagnosis and treatment the death of the child could have been prevented or postponed. However, the Supreme Court refused this view and firmly held that the plaintiff should have proved that the death of the child was due to negligence on the part of the defendant.

It shows that the Court has cited some cases in the United Kingdom to support their lordships' view on establishing a nexus between negligence and causation.[11] It is submitted that some of the cited cases reflect the contemporary view of the English Appellate Courts about the plaintiff's duty on establishing negligence on the part of the defendant and that negligence caused his injury or loss.[12] The present trends of the United Kingdom and Australia in establishing a nexus between negligence and causation will be discussed later in this paper.

Standard of care

The Supreme Court in the *Arsecularatne case* held that the principle regarding the standard of care is the general principle in the Roman Dutch law and in that respect it is not different from the Common law principle.[13] The Court further held that it is merely an application of the Roman Dutch law general principle for the notion that the reasonable man will not voluntarily undertake to perform a task for which he is not qualified himself. The Court applied the *Bolam* test to decide the standard of care required from the defendants towards the child of the plaintiff.[14] By applying this test to decide the defendant's standard of care the Court has taken the view that her failure to maintain the BHT and order a CT scan which would have disclosed the BSG on the

10. Ibid 312.
11. Ibid 326,327,328 and 329.
12. Kumaralingam Amirthalingam, 'Anglo-Australian law of medical negligence- Towards convergence?' (2003) Tort Law Review 117, < http://www.lexisnexis.com.ezproxy.library.uq.edu.au> at 05 April 2010.
13. (2001) 2 SLLR 293, 308.
14. Bolam v Friern Hospital Management Committee (1957) 2 ALL ER 118; (1957) 1 WLR 582.

child did not amount to a departure from a practice accepted as proper by a responsible body of medical professionals having requisite knowledge and skill in that particular branch of practice.. The Court refused to decide which body of opinions are reasonable and responsible with regard to the defendant's failure in maintaining clinical records and her fatal and material failure to order a CT scan on the child and did not consider the approach of *Bolitho v City and Hackney Health Authority*[15] and *Rogers v Whitaker.*[16] It clearly shows that the Court considered the failure of the defendant did not fall short of the required standard of care. If the BSG discovered at the initial stages it would render the plaintiff significant time and options to seek medical treatment available elsewhere to the kind of illness suffered by his child. However the Court took the view that the child of the plaintiff suffered from an unrecoverable and fatal illness and her fate had sealed with its inevitable outcome and the defendant's failure could not have changed the circumstances. Taking this view the Court held that the plaintiff has failed to prove that the defendant's conduct fell short of the required standard on a balance of probabilities.

Damages under the Roman Dutch Law on medical negligence

The plaintiff in the *Arsecularatne case* claimed damages from the defendant for loss of care and companionship of the deceased child. Therefore, it is useful to examine the opinion taken by the Court as it relates to the claims of damages on medical negligence and the existing Roman Dutch law principles considered part of the country's common law.[17]

It is well settled in Sri Lanka that the law in relation to damages is based on the Roman Dutch law principles.[18] According to the delict known as *'damnum injuria datum'* created by the *'Lex Acquilia"* action has been considered a general remedy for a loss or injury caused by another under the Roman Dutch law.[19] But under the English Common law specific delict of negligence could be seen.[20]

There are requirements for an action under the *Lex Acquilia* and opinions have been expressed by some writers about these requirements and different kind of damages available under this action. One school of writers expresses that under this Acquilian action the plaintiff should fulfil the following requisites;[21]

(1) He must show that there is an actual pecuniary loss.

(2) He must show that the loss was due to the unlawful act of the defendant.

(3) He must show *dolus* or *culpa* on the part of the defendant.

15. (1997) 4 ALL ER 771.
16. (1992)175 CLR 479.
17. De Costa v Bank of Ceylon (1969) 72 NLR 457, 461.
18. E D Wickramanayake, The Law of Delict in Ceylon (1946) 2.
19. Ibid 2-4.
20. Sir Percy Henry Winfield, 'History of Negligence in the Law of Tort' (1926) 42 Law Quarterly Review 184.
21. Wickramanayake, above n 19.

The other school of thought is that, there should be a wrongful act, a pecuniary loss resulting to the plaintiff and a fault on the part of the defendant under the *Acquilian* action.[22] Another writer agreeing with these requisites has expressed the view that the damages claimed under this action are in the nature of patrimonial[23] and others have called them pecuniary.

In the *Arsecularatne case* the Court held that the damages with regard to loss and companionship could not be claimed under the Roman Dutch Law and the *Acquilian* action only permits the grant of patrimonial damages. After analysing the earlier decisions, the Court took the view that the Roman Dutch Law has become a part of the common law of the country since 1799 and only the legislature is empowered to alter and deviate the Roman Dutch Principles, and not the courts of law.[24] However the Court refused to take into consideration the view expressed by Lord Diplock in *Kodeeswaran v Attorney General* where his lordship equated the common law of the country to the common law of the England, stated that it has not remained static since 1799.[25]

The Court expressed that in view of the nature of the damages permitted to claim under the Roman Dutch Law, the plaintiff's action for damages on the ground of loss of care and companionship could not be maintained. The Court further held that if loss of care and companionship as such should attract compensation, it is for the legislature to make necessary provision as the legislature has not granted powers to the Courts to change or avoid the Roman Dutch Law principles.

It is clear that due to this reasoning of the highest court of the country, damages on medical negligence can be claimed only to a patrimonial or pecuniary loss and not to loss of care or companionships. Though there are instances where the Supreme Court has adopted a liberal approach in applying some Roman Dutch Law principles in the context of today's socio-economic circumstances, in the *Arsecularatne case,* their lordships have taken this view regarding the nature of the compensation a plaintiff can be claimed on medical negligence. Therefore, it is now left to the Parliament to introduce necessary legislation in which the damages can be claimed on the ground of loss of care and companionship.

Recent Trends in Medical Negligence in United Kingdom and Australia

United Kingdom

The classic test the courts applying to medical negligence cases in the UK is the ruling laid down by *Bolam v Friern Hospital Management Committee,* known as *'Bolam Test'* In this case McNair J, said 'A doctor is not guilty of medical negligence if he has acted in accordance with a practice accepted by a responsible body of medical men skilled in that

22. R G McKerron, The Law of Delict (6th ed 1965) 13.
23. P Q R Boberg, The Law of Delict (1984) 118.
24. De Costa v Bank of Ceylon (1969) 72 NLR 457, 461, Chissel v Chapman (1954) 56 NLR 121, 127.
25. (1969) 72 NLR 337, 339.

particular art.'[26] However the application of this Bolam test and its interpretation to cases on medical negligence by the courts has caused the plaintiffs considerable hardships to prove medical negligence on the part of the defendants.[27] The reason is that there seems to be a common medical practice or custom which always supports the defendant.[28]

Recently the Lord Chief Justice of England and Wales has focused his attention to the application of the Bolam test when delivering a public lecture. Lord Woolf said:

> *The problem lies in the way his words have been subsequently understood. Bolam has been taken to mean that a doctor will not be negligent so long as he acts in accordance with common professional practice or opinion. There are many cases in which actions for medical negligence have been dismissed on the basis that the doctor conformed to accepted professional practice. Further, if there is a difference of opinion then it is enough that he acted in accordance with one of the bodies of opinion. I do not say that the test has always been formulated this bluntly, but that this is how it has been understood.*[29]

The danger involved in applying this test is that, as long as the defendant is able to produce experts to give evidence in his favour, a court will not hold him responsible for medical negligence. Even in some cases it has been held that the evidence of a single defence witness can form an opinion of a body of medical professionals.[30]

However in recent times it shows that the courts have tried to seek a way out of the Bolam application to the medical negligence cases. In *Maynard v West Midlands Regional Health Authority,* the trial judge accepted the evidence of the plaintiff's expert, refused the defendant's and held in favour of the plaintiff.[31] But in appeal the ruling of the trial judge was set aside on the basis that a court did not have the right to choose between conflicts of medical opinions.

In *Sidaway v Governors of Bethlem Royal Hospital,* it was discussed whether the Bolam test could be applied to the circumstances of the case where the plaintiff alleged that the defendant`s negligence in failing to disclose a right of 1-2% that the surgery to relief the pain caused by pressure on a spinal nerve could damage her spinal column and nerve roots near the area of the operation.[32] The majority of the Law Lords held that the *Bolam* test could be applied but Scarman LJ in his dissenting opinion said that the application of the *Bolam* test to the duty of inform was not in accordance with the current

26. (1957) 2 ALL ER 118, 122.
27. See above n 12 and Joanna Manning, 'Causation in Medical Cases' (2004) New Zealand Law Review 192.
28. Ibid.
29. Lord Woolf, 'Are Courts Excessively Deferential to the Medical Profession?' (2001) 9 Med Law Review 1, 6.
30. Gerrard v Royal Infirmary of Edinburgh NHS Trust (2002) Scot CS 11, 89 and Hunter v Hanley (1955) SLT 213.
31. (1985) 1 ALL ER 635.
32. (1985) 1 ALL ER 643.

development found in an American decision of *Canterbury v Spence*[33] and academic writings. Therefore rejecting the majority view, Lord Scarman held that a doctor should disclose all "material risks".

The House of Lords in *Bolitho v City & Hackney Health Authority* held that in general the Bolam test must be applied.[34] But in some cases where it shows that the professional opinion is not capable of rejecting a logical analysis, the Court held that in such circumstances a judge has discretion to hold that which body of opinion is not reasonable or responsible.

In *Fairchild v Glenhaven Funeral Services Ltd*[35] and *Chester v Afshar*[36] the Court considered whether damages could be granted on the basis of 'loss of chance'. The majority in *Gregg v Scott* held that the plaintiff was not entitled to claim damages for loss of chance where the defendant failed to diagnose the plaintiff's cancer and as a result he claimed that he lost his chance to cure.[37] These decisions show that the damages for loss of chance including loss of care and companionship are to be recognised by the Courts.

In the recent decisions of the English Courts, the judges have adopted a new approach towards more patient oriented than the doctor oriented approach.[38] The adaptation of the *European Convention on Human Rights* and *the enactment of the Human Rights Acts 1998* (UK) has also impacted on this approach of the English Courts.[39] This new trend is reflected on cases where patients who cannot take decisions on their own are involved.[40] Earlier the best interests of the patients were decided according to the *Bolam* test but now the courts decide in the best interests of the patient when disabled and incompetent patients are involved.

Australia

It can be seen that up to 1992 the Law in relation to medical negligence in Australia was governed by the doctor-centred approach laid down by the *Bolam* case. This approach covered every aspect of a doctor's practise; diagnosis, advice and treatment.[41]

33. (1972) 464 F 2d 772.
34. (1997) 4 ALL ER 771.
35. (2002) 3 ALL ER 305.
36. (2002) 3 ALL ER 552.
37. (2002) EWCA Civ 1471.
38. See above n 12.
39. Ibid.
40. B v An NHS Hospital Trust (2002) EWHC 429, Re F (Mental Patient: Sterilisation) (1989) 2 ALL ER 545 and Re SL (Adult Patient: Sterilisation) (2001) Fam 15.
41. J A Devereux, Australian Medical Law (3rd ed, 2007) 314.

However, with the decision of *Rogers v Whitaker*,the High Court showed the departure from the application of the *Bolam* test to cases on medical negligence.[42] In this case, the plaintiff underwent surgery to her injured right eye but she was not informed of a risk of possibility of damaging her left eye. At the end of the procedure she was left almost completely blind. The Court had to decide whether the surgeon had been negligent in failing to disclose and warn the plaintiff of this risk. The High Court found that t the surgeon was negligent and rejected applying the *Bolam* test. Their Honours based their decision on the dissenting judgement of Lord Scarman in the *Sidaway* case and a decision of South Australian Supreme Court in F v R.[43] The High Court held:

> *The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient`s position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it. This duty is subject to the therapeutic privilege.*[44]

The importance of this trend lies in the shift away from a doctor- centred approach to a patient oriented approach to medical negligence.[45] The High Court clearly held that warning about material risks is not an additional duty upon a doctor but a part of the comprehensive duty owed by the doctors to their patients.[46]

In *Naxakis v Western General Hospital* the High Court held that a duty of a medical practitioner extends beyond advising of risks.[47] The Court further expressed that the evidence of a reasonable competent body of medical practitioner would guide a court but it was not bound to follow it.

The Australian Courts have shown some flexibility with regard to granting damages on the basis of 'loss of chance' concept. The opinions expressed by individual judges in *Chappel v Hart,*[48] *Naxiakis v Western General Hospital*[49] *and Rosenberg v Percival*[50] shows that the 'loss of chance' concept may be applied in appropriate circumstances.

42. (1992) 175 CLR 479.
43. (1983) 33 SASR 189.
44. (1992) 175 CLR 479, 490.
45. See above n 12.
46. (1992) 175 CLR 479, 489.
47. (1999) 197 CLR 269.
48. (1998) 195 CLR 232.
49. (1999) 197 CLR 269.
50. (2002) 2005 CLR 434.

With the enactment of the Civil Liability Acts in most of the states and territories in Australia, it seems that the application of the Bolam test again restored to the law in relation to medical negligence.[51] These Acts have set up clear standards for professionals including medical practitioners to refrain from certain practices when they provide services. The impact of these Acts on medical negligence can be seen near future.

Conclusion

That the whole sphere in relation to medical negligence in the United Kingdom and Australia has changed with new trends, approaches and sometimes with the introduction of new legislation, is a fact. Throughout the time it indicates that the Courts have tried to minimise the rather imbalance position between the medical practitioners and their patients in respect of establishing causation and other requirements. The shift from "doctor-centred approach" to "patient-centred approach" sometimes indicates the willingness of the Courts to be the ultimate arbiter between these two sides in medical negligence cases.

Sri Lankan Courts having inherited the Common Law traditions from British always have been sensitive to contemporary trends and approaches in other Common Law countries. The law in relation to medical negligence in Sri Lanka still developing and needs to be improved in a way balancing the positions of medical practitioners and their patients. The Supreme Court in the *Arsecularatne case*, the only reported case on medical negligence, dealt with respect of causation, standard of care and entitlement of the damages. The Court has left the task to the Parliament to remedy the situation where a Roman Dutch Law principle blocked the further advancement of law on medical negligence with regard to granting of damages for loss of care and companionship.

It is observed that the Courts in the United Kingdom and Australia have tried to minimise the application of the Bolam test in certain situations such as disabled, incompetent patients are involved and where all the material risks are not informed to select the best options available. The other significant fact is that the introduction of the legislation to regulate the laws on professional responsibilities in both the United Kingdom and Australia. Therefore, rules and guidelines introduced by these new set of legislations, now play an important role on the law of medical negligence in the United Kingdom and Australia.

In the Sri Lankan socio-economic context, there exists a vast imbalance between the relationship of medical practitioners and their patients. On many occasions, it is evident that the patients have to face unbearable pressure and hardship not only in filing actions against doctors but also bringing their negligence and malpractices into light.[52] In

51. Devereux, above n 41, 315.
52. Asian Human Right Commission, Medical negligence undermines the right to health in Sri Lanka (2005) <http://www.ahrchk.net/statements/mainfile.php/2005statements/300/> at 12 April 2010.

that background, the *Arsecularatne* case came into light on medical negligence in the country. Though it was decided ultimately in favour of the defendant, it shows that there are avenues in law to question the malpractices and negligence of doctors. Though not maintaining the BHT and not ordering a CT scan clearly reflected material and fatal negligence on the part of the defendant and the Court was of the opinion that the plaintiff has failed to prove them on balance of probabilities. It is submitted that when deciding medical negligence, due consideration should be given to the community expectations, which in the context of medical negligence may sometimes be unrealistic. The other important factor is that the view of the Court that an action for damages for loss of care and companionship could not be maintained under the Roman Dutch Law in Sri Lanka. It is left to the Parliament to introduce necessary legislation changing these Roman-Dutch law principles on damages, otherwise till the Parliament plays its role, the law on medical negligence in the island will definitely stands still. The contemporary trends of the Courts in the United Kingdom and Australia on medical negligence provide their willingness to shift from a doctor- centred approach to a patient-centred approach in today's changing circumstances.

Hippocratic Oath and Medical Ethics… But, Rules are bound to break…

R.S.M. Mahendraraja
District judge, Kayts

Mr. {x} vs. Hospital {z}

Brief, is as follows...

The appellant after obtained the Degree of MBBS in 1987 from Jawaharlal Institute of Post Graduate Medical Education and Research. Chandigarh, completed his internship and junior residence at the same college. In June, 1990 he joined the Nagaland State Medical and Health Service as Assistant Surgeon Grade-I. Thereafter, the appellant joined the MD Pharmacology Course though he continued in the Nagaland State Service on the condition that he would resume his duties after completing the MD Course. In September, 1991 the appellant jointed the further course of Diploma in Ophthalmology which he completed in April, 1993. In August, 1993 he resumed his duties in the Nagaland State Health service as Assistant Surgeon Grade I.

One who was ailing from a disease which was provisionally diagnosed as Aortic Aneurism was advised to go to the 'Z' Hospital at Madras and the appellant was directed by the Government of Nagaland to accompany the said patient to Madras for treatment. For the treatment of the above disease, he was posted for surgery on May 31, 1995 which, however, was cancelled due to shortage of blood. On June 1, 1995 the appellant and the driver were asked to donate blood for the latter. Their blood samples were taken and the result showed that the appellant's blood group was A(+ve). On the next date, namely, on June 2, 1995, he was operated for Aortic Anuerism and remained in the Hospital till 10th June 1995 when he was discharged. In August 1995 the appellant proposed marriage to one Ms. 'Y' which was accepted and the marriage was proposed to be held on December 12, 1995. But the marriage was called off on the ground of blood test conducted at the respondents' hospital in which the appellant was found to be HIV(+). The appellant went against to the respondents' hospital at Madras where several tests were conducted and he was found to be HIV(+). Since the marriage had been settled but was subsequently called off, several people including the members of the appellant's family and persons belonging to his community became aware of the appellant's HIV(+) status. This resulted in severe criticism of the appellant and he was ostracized by the community. The appellant left Kohima (Nagaland) around November 26, 1995 and started working and residing at Madras.

The appellant then approached the National Consumer Disputes Redressal Commission for damages against the respondents, on the ground that the information which was required to be kept secret under Medical ethics was disclosed illegally and, therefore, the respondents were liable to pay damages. The Commission dismissed the Petition as also the application for interim relief summarily by order dated 3rd July 1998 on the ground that the appellant may seek his remedy in the civil court.

Learned counsel for the appellant has vehemently contended that the principle of "duty of care", as applicable to persons in medical profession, includes the duty to maintain confidentiality and since this duty was violated by the respondents, they are liable in damages to the appellant. Duty to maintain confidentiality has its origin in the Hippocratic Oath, which is an ethical code attributed to the ancient Greek physician Hippocrates, adopted as a guide to conduct by the medical profession throughout the ages and still used in the graduation ceremonies of many medical schools and colleges. Hippocrates lived and practiced as physician between third and first century BC. He has referred to by Plato as a famous Asclepiad who has philosophical approach to medicine. His manuscripts, the Hippocratic Collection [Corpus Hippocracticum], contained the Hippocratic Oath which is Reproduced below:

What is Hippocratic Oath?

The Hippocratic Oath is an oath historically taken by physicians and other healthcare professionals swearing to practice medicine with integrity. It is widely believed to have been written by Hippocrates often regarded as the father of western medicine, or by one of his students The oath is written in Ionic Greek (late 5th century BC),and is usually included in the Hippocratic Corpus. Classical scholar Ludwig Edelstein proposed that the oath was written by Pythagoreans, a theory that has been questioned because of the lack of evidence for a school of Pythagorean medicine Of historic and traditional value, the oath is considered a rite of passage for practitioners of medicine in many countries, although nowadays the modernized version of the text varies among them.

The Hippocratic Oath (horkos) is one of the most widely known of Greek medical texts. It requires a new physician to swear upon a number of healing gods that he will uphold a number of professional ethical standards.

The Oath…….

"I swear by Apollo the physician and Aesculapius and health and all-heal and all the gods and goddesses that according to my ability and judgment I will keep this oath and this stipulation - to reckon him who taught me this art equally dear to me as my parents, to share my substance with him and relieve his necessities if required, to look upon his offspring in the same footing as my own brothers and to teach them this art if they shall wish to learn it without fee or stipulation and that by precept, lecture, and every other mode of instruction I will impart a knowledge of the art to my own sons and those of my teachers and to disciples bound by a stipulation and oath according to the law of medicine but to none others. I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to any one if asked nor suggest any such counsel, and in like manner I will not give to a woman a peccary to produce abortion. With purity and with holiness I will pass my life and practice my art. I will not cut persons laboring under the stone but will leave this to be done by men who are practitioners of this work. Into whatever houses I enter, I will go into them for the benefit of the sick and will abstain from every voluntary act of mischief and corruption, and further, from the seduction of females or males, of freeman and slaves. Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad. I will not divulge as reckoning that all such should be kept secret. While I continue to keep this oath inviolate, may it be granted to me to enjoy life and the practice of the art, respected by all men, in all times, but should I trespass and violate this oath, may the reverse be my lot."

The Hippocratic Oath consists of two parts. The first, or covenant, is the solemn agreement concerning the relationship of apprentice to teacher and the obligations enjoined on the pupil. The second part constitutes the ethical code. It is on the basis of the above that International Code of Medical Ethics has also laid down as under:

"A Physician shall preserve absolute confidentiality on all he knows about his Patient even after his patient has died."

It is true that in the doctor-patient relationship, the most important aspect is the doctor's duty of maintaining secrecy. A doctor cannot disclose to a person any information regarding his patient which he has gathered in the course of treatment nor can the doctor disclose to anyone else the mode of treatment or the advice given by him to the patient.

It is contended that the doctor's duty to maintain secrecy has a correlative right vested in the patent that whatever has come to the knowledge of the Doctor would not be divulged and it is this right which is being enforced through these proceedings.

It is the basic principle of Jurisprudence that every Right has a co-relative Duty and every Duty has a co-relative Right. But the rule is not absolute. It is subject to certain exceptions in the sense that a person may have a Right but there may not be co-relative duty. The instant case, as we shall presently see, falls within the exceptions.

"RIGHT" is an interest recognized and protected by moral or legal rules. It is an interest the violation of which would be a legal wrong. Respect for such interest would be a legal duty. That is how **Salmond** has defined the "Right". In order, therefore, that an interest becomes the subject of a legal right, it has to have not merely legal protection but also legal recognition. The elements of a "LEGAL RIGHT" are that the "right" is vested in a person and is available against a person who is under a corresponding obligation and duty to respect that right and has to act or forbear from acting a manner so as to prevent the violation of the right. If, therefore, there is a legal right vested in a person, the latter can seek its protection against a person who is bound by a corresponding duty not to violate that right.

English law….

This is also the law in England where it is provided that the exceptions to this rule permit disclosure with the consent, or in the best interests, of the patient, in compliance wish a court order or other legally enforceable duty and, in very limited circumstances, where the public interest so requires. Circumstances in which the public interest would override the duty of confidentiality could, for example, be the investigation and prosecution of serious crime or where there is an immediate or future (but not a past and remote) health risk to others.

The General Medical Council of Great Britain in its guidance of HIV infection and AIDS has provided as under:

"Where diagnosis has been made by a specialist and the patient after appropriate counseling still refuses permission for the General Practitioner to be informed of the result, that request for privacy should be respected. The only exception would be when failure to disclose would put the health of the healthcare team at serious risk. All people receiving such information must consider themselves to be under the same obligations of confidentiality as the doctor principally responsible for the patient's care. Occasionally the doctor may wish to disclose a diagnosis to a third party other than a health-care professional. The Council think that the only ground for this are when there is a serious and identifiable risk to a specific person, who, if not so informed would be exposed to infection. A doctor may consider it a duty to ensure that any sexual partner is informed regardless of the patient's own wishes."

Thus, the Code of Medical Ethics also carves out an exception to the rule of confidentiality and permits the disclosure in the circumstances enumerate above under which public interest would override the duty of confidentiality, particularly where there is an immediate or future health risk to others. The argument of the learned counsel for the appellant, therefore, that the respondents were under a duty to maintain confidentiality on account of the Code of Medical Ethics formulated by the Indian Medical council cannot be accepted as the proposed marriage carried with it the health risk to an identifiable person who had to be protected from being infected with the communicable disease from which the appellant suffered. The right to confidentiality, if any, vested in the appellant was not enforceable in the present situation.

Fundamental right

Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."

The right to privacy……

A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."

Jane Roe vs. Henry Wade 410 Us 113, (US)

the Supreme Court of United State said that: "Although the Constitution of the U.S.A. does not explicitly mention any right of privacy, the United State Supreme Court recognizes that a right of personal privacy, or a guarantee of certain areas or zone of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendment, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment and that the "right to privacy is not absolute."

Marriage……

Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be mental, psychological and physical union. When two souls thus unite, a new soul comes into existence. That is how, the life goes on and on this planet.

European Convention……

The Article of the European Convention on Human Rights which defines this right as follows:

> "(1) Everyone has the right to respect for his private and family Life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protections of rights and freedoms of others.

Right of Privacy may, apart from contract, also arise out of a particular specific relationship, which may be commercial, matrimonial, or even political. As already discussed above, Doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, Doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the Rights of Privacy which may sometimes lead to the clash of one person's "right to be alone" with another person's right to be informed.

In the above mention case Justice Saghir Ahmed-hold that the above observation made by this court, except to the extent of holding as stated earlier that the appellant's right was not affected in any manner…….

In conclusion as one of the basic human rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protections of rights and freedoms of others.

A doctor should realize his moral, ethical and professional obligation and responsibility to his patient treat the patient with due care, competence, skill and diligence, thus there is no fear of litigation against him

Case law reference

1) Kharak Singh Vs State of Uttar Pradesh AIR 1963 SC 1295
2) Gobind Vs State of Madhya Pradesh & Anr (1975, 2 SCC 148)
3) Munn Vs Illinois (1877) 94 US 113
4) Wolf Vs Colorado (1949) 338 US 25

Case law related to building encroachments in sri lanka

Chinthaka Srinath Gunasekara LL.B
District Judge, Nuwara-Eliya.

Introduction

Encroachments have become a severe problem all over the world due to urbanization and rapid increase of population. All courthouses are crowded with the disputes related to immovable properties. These disputes lead to increased grave crimes like murder, attempted murder, assault, grievous hurts etc., even among the family members. This is a common problem also in Sri Lanka. Rei-vindicatio Actions, Possessory Actions, Partition Actions, Declarations of Title, Right of way, Actions for Definition of Boundaries are the major disputes pertaining to lands. (The extent of lands are described according to the very old measurements like vee kuruni, kurahan kuruni, pela, laha, Bushal, even today). It is clear that encroachments have taken lions share of the land disputes. As the statutory law is silent on this issue this paper attempts to discuss the case laws pertaining to remedies available with regard to building encroachments.

Among the definitions given to the word 'encroachment', following characteristics could be identified.

> *"The Act of extending one's own rights at the expense of others, particularly by taking in adjoining land to make it appear part of one's own."* [1]
>
> *"Encroachment is where you or a previous owner of your property have erected a building and part of the building is on a neighbor's property."*[2]

The question is if someone erects a building or/and another construction (Ex: parapet wall, drainage system, pipe line, temporary shed) over a land of another person, whether the affected landowner has a right to demolish it or not. As the erection is a disturbance to the peaceful possession of his land, it is logical to decide that it should be removed.

1. Oxford Dictionary ,Edited by Elizabeth A. Martin, 5th Edition, (Oxford University Press)
2. How to deal with encroachment, www.howtolaw.co.nz,

Remedies under the roman dutch Law

Every landowner is entitled to have uninterrupted possession of his land under the rule of ownership. The incidence of encroachment is a limitation of that Right. Then the landowner is entitled to remove the erected building or other constructions under the Remedy of Removal which is identified under the Roman Dutch Law. In addition to that, an application under Actio Nugatoria (where the encroachment has been expanded over the air space above the affected land) is possible to get similar remedies available under the Roman Dutch Law.

With urbanization and rapid development of building industry the circumstances related to building encroachments too have changed. Accordingly, the judiciary has developed laws to suit the need of the present day. On the grounds of equity and fairness, nature of the encroachment, abuse of rights, geographical facts, balancing the rights of parties, maintaining peace and harmony among neighbors, behavior of the parties, public policy and on specific circumstances, courts have deviated from the above common law. These remedies could be considered as more practical.

Geographical location of the construction should be considered when dealing with encroachments. Especially in the central hills of the country, people have constructed several storied buildings, hotels, houses, boutiques with the supportive strength of huge parapet walls. If it is ordered to demolish the parapet walls which provide protection to buildings and of the land, that will cause irreparable damage to people as well as the environment. There are also other areas where the impact will be more harmful.

There are several enactments to control the encroachments of state lands in Sri Lanka. State Lands Encroachment Ordinance,[3] Crown Land Ordinance,[4] Land Development Ordinance,[5] State Lands (Recovery of Possession) Act, State Quarters (Recovery of Possession) Act,[6] Mahaweli Authority Act,[7] Municipal Council Ordinance,[8] Provincial Councils Act, Urban Councils Ordinance,[9] Pradeshiya sabha Act,[10] National Thoroughfare Act,[11] REPIA Act[12] (property affected under the crisis of July 1983) are very important among them.

3. 12 of 1840
4. 8 of 1947
5. 19 0f 1935
6. 7 of 1969
7. 23 of 1979
8. 29 0f 1947
9. 61 of 1939
10. 15 of 1987
11. 40 of 2008
12. 29 of 1987

There is no specific legislation pertaining to encroachments on private lands in Sri Lanka although some other countries have such laws. Examples could be traced from other jurisdictions; Party wall Act,[13] and Supreme Court Act[14] of Britain, Property Law Act[15] of Newzealand, Encroachment Of Building Act[16] of Australia are some of them. But in Sri Lanka the court decisions have made legal provisions to fill up that gap during last decades.

According to **Miguel Appuhamy vs Thamel**[17] under certain circumstances the court, instead of ordering the removal of the Encroachment, may order either compensation to be paid by the defendant to buy the land encroached upon. This approach has been applied in the case of **Samaraweera et al . vs Mohotti et al.**[18] In this case court has referred to the legal background of South Africa.

> *"In the case of an encroachment by a person in the course of a building on the land of his neighbor, there is no authority in the Roman-Dutch law to support an order permitting the offending party to retain the encroachment, paying compensation therefore. It is usual in South Africa to give the offending party the option of buying the portion of land encroached upon, paying the aggrieved party an adequate price for it, and damages. This course may in suitable cases be adopted with advantage in Ceylon."*[19]

English Approach

It was necessary to look at the English approach because it is used as authority by South African courts for identifying cases where compensation might be favoured instead of removal . In terms of English law, compensation should be awarded instead of removal when there has been a blatant disregard for the right of the claimant. The English Supreme Court Act gives English Courts wide discretional powers to award monetary instead of injunctive relief in order to reach a just and equitable outcome. The size of the encroachment plays a role in determining which remedy would be the most appropriate under the circumstances. This is the settled principle of English Courts in terms of **Shelfer V City of London Electric Lighting Company.**[20] in Shelfer, it was established that the award of monetary compensation instead of injunctive relief should be made in cases where the injury to the plaintiff's legal right is small, is capable of being estimated

13. 1996
14. 1981
15. 1952
16. 1922 (NSW), www.austitii.edu.au
17. 1910 (2) Cur. LR 209
18. 18 NLR 187
19. IBID HELD
20. 1895 (1) ch. 287

in money, where it can adequately be compensated by a monetary payment and it would be oppressive to the defendant to order removal of the encroachment.

Recent Trends in South Africa: In a Nutshell

Even in South Africa, the courts deviate from the common law remedy of removal on policy grounds, such as the balance of equity and fairness, to keep harmony between the neighbors etc., In the case of **Waterraad vs Bothma en 'n Ander**[21] Court is of the view that the discretion to award compensation instead of removal in the context of building encroachment is wide and equitable and consideration should be given to the surrounding circumstances in the particular case. Same view has taken in the case of **Trustees ,Brian Lackey Trust Vs Annadale,**[22] saying that the discretion to leave an encroached structure in place could be exercised regardless of the size of the encroachment.

In both cases the respective courts took considerations of fairness and the equity into account and came to the conclusion that the default remedy of removal should not be awarded.[23]

It is clear that even the South African courts are depending on the English Law principles to decide the circumstances, where Sri Lankan courts refer the South African situation as well. In the case of **Bishohamy vs.Joseph,**[24] Hon J. De Sampayo has addressed the said issue in a same way.

Facts of the case were; the defendant built a boundary wall, and in doing so encroached upon a very small strip of land belonging to the plaintiff. The plaintiff who was aware of the building raised no objection at that time. Under the circumstances the Court instead of giving judgment for the actual portion encroached upon, as prayed for by plaintiff, ordered defendant to pay compensation for the encroachment. De Sampayo J. was of the view that,

> *"The strip is so narrow that it would be inequitable to compel the defendant to break down the wall. It appears that the wall in question was not build in a day, but took some time in the building, and the plaintiff was aware of it. But there was no objection to it until the defendant, after completing the building of it, sent a letter of demand claiming half the expenses from the plaintiff. In a case of encroachment like this, it does not necessarily follow that the plaintiff should get judgment for the actual portion encroached on, with the result that any building should be broken down."*[25]

21. 1997(3) SA 120(O)
22. 2004(3) SA 281 (c)
23. Z. Temmers, Building Encroachment and Compulsory Transfer of Ownership, 2010, www.scholar.sun.cc.z
24. 23 NLR 350
25. Ibid, P.351

But it is noteworthy to mention that the above judgment was delivered in 12th 05.1922, some 9 decades ago. Huge constructions could be concluded within a day with the technology and the machineries today. How the higher courts have dealt such situations in Sri Lanka? It seems that Sri Lankan courts are in agreement with the above decision of De Sampayo J and have developed a similar view after making decisions in several cases on the building encroachment issue.

Gnanapragasam vs Mariampillai [26] is also another authority on that issue.

> *"Where a building is erected partly on one's own ground (not in whole land) an encroached partly on the ground of another, the court may either order the encroachment to be removed or the party encroaching to take a transfer of the piece of ground actually occupied by the encroachment and so much of it as is rendered useless by the encroachment and pay the value of the ground transfer together with the costs of transfer and a reasonable sum as damages. The court will grant such remedy as is reasonable in the circumstances of each case. Whether there has been delay on the part of the party encroached upon or not, the party encroached should not be ordered to remove the building, if the other party could be compensated in damages."*

Silva vs Silva[27] is another judgment, which took similar view that,

> *"Where a building has been erected not wholly on the ground of another, but is built partly on one's ground and only encroaches partially on the ground of another, the court may, where it is equitable to do so, order the owner of the ground encroached on to transfer that portion on reasonable terms to the party who made the encroachment."*

Then it is evident that the discretion vested with the courts is wide enough to make an order to sell the portion.

Kuruneru vs Haththotuwa[28] is a rei Vindicatio Action case based on Remedies for encroachment. This is an appeal preferred by the parties, dissatisfied with the Judgment of Mount Lavinia District Court. In this matter The Court of Appeal held that;

> *"where a defendant is found to have encroached on the Plaintiffs lot, the Court may according to the circumstances, order the removal of the encroachment or order the defendant to buy the land encroached upon or order the defendant to pay compensation."*

26. 39 NLR 406

27. 53 NLR 377

28. 1983 (2) SLR 429

Facts of the case in brief; the defendant had put up a parapet wall and two sewerage pipes encroaching on plaintiffs lot, at the time it belonged to plaintiffs predecessor without any protest, and when the plaintiff bought his lot the wall was there and the precaution of a survey at the time of purchase had not been taken. Then the plaintiff has filed action against the defendant,

(A) seeking a declaration that he is entitled to the portion of the land marked as "X" in Plan No:2051, which he alleges had been encroached upon by the Defendant,

(B) for an order directing the defendant to remove the encroachment.

(C) that the defendant be ordered to divert the sewerage pipes fixed to the wall of the defendant 's house, from the Plaintiff 's land ,

(D) If the Defendant fails to carry out the orders sought, such removal to be effected by officers of the court and

(E) Damages.

Findings of the learned District judge were that,

> *"The plaintiff is the owner of the land describe in the schedule of the plaint. The strip of the said land (Lot 'X' in Plan 2051) is a portion of the plaintiff's land. Further defendant has encroached said strip both ways of by putting up a parapet wall and by putting two sewerage pipes. Then his order is though the strip(Lot X) belongs to the Plaintiff ,he is not entitle to the encroachment ,done by the defendant, the parapet wall and sewage pipes on the wall of the defendants house removed. The plaintiff will how ever be entitled to compensation for the portion of his land encroached by the defendant as assessed by the commissioner of the court .On the payment of the compensation Defendant will be the owner of the strip of land Depicted as Lot 'x' .The plaintiff will also be entitle to the costs of action*".

Then the Court of Appeal affirmed the order of the learned District Judge in its entirety and dismissed the appeal. When considering the appeal Hon Judges observed that, the plaintiff was aware about the encroachment and no objections were taken against it at any stage. Not only that, although the plaintiff had purchased the said land in 1968, he has commenced his constructions after 6 years (in 1974). With the knowledge of having such a construction plaintiff has purchased the land and later the plaintiff sued against the defendant.

According to the above court decisions, Sri Lankan Courts also deviated from the principle of Right of Removal and apply their discretionary powers according to the circumstances of each an every case. Then it is apparent that when someone has erected a building/ construction partly on a land of another, Court can make following orders.

1. Order to remove the encroachment.
2. To pay the damages to the affected landowner instead of removal.
3. Order to buy the land encroached upon with reasonable conditions instead of removal.
4. Order the defendant to pay compensation to the plaintiff.

Due attention should be taken to the circumstances, which the courts have focused on, prior to issue above orders. This has been clearly held by H.A.G. De Silva J.,in **Kuruneru Vs Haththotuwa.**

> *"In deciding what to do the court will consider the conduct of the parties whether the encroachment was made in bad faith with knowledge that it was an encroachment, or whether he thought he had a right to do what he did and where the plaintiff saw the encroachment while it was in progress and said nothing about it.; or if he did not know of it until after it was finished whether he acquiesced in it for a long period or otherwise."*[29]

Under the above criteria, parties have the responsibility to elaborate the circumstances on balance of probability through evidence in the court. Identification the cause of action, preparation of proper pleadings and leading evidence pertaining to issues are very significant to the courts for their determination. If that duty were not done on behalf of the client by the attorney, the ultimate result would be to demolish the buildings despite the harm caused to the area, people and to the environment.

Lands belongs in common

Lands with co-ownership should be partitioned in accordance with the provisions of The Partition Act.[30] The Act has no provisions to deal with Building encroachments. So where there are building encroachments in such a land, several Judgments have focused on the legality of such encroachments and Courts were much stricter and the orders were given to demolish such encroachments.

Muthaliph vs. Mansoor[31] is a case base upon encroachment in a partition suit. It was held that

> *"A co-owner is not entitled to build a house on a land in common without the consent of others. An injunction may be issued against the offending co-owner to remove the building without proof of irreparable damage to the party complaining."*

29. Ibid, Held, p.429
30. 21 of 1977 (with later amendments)
31. 39 NLR 316

Same principle had been applied in **Goonewardene vs.Silva**[32] and in Muthaliph's case that decision has been followed. According to the judgment of **Perera Vs. Podisigngno,**[33] it was held that,

> *"One co-owner has erected a house on the common land without the consent of another co-owner the latter can obtain a mandatory order for the demolition of the building."*

In the case of **Agnes Perera vs Edward Perera,**[34] Hon. **Nagalingam J** is of the view that,

> *"Where a co-owner put up buildings on the common land contrary to and in spite of the protest of another co-owner, an order for demolition of such building can be properly made in a partition Action.*
>
> *"it is settled law that where a co-owner puts up or becomes solely entitled to building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation to him for it."* [35]

Then it is clear that in Partition Actions Sri Lankan courts have given much attention to demolish building encroachments in order to protect the rights of the all co-owners pertaining to the common land.

When some constructions are considered as improvements to the affected land, compensation is available under the nature of that improvement such as necessary, useful and/or ornamental, subjected to the nature of the possession of improver thus either Bona fide or Mala fide. According to the said criteria, remedies of Jus Retentionis (right to possess the Improvement until pay the compensation)and Jus Tollendi (right to remove useful things of improvement without causing harm to affected land, instead of compensation)are available under the Roman Dutch Law.

CONCLUSION

Considering the judgments with regard to the building encroachments, Courts have decided them on the circumstances using discretionary power. It is clear that demolition is not the only solution in the cases of building encroachments. It should also be mentioned that encroachment are not encouraged by the said decisions, but to give practical approach to balance rights of the people with needs of the day.

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32. 17 NLR 287
33. 47 NLR 347
34. 1954(52) Ceylon Law Weekly 95
35. ibid

Human smuggling - the need for reform

W.K.D.S. WEERATUNGA LL.M
Additional Magistrate, Negombo.

Introduction

Human smuggling is a transnational crime which poses threat to the economy, security and the essence of sovereignty of the States involved. It also exposes the migrants to unacceptable risks and challenges where the travel conditions are often arduous and sometimes even fatal; and the "successful" migrant would be confronted with their improper status and would have limited means to be successful in their endeavour.

However, human smuggling should not be confused with human *trafficking.*[1] Several key distinctions exist between the two and one of the most significant differences is in respect of the issue of consent. In smuggling, the migrant is smuggled with his consent and he is aware of the fact that he is being smuggled. In trafficking however, there is no consent and even if there is, it would have been obtained by means of deception, fraud, or coercion. Although in trafficking the ultimate goal is the exploitation of the person trafficked, in smuggling the aspect of exploitation is not present. In addition, smuggling occur trans-boundary whereas trafficking could occur within a single country itself. Therefore, since smuggling is a crime against a State, the sovereignty of a State is also challenged under human smuggling. However, human trafficking is a crime against the individual concerned where the particular individual's human rights are clearly in violation. However, it is pertinent to note that a transaction which started as a human smuggling transaction could surface as a human trafficking transaction. For example, a migrant who is smuggled could be in a position where he cannot meet the demands of

1. As per Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Human trafficking is the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat, force, coercion, abduction, fraud, deception, abuse of the position of vulnerability or giving or receiving of payments or benefits to achieve consent of a person having control over another person for the purpose of exploitation

his “smugglers”, and would be exploited for forced labour, slavery or removal of organs etc. In addition, a smuggler could benefit from being an intermediary in a trafficking transaction where he transports or organizes the transportation of illegal migrants for a fee across the border.

The United Nations Instruments on Human Smuggling

The issue of human smuggling is addressed in the United Nations Convention against Transnational Organized Crime; (UNTOC) adopted by the General Assembly resolution 55/25 of 15 November 2000. This Convention along with its three supplementary Protocols, namely, the Protocol to prevent, suppress and punish trafficking in persons, especially women and children; the Protocol against the smuggling of migrants by land, sea and air and the Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition is the main international instrument in the fight against transnational organized crime.

The United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air[2] defines human smuggling as the procurement in order to obtain (directly or indirectly) a financial or other material benefit of the illegal entry of a person into a country of which the person is not a national or permanent resident.[3] It deals with the growing problem of organized criminal groups who smuggle migrants, often at high risk to the migrants and at great profit for the offenders. It could be stated that the major achievement of the Protocol was that, for the first time in a global international instrument, a definition of smuggling of migrants was developed and agreed upon. The Protocol aims at preventing and combating the smuggling of migrants, as well as promoting cooperation among States parties, while protecting the rights of smuggled migrants and preventing the worst forms of their exploitation which often characterize the smuggling process.[4] Sri Lanka has ratified the United Nations Convention on Transnational Organised Crime in September 2006. Although Sri Lanka has signed the Protocol against the Smuggling of Migrants by Land, Sea and Air in December 2000 it is yet to be ratified.

The Sri Lanka legal regime and the necessity to improve

Sections 45, 45A and 45C of the Immigration and Emigration Act No. 20 of 1948 as amended deals with the issue of human smuggling in the Sri Lankan context. Accordingly, any person who organizes one or more persons to leave Sri Lanka in contravention of the provisions of the Act or attempts or does any act preparatory to, or aids and abets any other person to, so organize shall be guilty of an offence and upon conviction be liable to imprisonment of either description for a minimum of 1 year up to maximum of 5 years.[5] The term “organizes” includes the transportation of persons by sea, land or

2. Resolution 55/25, entered into force on 28 January 2004
3 Article 3(a) of the People Smuggling Protocol
4. (http://www.unodc.org/unodc/treaties/CTOC/)
5. Section 45C of the Act

any other manner without obtaining valid travel documents, receiving ad harbouring persons whether in Sri Lanka or in a foreign country and soliciting pecuniary benefits from persons whether or not any such benefit was realized. However, it has to be noted that although the Act contains detailed provisions to combat smuggling, it fails to define smuggling.

Although the Sri Lankan legal framework appears to be adequate in order to deal with issue at hand, a close scrutiny reveals that the law should be improved upon to deal with this increasing global threat. The law could be further strengthened so as to deter and overcome the inimitable methods that are devised by the offenders of law. In addition, the law could further provide for the victims of human smuggling.

The necessity for the improvement of the present legal regime is quite apparent when the Sri Lankan legislation is compared with the legal provisions of other jurisdictions. For example, the Australian Migration Act provides for significant penalties and mandatory minimum sentencing for some offences. An analysis of Section 233A of the Migration Act reveals stringent definition of smuggling along with penalties. The offence of people smuggling (as it is recognized under the Act) occurs where a person organizes or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person, where that person is a non-citizen[6] and has no lawful right to come to Australia. Further, the Act recognizes the offence of "aggravated people smuggling" in section 233C where a group of at least 5 people is smuggled into Australia. In addition, providing material support or resources that aid the commission of a people smuggling offence, concealing or harbouring a non-citizen, making false statements or using false documents in connection with the visa application or proposed entry to Australia of a non-citizen are recognized as offences under the Act. The other piece of legislation which primarily deals with the offence of human smuggling is the Criminal Code which was enacted to give effect to the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air and mirrors the offences[7] under the Migration Act. Both Acts have extra territorial application as well.

In the light of the above, amendments could be introduced to the Immigration and Emigration Act to enhance the penalties and to introduce provisions for the forfeiture of assets. However, it must be stated that a present the Department of Immigration and Emigration is looking into this problem and is stated that the proposed amendments will incorporate comprehensive people smuggling provisions, extradition provisions, extra territorial jurisdiction, fraudulent travel identity document offences, aggravated forms of people smuggling offences and a tougher penalty regime for related offences.[8]

6. Absolute liability applies in this instance; and section 6.2 of the Criminal Code defines absolute liability
7. Section 73.1 deals with the offence of people smuggling and the definition is similar to that stated in the Migration Act
8. http://www.sundayobserver.lk/2012/12/23/new05.asp

CONCLUSON

The issue of human smuggling cannot be addressed in isolation for, offences such as money laundering, human trafficking and trafficking in fire arms are also connected with the issue of smuggling. Strengthening the existing legal structures, establishing national level task forces, information campaigns in order to deter migrants from seeking illegal immigrating methods, training programmes for judges, prosecutors and investigators would undoubtedly help for the control of the offenders in order to mitigate the adverse effects of this phenomenon. In addition, in order to successfully investigate and prosecute smugglers, the victims must be stable and free from fear and intimidation to be effective witnesses. Therefore sound witness protection programmes and victim protection programmes should also be implemented to combat this global menace.

Need for Certain Institutions Essential for Promoting Constitutionalism In Sri Lanka

M.Ganesharajah
LL.M (USA) (Merit)
District Judge, Mullaithivu

Introduction

The concept of constitutionalism

Definition of constitutionalism may carry a wide range of meanings, and commonly mistaken by the public given the very complex nature of the concept and mostly because of the composition of such an idea.

The concept of constitutionalism underpins the fundamental law, ideas, and attitudes and patterns of behavior that limits and regulates the power of the government. This is the reason why in most democratic countries governments are known to be 'by the people for the people. The constitution is not only the source that derives this power but also the fundamental source which limits or regulates that power by imposing checks and balances on government institutions belonging to judiciary, executive, and legislature.

Seperation of powers

This mechanism is supported by doctrine of separation of powers to establish impartiality and to prevent abuse of power. The constitutional doctrine of separation of power suggest that these institutions, its authority, powers, functions, and personnel should be kept apart without vesting it all on one person or one institution which could lead to confusion. However, it is also reckoned that pure separations of powers do not assist a government practically in functioning properly and may sometimes lead to a 'constitutional deadlock', if separation of powers is strictly practiced.

On the other hand the doctrine of separation of powers guarantees that the human rights, freedom and liberties of the citizens are best protected through a constitution which divide proper institutional powers, demarcate the legal boundaries of those institutions and their legal jurisdictions. However, the supreme constitution cannot do anything in isolation without the high regard for the rule of law in a country. The constitutionalism thus proclaims the desirability of rule of law over the arbitrary judgment and fiats of public officials.

Rule of law

For a constitution, which is considered as supreme law of the country to be effective and efficient, the rule of law should be given due recognition, for without rule of law the concept of constitutionalism, is no more than a mere concept so as the constitution of the country in concern. For the officials or the institutions who practice governmental power to limit its exercise of power to its jurisdiction the officials as well as the government should be aware of the constitutional limits available to them in order to protect the interests, rights, and liberties of the citizens, but mere awareness does not lead things anywhere, if they do not hold rule of law in high regard in its inherent virtue of glamour and status the country's Law above everything else. What we bind to the law is the government, Executive, legislature, and judiciary will have to observe its limitations in terms of fundamental rights of the citizenry and other constitutional constraints.

This determination of scope guarantees the protection of human rights of the citizens, recognized by the supreme law. This is the practical application and also the touchstone of the concept of constitutionalism "limited government under a supreme law". Rule of law refers to the supremacy of law: that society is governed by law and this law applies equally to all persons, including government and state officials

Collapse of the Institutions

Over a period of 34 years, Sri Lankans witnessed the collapse of all the basic institutions in their society. The collapse of these institutions means that the basic principles of law on which these institutions were organized and operated have been seriously disturbed. Among the institutions which collapsed were Sri Lanka's policing system, the public service commission, the election commission, the system of controlling bribery and corruption, and the department of the Attorney General.

The collapse of these institutions was recognized by the Sri Lankan parliament when they made a limited attempt to give some life back to these institutions by way of the 17th amendment. When the 18th amendment was passed, that rescue attempt was abandoned and the very possibility of the survival of the multiparty system and the possibility of a genuinely elected legislature was brought to an end.

17th Amendment to the constitution

The government's argument on the 17th Amendment was that it was good piece of legislation but that there were some defects in it. In fact, the real problem of the 17th Amendment from the government's viewpoint was that it tried to impose limitations on the power of executive president. The limitations were on his powers to appoint whomever he wished to important positions in the civil service. The government did not agree with having any such limitations and did not wish to debate them.

It decided that it was not possible for it to debate on the need to have checks and balances. There was no meaningful debate over the 17th Amendment. The government had abandoned the principles on which constitutionalism is based.

18th Amendment to the constitution

The 18th Amendment fundamentally transformed Sri Lanka's political system, stripping away the façade of democracy. The 18th Amendment end presidential term limits, eliminate the Constitutional Council, increase the Executive's control over appointments, and give the President the power to regularly attend and address Parliament. Its effect will be to remove vital checks on Executive power and further undermine Sri Lanka's democracy.

Presidential term limits are critical to democratization. The concept of Executive term limits has been a part of discussions of democracy since its inception in ancient Rome and Athens. The end of term limits will preclude institution-building, policy reforms, and training integral to the development of stable democracy in Sri Lanka. Incumbents will have decreased electoral imperatives and become less likely to generate new platforms and policies or improve existing institutions and infrastructure. With a single party remains in power and little turnover among government employees and appointees, relatively few Sri Lankans will acquire the knowledge and experience necessary to become part of democratic government.

The 18th Amendment will also expand the power of the Executive to make appointments, eroding the independence and power of other government actors and branches. The President will only have to seek the opinion of a five-member council comprised of the Prime Minister, the Speaker, the Leader of the Opposition, a Member of Parliament nominated by the Prime Minister, and a Member of Parliament nominated by the Leader of the Opposition when appointing officials to the Election Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission of Sri Lanka, the Permanent Commission to Investigate Allegations of Bribery and Corruption, the Finance Commission, and the Delimitation Commission. These far-reaching changes in the appointment process will affect agencies and actors responsible for essential human rights infrastructure and the provision of basic services and have the potential to destabilize or interrupt services.

Changes to the appointment process within the 18th Amendment present a special threat to the independence of the Judiciary. The President's expanded appointment powers will extend to the selection of the Chief Justice and the Judges of the Supreme Court, the President and the Judges of the Court of Appeal, the Members of the Judicial Service

Commission, other than the Chairman, the Attorney-General, the Auditor-General, the Parliamentary Commissioner for Administration, and the Secretary-General of Parliament.

Additionally, the 18th Amendment's expansion of the President's privileges with regard to Parliament will compromise the autonomy of Parliament. The prerogative to address Parliament and acquisition of full Parliamentary privileges will significantly increase the President's influence on the Legislative branch, reducing the separation of powers.

The 18th Amendment will destabilize the Sri Lankan political system. Its effects will only grow with time. The Amendment removes essential limits on Executive power and cripples the Judiciary while reducing the independence and influence of the Parliament; further, it ensures political stagnancy and precludes progress. Political scientist Samuel Huntington proposed a "two turnover? Rule: only after two successful political turnovers could a democracy be declared stable. By passing the 18th Amendment, Sri Lanka is regressing, destroying what democratic framework is in place rather than improving it.

When the head of a state has the possibility of remaining in power indefinitely he will interfere with other parts of the state apparatus: the Attorney General's Department, the courts, the police, the public service and all other components of power. All those components that deliver services to the public suffer when one person has unlimited power through unlimited time in office. The ruling individual becomes the nation, and the nation is made subordinate to this ruling individual rather than this ruling individual serving the nation.

Conclusion

Thus the 18th Amendment challenges one of the most sacred notions that has been developed by civilisation: that power must be bound, power must be limited and that this is the only way to preserve the sovereignty of the people, the independence of the nation and that the power of the individual will not become a destructive force. If this sacred notion is taken away, Sri Lanka will be pushed together with those nations where all principles for the defence of constitutional rule have been abandoned. No nation that abandons limits on power can remain civilised and constitutional.

A major weakness of the 1978 Constitution of Sri Lanka, by contrast, was that it created room for the easy manipulation of the constitution by the use of a two-thirds majority in parliament and by referendum. As the constitution's father, J. R. Jayewardene was moved by authoritarian ambitions it was not to his benefit to incorporate democratic ideas that would restrict his powers. Thus, the 1978 Constitution left room for the destruction of democracy itself by the manipulation of ostensibly democratic practices.

Those institutions which are more directly linked to law enforcement and the administration of justice, should not be placed in jeopardy either. There are also other statutory bodies that are vested with quasi judicial functions who should be protected from facing problems due to politicization and the loss of professional independence.

This "state of lawlessness' has to be curbed and controlled by the judiciary. This is the essence of the rule of law, and it goes to the roots of constitutionalism. It is the solemn function of the judiciary to ensure that no constitutional or legal functionary or authority acts beyond the limits of its power nor that there be any abuse or misuse of power. Be it the common man, the legislator or the legislature, judicial activism should be applied with vigor and without favor. This solemn function cannot be discharged without the commitment of the legal profession.

The judiciary stands between the citizen and the state as a bulwark against the executive excesses of misuse or abuse of power or the transgression of constitutional or legal limitation by the executive as well as the legislature.

It is therefore, absolutely essential that the above institutions must be totally free from executive pressure or influence and must be fiercely independent.

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International standard of privacy implementation and issues of human Rights, concerning privacy and security.

Dushantha Epitawala
LL.M (Colombo)
Additional Magistrate
Colombo.

Introduction

Privacy law is the area of law concerned with the protection and preservation of the privacy rights of individuals. Increasingly, governments and other public as well as private organizations collect vast amounts of personal information about individuals for a variety of purposes.

The way Alan Westin sees it, privacy is not so much a cause or a burden for corporate America as it is a balance one.

Thus one of the main issues that will be thoroughly analysed is the relentless development of information technology, especially the internet, an essential tool in present-day society which requires a great deal of reflection in light of the proliferation of new services, for instance social networks, due to their impact in terms of data protection and privacy.

With the influence of new technologies, one of the core subjects at the conference will be the education of minors, a strategic challenge in the digital world we are evolving towards with every big stride we make.

The notion of privacy takes on a completely different meaning when viewed from the perspective of an IT professional, an organisation using technology to support strategic directions or a member of the public.

The paper documents some of the legislative developments in privacy and data protection and examines what these developments mean for IT.

What is Privacy?

Of all the human rights in the international catalogue, privacy is perhaps the most difficult to define. Definitions of privacy vary widely according to context and environment.

In many countries, the concept has been fused with data protection, which interprets privacy in terms of management of personal information.

Outside this rather strict context, privacy protection is frequently seen as a way of drawing the line at how far society can intrude into a person's affairs. The lack of a single definition should not imply that the issue lacks importance. As one writer observed, "in one sense, all human rights are aspects of the right to privacy."

Robert Ellis Smith, defined privacy as "the desire by each of us for physical space where we can be free of interruption, intrusion, embarrassment, or accountability and the attempt to control the time and manner of disclosures of personal information about ourselves.

The Preamble to the Australian Privacy Charter provides, "A free and democratic society requires respect for the autonomy of individuals, and limits on the power of both state and private organizations to intrude on that autonomy . . . Privacy is a key value which underpins human dignity and other key values such as freedom of association and freedom of speech. . . . Privacy is a basic human right and the reasonable expectation of every person."

Privacy can be divided into several categories such as Information privacy, Bodily privacy, Privacy of communications, Territorial privacy.

Privacy Principles in different jurisdictions.

In recent years, Parliaments throughout the world have enacted legislation intended to comprehensively increase government's reach into the private life of nearly all citizens and residents. Competing "public interest" claims on the grounds of security, law enforcement, the fight against terrorism and illegal immigration, administrative efficiency and welfare fraud have rendered the fundamental right of privacy fragile and exposed. The extent of surveillance over the lives of many people has reached an unprecedented level.

Constitutional protections, statutory protections, and privacy enforcement reflected real and actual protections. Together with democratic safeguards they have the capacity to create a weighting that could easily counter-balance any surveillance intransigence.

In many countries around the world, there is a general law that governs the collection, use and dissemination of personal information by both the public and private sectors. An oversight body then ensures compliance. A variation of these laws, which is described as a "co-regulatory model," was adopted in Canada and Australia.

Various countries developed specific protections for privacy in the centuries that followed. In 1776, the Swedish Parliament enacted the Access to Public Records Act that required that all government-held information be used for legitimate purposes. France prohibited the publication of private facts and set stiff fines for violators in 1858. The Norwegian Criminal Code prohibited the publication of information relating to "personal or domestic affairs" in 1889.

World and Regional Conventions.

Interest in the right of privacy increased in the 1960s and 1970s with the advent of information technology. The surveillance potential of powerful computer systems prompted demands for specific rules governing the collection and handling of personal information. Two crucial international instruments evolved from these laws. The Council of Europe's 1981 Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data and the OECD Guidelines Governing the Protection of Privacy and Trans-border Data Flows of Personal Data set out specific rules covering the handling of electronic data.

The OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data continue to represent international consensus on general guidance concerning the collection and management of personal information. By setting out core principles, the guidelines play a major role in assisting governments, business and consumer representatives in their efforts to protect privacy and personal data, and in obviating unnecessary restrictions to trans-border data flows, both on and off line.

The APEC economies commenced development in 2003 of an Asia-Pacific privacy standard and in 2004 may develop a procedure for handling data export limitation issues. This may become the most significant international privacy initiative since the European Union's Data Protection Directive. In February 2003, Australia put forward a proposal for the development of APEC Privacy Principles, using the 20-year old OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data (1980) as a starting point. A Privacy Sub Group was set up comprising Australia, Canada, China, Hong Kong, Japan, Korea, Malaysia, New Zealand, Thailand and the United States. In March 2004, Version 9 of the APEC Privacy Principles was released as a public consultation draft.

Numerous international human rights treaties specifically recognize privacy as a right. The International Covenant on Civil and Political Rights (ICCPR), Article 17, the United Nations (UN) Convention on Migrant Workers, Article 14, and the UN Convention on Protection of the Child, Article 16 adopt the same language.

On the regional level, various treaties make these rights legally enforceable. Article 8 of the ECHR states Everyone has the right to respect for his private and family life, his home and his correspondence and There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others.

European Union

In 1995, the European Union enacted the Data Protection Directive in order to harmonize member states' laws in providing consistent levels of protections for citizens and ensuring the free flow of personal data within the European Union. In 1997, the European Union supplemented the 1995 directive by introducing the Telecommunications Privacy Directives.

The basic principles established by the Directive are: the right to know where the data originated; the right to have inaccurate data rectified; a right of recourse in the event of unlawful processing; and the right to withhold permission to use data in some circumstances. The Directive contains strengthened protections over the use of sensitive personal data relating. In the future, the commercial and government use of such information will generally require "explicit and unambiguous" consent of the data subject. In most countries with an omnibus data protection or privacy act, there is an official or agency that oversees enforcement of the act. The powers of these officials, Commissioner, Ombudsman or Registrar, vary widely by country. Several countries, including Germany and Canada, also have officials or offices on a state or provincial level.

Under Article 28 of the EU Data Protection Directive, all European Union countries must have an independent enforcement body. Under the Directive, these agencies are given considerable power: governments must consult the body when the government draws up legislation relating to the processing of personal information; the bodies also have the power to conduct investigations and have a right to access information relevant to their investigations; impose remedies such as ordering the destruction of information or ban processing, and start legal proceedings, hear complaints and issue reports.

Following the events of September 11, however, the political climate changed and the Parliament came under increasing pressure from member states to adopt the Council's proposal for data retention. The United Kingdom and the Netherlands, in particular, questioned whether the proposed privacy rules still struck "the right balance between privacy and the needs of the law enforcement agencies in the light of the battle against terrorism. On June 25, 2002 the European Union Council adopted the Privacy and Electronic Communications Directive as voted in the Parliament. Under the terms of the new Directive, member states may now pass laws mandating the retention of the traffic and location data of all communications taking place over mobile phones, SMS, landline telephones, faxes, e-mails, chat rooms, the Internet, or any other electronic communication device. Such requirements can be implemented for purposes varying from national security to the prevention, investigation and prosecution of criminal offences.

The European Council recently adopted an agreement between the EU and the United States concerning the transfer of passenger name records information for travellers on all flights originating in the EU and landing in the US.

In Belgian constitution was amended in 1994 to recognise the right to privacy; Supreme Court has ruled in accordance with Article 8 of the ECHR and the Commission has investigatory powers, issues a number of recommendations; took a strong stance against the transfer of data from SWIFT to the U.S. government . Belgium is the Leading country for smart ID cards, issued from age 6, that may contain such data as medical files, for use in public and private sectors, despite much criticism and the First European country to use RFID passports.

In Finland there is Constitutional protection under section 10. There is much information in the public domain, including name, birth year, taxable income, property taxes, and total taxes paid. Location data tracking of youth is widely provided service. Helsinki transport network monitors movements of travellers, though data privacy authority has compelled a change of policy. Specific act on workplace privacy now permits email surveillance, video surveillance, and drug testing; though ombudsman recently ruled that employers cannot use search engines to assess prospective employees without consent.

In France no explicit right to privacy in constitution, though constitutional court has ruled that it is implicit. Data privacy authority well known for its strong stance on many issues, investigates, warns and imposes financial sanctions. There is Tort of privacy in civil code, and other laws also exist, as well as protections in the penal code. But there are serious lacks of data protection and many security breaches identified in computerized patient records, according to data privacy authority in 2007.

In Germany Basic Law protects communications privacy under article 10; but Constitutional Court ruled in 1983 that individuals have a right of informational self-determination based on Articles 1 and 2 on rights to freedom. This is one of the strictest privacy laws in the world.

In Greece Article 9 of the constitution recognises the right to privacy in the home, and data protection (since amendment), Article 19 for communications privacy.

In Hungary Constitutional right in Article 59, and strong Supreme Court decisions upholding this right; in 2007 the court called on enhanced protection to the right of privacy because of poor oversight.

In Italy Constitution protects right to privacy in the home (article 14) and communications (article 15). Data privacy authority has extensive powers, including auditing databanks of intelligence activities. Data privacy authority has stopped two initiatives for expanding use of fingerprinting; and has regulated use of CCTV; and has run public education campaigns on television.

In Lithuania Constitutional right under Article 22, with mixed Supreme Court jurisprudence and recent amendment requires public statements by companies on their websites regarding accountability.

United Kingdom

The United Kingdom adheres to Article 8 ECHR, which guarantees a "right to respect for privacy and family life", subject to restrictions as prescribed by law and necessary in a democratic society towards a legitimate aim. However, there is no independent tort law doctrine which recognises a right to privacy. This has been confirmed on a number of occasions.

The Computer Misuse Act 1990, enacted by Great Britain on 29 June 1990, and which came into force on 29 August 1990, is an example of one of the earliest of such legal enactments.

Under the Terrorism Act 2000, the government can demand that a public telecommunications service intercepts an individual's communications. Government to illegitimately intercept your communications, the surveillance data cannot be used in a court of law, and that surveillance cannot be used to provide evidence in a court of law. The European Court of Human Rights has ruled against the UK on its anti-terrorism powers for stop and search. The court reiterated that stop and search was an interference with the right to privacy under Article 8 of the ECHR.

In Halford v. United Kingdom, Ms Halford was appointed to the rank of Assistant Chief Constable with the Merseyside Police. Following a refusal to promote her, Ms Halford commenced proceedings in the Industrial Tribunal claiming that she had been discriminated against on grounds of sex. She alleges that calls made from her home and her office telephones were intercepted for the purposes of obtaining information to be used against her in the discrimination proceedings. She claims a breach of Article 8 of the Convention. The ECHR held that conversations made on the telephones in Ms Halford's office at Merseyside Police Headquarters fell within the scope of "private life" and "correspondence" in Article 8.45

Kaye v Robertson is a case in English law which is a notable case, expressing the view that there is no common law right to privacy in English law. A friend of Mr Kaye had been granted an interlocutory injunction preventing the editor (Anthony Robertson) and the newspaper (the Sunday Sport) from using the material, which they appealed. In the absence of the right to privacy, Mr Kaye's advisers based their claim on libel, malicious falsehood, and trespass to the person and passing off. The Court of Appeal ruled that none of these torts was applicable except malicious falsehood; Kaye remains a compelling demonstration of the limits of both existing English law and of the limitations of an approach that relies upon inadequate existing remedies to protect privacy.

United States of America

The United States strongly lobbied the European Union and its member countries to find the United States system adequate. In 1998, the United States began negotiating a "Safe Harbour" agreement with the European Union in order to ensure the continued trans-border flows of personal data. The idea of the "Safe Harbour" was that United States companies would voluntarily self-certify to adhere to a set of privacy principles worked out by the United States Department of Commerce and the Internal Market Directorate of the European Commission. These companies would then have a presumption of adequacy and they could continue to receive personal data from the European Union. Negotiations on the drafting of the Safe Harbour principles lasted nearly two years and were the subject of bitter criticism by privacy and consumer advocates.

In Harris v. Blockbuster, In 2008, Cathryn Elaine Harris, a Face book user, filed a class action complaint in the District Court for the Eastern District of Texas, against Blockbuster for violations of the Video Privacy Protection Act. The Video Privacy Protection Act bans the disclosure of personally identifiable rental information unless the consumer consents specifically in writing. Harris claimed that Blockbuster violated this provision by reporting the rental activity of users to Face book, without their permission, and even when the users were not logged into the social networking site. Blockbuster sought to keep the case out of court by invoking an arbitration clause in its "Terms and Conditions," which stated that "all claims, disputes, or controversies . . . will be referred to and determined by binding arbitration." The Terms and Conditions further prohibited the commencement of class actions, and stated that it "may at any time, and at its sole discretion, modify these Terms and Conditions of Use, including without limitation the Privacy Policy, with or without notice." Before joining Blockbuster Online, customers were required to click a button to confirm that they read and agreed to the Terms and Conditions, including the arbitration clause. Plaintiffs argued, however, that Blockbuster On line's Terms and Conditions were unenforceable, because they were illusory and unconscionable. The District Court for Texas ruled that Blockbuster On line's Terms and Conditions were unenforceable because they gave Blockbuster too much discretion in modifying the terms of the agreement.

In Bonita v. Nissan U.S.A., Plaintiffs, former employees of defendant, brought suit claiming, inter alia, that defendant's review of e-mail messages sent by plaintiffs over a company system of a personal and sexual nature constituted an invasion of their right of privacy in violation of both the California Constitution and common law. Plaintiffs also contended that their termination was motivated by their filing of a complaint attacking this conduct, which constituted a wrongful discharge in violation of California public policy. The Court rejected these claims, and affirmed the trial court's grant of summary judgment to the employer. The wrongful discharge claim was dismissed due to the absence of any violation of public policy.

Privacy Act of 1974 states No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains... The Privacy Act mandates that each United States Government agency to have in place an administrative and physical security system to prevent the unauthorized release of personal records.

Asian Countries.

India's Information Technology Act 2000 has tried to assimilate legal principles available in several such laws (relating to Information Technology) enacted earlier in several other countries, as also various guidelines pertaining to Information Technology Law. The government of India appointed an Expert Committee to suggest suitable amendments into the existing IT Act, 2000. ITA 2008 as the new version of Information Technology Act 2000 is often referred has provided additional focus on Information Security. It has added several new sections on offences including Cyber Terrorism and Data Protection. Section 69 empowers the Central Government/State Government/ its authorized agency to intercept, monitor or decrypt any information generated, transmitted, received or stored in any computer resource if it is necessary or expedient so to do in the interest of the sovereignty or integrity of India, defence of India.

In China there are Limited rights under constitution under articles 37, 38, 39. Chinese government acknowledges that it has room for improvement in applying laws fairly and systematically. Stricter controls are being exerted on press, internet, academics, lawyers and NGO's. In 2006 China's central bank developed a database that links up information on consumer credit; and private sector initiatives are emerging that advertise access to 90 million incomes, marital status and sensitive information for 12 cents per request.

In Japan No explicit right to privacy in constitution though Supreme Court has interpreted a substantial right as falling under Article 13 on right to life a liberty. No comprehensive privacy law, instead only guidelines for specific industries; and some legislation in some sectors. Tagging and tracking of children continues .Only second country to implement vast biometric collection at borders and have Ratified convention on Cybercrime.

In Malaysia there is No right to privacy in constitution. Controversial internal security act allows for extensive police powers.

In Russia Constitutional right exists under Article 23, 24, and 25. Criminal Code imposes a penalty for violation of privacy, enforced by a court is physical or moral damages result from a violation. In 2006 law on personal data protection adopts Council of Europe convention, but government is given wide exemptions The Data Privacy Authority, when it will exist, will not be independent and will be within the Ministry of Communications

In Singapore there is No right to privacy under constitution, though the High Court has ruled that personal information may be protected under duty of confidences. Judicial warrants are not necessary for surveillance.

Is the Law in Sri Lanka sufficient?

In this article I wish to analyze the current Sri Lankan Law in Privacy against European Union, especially United Kingdom.

In Sri Lanka Under 1978 constitution there is no specific right of Privacy been protected? But there are special provisions in regard of the protection of Human Rights. Therefore the scope of Privacy is coming under the Human Rights. In Sri Lanka Privacy is coming under law of torts. In Bandaranayke vs. Sunday Times court held that there is no data security policy in the country, but under common law, laws of tort would apply. There only few cases regarding this aspect and much attention are required.

But in UK though there is no specific provisions in the form of constitution, it governs by ratifying the EU directives 95/46. The 1998 Act replaced the Data Protection Act 1984, and was intended to bring UK law into line with the European Directive of 1995. It gives a vast scope of protection in privacy and data protection.

After Halford v. United Kingdom, there were significant changes in development in privacy law enforcement. As a member of the European Convention on Human Rights, the United Kingdom adheres to Article 8 ECHR, which guarantees a "right to respect for privacy and family life".

Wainwright v Home Office is an English tort law case concerning the arguments for a privacy, and held that there was no tort for invasion of privacy, because (owing to the experience in America) it was too uncertain. However, there is no independent tort law doctrine which recognises a right to privacy.

In UK Database right was created in 1996. Prior to that, under the Data Protection Act 1998 , a computer database was treated as a literary work.

In Benwell vs. Rep. of Sri Lanka held that the computer evidence is in a category of its own and don't come into the scope of section 34 of the Evidence Ordinance. This lead to the Evidence (special provisions) act to specially crafted to fill this lacuna. There after due to the development in technology, several statutes been enacted. The Information and Communication Technology act, the Payment and Settlement Systems Act, the Electronic Transactions Act (ETA), the Payment Device Frauds Act, and the Computer Crime Act are the most significant laws enacted to meet to necessity. Out of these the ETA is the mostly concern legislature which tally with the international requirements.

Conclusion

Many countries around the world are discussing or have signed the Council of Europe Convention on Cybercrime. The Cybercrime Convention expanded law enforcement authority without oversight or accountability in spite of being opposed by many human rights organizations and NGOs around the world. Now, the Council of Europe Privacy Convention should have the support of all organizations interested in human rights and civil liberties.

The United Kingdom proposed the adoption of entitlement cards in an effort to deal with immigration and illegal work and identity theft, but also supported by the fight against terrorism. Similarly, Hong Kong planned to introduce a biometric chip identity card to verify fingerprints to authenticate travellers into China.

The Governments of OECD Member Countries, Considering that the development and diffusion of digital computer and network technologies on a global scale offer social and economic benefits by encouraging information exchange, increasing consumer choice, and fostering market expansion and product innovation, Considering that global network technologies facilitate the expansion of electronic commerce, and accelerate the growth of trans-border electronic communications and transactions among governments, businesses, and users and consumers. Considering that personal data should be collected and handled with due respect for privacy came to a ministerial declaration at Ottawa.

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Looking at these developments in the law, Sri Lanka also has to come up with some sort of legal protection in privacy and data protection to safeguard the basic Human Rights and well as to bring EU countries to invest in the country in a more secure environment. Fair amount of interpretation, clarification, and modification will be needed to cater the present requirements.

How vital is it for the Judicial decision making process to reflect the best interest of the child under the light of Convention on the Rights of the child (CRC)

A.N.J. De Alwis
Additional Magistrate
Colombo.

Convention on the Rights of the child (C R C) which was adopted by the United Nations General Assembly in 1989, has been ratified by allmost all the states and is recognized as international law. The C R C does not just state what children's rights are yet it goes much further, obliging all governments that ratify it to take all necessary steps to ensure that children's rights are realized in their country as well as to co-operate internationally on their fulfillment worldwide.

The Convention is Commonly referred in three "P" s.

1. Provision
2. Protection
3. Participation.

Article 12 manifests that the child holds rights which have an influence on her or his life, and not only rights derived from her or his vulnerability (protection) or dependency on adults (provision). Article 12 as a general principle provides that states parties should strive to ensure that the interpretation and implementation of all other rights incorporated in the convention are guided by it.[1]

Article 12 of the Convention on the Rights of the child (The Convention) is a unique provision in a human rights treaty at the same time addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but on the other, are subjects of rights.

Article 12 assures, to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being

1. see the committee's general comment No 5(2003) on general measures of implementation for the convention on the rights of the child (CRC/GC/2003/5)

given due weight in accordance with age and maturity and the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.

The constitution of Boards or Commissions for children's participation is essential to advance the process of knowledge of rights an to implement experience in which children have been confirmed as responsible and involved in solution of the problems affecting them, to the extent that the local authorities have given them opportunities to intervene and advise.

The Convention concerning the right of the child is the first international recognition that children are subjects of Law and people with freedom. Until then, the principal documents protecting the rights of the child, such as declarations from 1924 and 1959, established rules for the children, but did not recognize them as individuals that were entitled to any rights.

The Convention also gives them an active role in determining their well being and respecting their rights. Undeniably as subjects of law, children have the right to express their opinion in all decisions affecting them and to participate in choices that concerns their welfare. The interest of the child is no longer only appreciated from an adult point of view, but is coming directly from the standpoint of the child. The Convention highlights the fact that the welfare of the child cannot be achieved without the involvement of the child in question.

Children as a group are gradually coming into their own as people with rights and social actors. But because marginalization is still a fact of life for the vast majority of the world's children, structured efforts to ensure their participation and protect them from exploitation have become essential.

Participation is frequently defined as "the process of sharing decisions which affect one's life and the life of the community in which one lives." It is a standard against which democracies should be measured.

Acknowledged as a multifaceted phenomenon, participation may include a wide range of activities that differ in form and style when children are at different ages; seeking information, expressing the desire to learn even at a very young age, forming views, expressing ideas; taking part in activities and processes; being informed and consulted in decision - making; initiating ideas, processes, proposals and projects; analyzing situations and making choices; respecting others and being treated with dignity.

The goal for children and young people is not simply to increase their participation but to optimize their opportunities for meaningful participation. It is important to note, however, that no matter how attractive an idea child participation might seem, it is not a 'free good' as is most commonly assumed, nor does it necessarily bring more rationality to any project. It carries both direct and opportunity costs.

The skills of participation must be learned and practiced in light of the medium - and long - term costs to society of not facilitating participation ; a world of young adults who do not know how to express themselves, negotiate differences, engage in constructive dialogue or assume responsibility for self, family, community and society.

Most importantly, however, child participation is a responsibility and an obligation of all those whose actions are guided by the Convention on the Rights of the child. Participation is a responsibility and an obligation of all those whose actions are guided by the Convention on the Rights of the child. Participation, in the Context of the Convention, entails the act of encouraging and enabling children to make their views known on the issues that affect them. Put into practice, participation involves adults listening to children - to all their multiple and varied ways of communicating, ensuring their freedom to express themselves and taking their views into account when coming to decisions that affect them. The principle that children should be consulted about what affects them often meets with resistance from those who see it as undermine adult authority within the family and society. But listening to the opinions of children does not mean simply endorsing their views. Rather, engaging them in dialogue and exchange allows them to learn constructive ways of influencing the world around them. The social give and take of participation encourages children to assume increasing responsibilities as active, tolerant and democratic citizens in formation.[2]

Sri Lanka and India are two Countries which have ratified the convention on the Rights of the child (CRC) and where the jurisdictions embody similar legal traditions of mixed legal system in English common law and Roman Dutch Law.

The principal statute that governs the subjects of care and protection and juvenile justice in Sri Lanka is The children and young persons ordinance (CYPO). The key section in the CYPO which guides Court on issues concerning children in contact with the criminal Justice process is stated below; whenever any child is produced before any court whether as an offender or otherwise, the court shall have regard to the WELFARE OF THE CHILD and in a proper case, remove him from surroundings harmful to him and ensure that he is provided with education and training. This section in the CYPO however must now be read in the light of sec. 5(2) of the international Covenant on civil and political Right (ICCPR) Act No.56 of 2007 which states;

> "In all matters Concerning children, whether undertaken by public or private social welfare institution, courts, administrative authorities or legislative bodies, the best interests of the child shall be of paramount importance."

2. Voices of Youth website 24 March 2002

The effect of this provision in the ICCPR Act is to make the best interests standard a general principle of interpretation that comes into play in all matters concerning children.

The object of the jurisdiction under the CYPO is that children shall be cared for and protected through enabling judicial measures. Since 1939 when this ordinance was first enacted two subjects have emerged as core disciplines to be integrated into legal practice. They are care and protection and juvenile Justice. International law has also changed with the acceptances of the UN Convention on the Rights of the child C R C.

Sri Lanka has identified and recognizes the following parts in the C R C.

- Rights to respect and identity (Art. 2,7,8,23,26,40)
- Rights to economic, social and cultural development (Art.6,24)
- Create and strengthen protective environment (Art.3,9,11,19,22,24,25,30,32,8)
- Promote caring environment (Art. 18, 23 (4), 26,31,39)
- Prohibit arbitrary or unlawful interference with privacy or honor and reputation. (Art. 16)
- Rights and freedoms of child (Art. 13,16,17,18)

From Article 3(1) of CRC in all action concerning children, whether undertaken by public or private social welfare institutions, Court of Law, administrative authorities or legislative bodies, the <u>best interest of the child</u> shall be a primary Consideration what International law requires is an effective procedures as follows;

- Article 19(1) CRC

  State parties shall take "all appropriate legislative, administrative, social and education measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment maltreatment or exploitation including sexual abuse."

- Article 19(2) CRC

  The measures should include;

  Efective procedures For identification, reporting, referral, investigation, treatment and follow - up of instances of child maltreatment described here to fore, and as appropriate, for judicial involvement.

In Sri Lanka how CYPO linkage with international Law, is stated below;

CYPO

1. Confidentiality and respect for privacy sections 11,18,19 and 20.	Art. 16 CRC child right to privacy Art. 8 ECHR- Respect for family life, Rule 8 Beijing Rules (BR)
2. place of safety section 37 (1)	Art 19 and 20 CRC Temporary care with continuity of relationships
3. Separation from adult offenders - section 13	General protective measures - Art 19, 37 (c) CRC Art 10 2 (b) ICCPR
4. parent or guardian to attend court section 16 (1)	Immediate notification to parent or guardian - Rule 10-1 BR
5. Notification to probation section 17 (1)	Background and circumstances in which the child lives to be properly investigated
6. Social Inquiry section 17 (2)	Rule 16.1 BR
7. Case Conference (out of court)	Full mobilization of all possible resources - Multi disciplinary approach Rule 1-3 BR
8. Social report to court section 17 (2)	Part 3 BR - Rules 14 - 22 Article 9 CRC
9. Court inquiry section 35 (1)	

Article 9.1 and 9.2 of the CRC stated Guidelines for family separation.

9.1 States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child, such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

9.2 In any proceedings pursuant to above paragraph all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

- Also stated rest of Art, 9 and **UN Declaration** on foster placement and adoption.

  These factors also linked with Sri Lanka statute **CYPO**

CYPO

10. Placement and supervision sections 35(1) and 38(1)	Art 39 - CRC -Measures to promote physical and Psychological recovery and social reintegration Art 19 (protection from abuse and neglect) and (protection of a child without family) CRC - 20
11. Periodic Review sections 44,45 and 57 (4)	Art 25 CRC - periodic review of placement Art 28 CRC - Ensure child's right to education.

However In Sri Lanka children are cared and protected by the **children and young person ordinance 1939.**

section 21 CYPO - whenever any child is produced before any court whether as an offender or otherwise, the court shall have regard TO THE WELFARE OF THE CHILD And in a proper case, remove him from surroundings harmful to him; and ensure that he is provided with education and training.

Article 3 CRC - In all actions concerning children whether undertaken by public or private social welfare institutions, courts of Law, Administrative authorities or legislative bodies. The BEST INTERREST OF THE CHILD shall be a primary Consideration.

Obligations of state parties under International Law has discussed in the following case **Weerawansa vs the Attorney General 2000 1 SLR 387.**

- Sri Lanka is a state party to the International convention on the Rights of the child (1989)
- When state becomes a party to an international convention or treaty. The state has an obligation in international Law to respect its treaty obligations.
- All organs of the state legislature, the Executive and the Judiciary, in enacting legislation or in applying or interpreting existing legislation relevant to a particular Treaty or convention to which the state is a party, owe a duty to conform to international standards and norms set out in the particular Treaty or the convention. Therefore I would suggest following changes in recognized rights in the convention, in light of state party obligations under CRC.

- Following guidelines to be developed by every stake holder who involve in child Rights. State party obligations should respect the following rights of children;
- Right to be treated with dignity and compassion.
- Right to be protected from discriminations.
- Right to express views and concerns and to be heard.
- Right to effective assistance.
- Right to privacy.
- Right to be protected from justice process hardship.
- Right to safety.
- Right to representation.
- Right to special preventive measures.

Conclusion

There are a whole series of questions as to the impact of international law. At one level the normative assumption of the value of human rights language is present in the use of international instruments. The value of these instruments is seen in the enormous pressure being brought to bear upon even powerful countries such as the USA to ratify the CRC It thus provides a language for advocacy groups. But on the other hand it is the very human rights instrument the CRC

The process of Law Reform needs to be subjected to serious interrogation. We must institutionalize a far more rigorous process where in local learnings, comparative experiences and human rights standards are taken far more seriously before law reform is proposed. There should be no law, which should be framed without policy clarity.

Under CRC if the state parties change their obligations as discussed above, there will be;

- A world which respects and values each child.
- A world which listen to children and learns.
- A world where all children have hope and opportunity.

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