JSA LAW JOURNAL

2016 | VOLUME - IV

ISSN 2357-2884

PUBLISHED BY JUDICIAL SERVICE ASSOCIATION OF SRI LANKA

JSA LAW JOURNAL 2016

Volume IV

web: www.jsasl.org | mail: editor@jsasl.org

Published by the Judicial Service Association of Sri Lanka

ISSN 2357-2884

Disclaimer:

Any views expressed in the JSA Law Journal are those of the individual author and are not to be attributed to the JSA Law Journal, the Editorial Committee, Unless expressly stated the views expressed are the author's own and not of any institution the represents.

Printers:
Sanghinda Printers & Publishers
No. 06, Wijerama Road,
Gangodawila,
Nubegoda.
e-mail: sanghindapubs@gmail.com
Tel: 011-2802679 / 4542725

Cover desingner

MoLa Senevirathne

Page Layout

Amila Sandamali Kannangara

JSA LAW JOURNAL 2016

CONTENTS

Editors' Note

Judicial Service Association deviated from its traditional publication "News Letter" by publishing the inaugural volume of JSA Law Journal in 2013. We, the editorial committee of the JSA 2016, take this opportunity with utmost pleasure and privilege to present the Fourth Edition of the JSA Law Journal.

This Journal is a result of hard work and dedication of the Editorial Committee and those who contribute with articles and ideas to shape its identity. The enthusiasm among the members to pen down articles is truly evident by the number of articles by members included in this issue, which deals with variety of subjects from the rights of transgenders to hostile witnesses, and laws relating to the protection of elephants. Further, this volume includes several articles from eminent scholars and dedicated legal practioners on timely important legal issues such as rights of disabled, combating sexual offences and copy rights violation in music industry. Hence we hope this edition would be a beacon of knowledge for the academics, practioners and jurists.

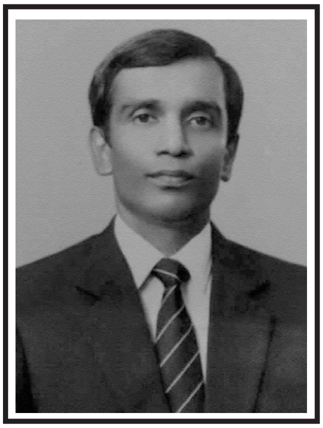
We are deeply indebted to the previous editors Mr. Ranga Dissanayake, Mr. Pamila Rathnayake and Mr. Anushka Senevirathna for paving the way for us by setting the standard for the journal. We also express our deepest gratitude to Hon. Ruwan Fernando, Director of Sri Lanka Judges' Institute and High Court Judge of Colombo for the guidance. We are much obliged to Mr. Mahie Wijeweera, District Judge of Tangalle who generously devoted his time by providing us with his guidance and efforts in making this issue a success.

We extend our sincere gratitude to Mr. Upul Shantha Sannasgala of Sanghinda Publishers who undertook and gave the fullest cooperation in the publication of the journal. Such gratitude should be extended to Ms. Eroshinee Handaragama, Ms. Amila Sandamali Kannangara and Mr. Lalith Senevirathne who performed a wonderful job by designing the journal, and the cover page.

We take this opportunity to express our gratitude to all the authors who despite their busy schedules found time to engage in academic writing and contributed articles to enhance the quality of the journal. Further we must place our deep gratitude on record to Mr. Ranga Dissanayake, Secretary of JSA who supported, guided and encouraged us in this endeavor.

Finally, we like to thank the membership of JSA and look forward to comments, criticism and analysis of this effort, for this tradition to be carried on in years to come.

JUSTICE NIMAL GAMINI AMARATUNGA MEMORIAL AWARD - 2016



Judicial Service Association has decided to select the best article in the 'Judicial Service Association Law Journal' and present an Award to the Writer, in recognition of valuable service its members render by submitting articles each year. Furthermore, JSA, filled with deep gratitude and appreciation of the enormous service rendered by one of the eternal legal legends of our time, late Justice Nimal Gamini Amaratunga, has decided to name the 'Best Article Award', in honor of his Lordship.

His Lordship Justice Amaratunga does not need special introduction. Nonetheless, we consider it is our duty to write this brief tribute in his memory. His Lordship, hailed from Kurunegala, was called to the Bar as an Advocate in 1972, having obtained a Bachelor of Laws Degree in 1970 from University of Colombo. His Lordship joined the Attorney General's Department in 1978 where he excelled as a Law Officer. His Lordship was a holder of two Master of Laws, one on the Law of Evidence from University of Colombo and the other on International Law and Shipping Law from the prestigious United Nations International Maritime Institute in Malta, where his lordship received an award for producing the most outstanding essay. To the surprise of many of his colleagues, in January 1994, his lordship accepted an appointment as a judge of the High Court, though his future in the Department appeared extremely colorful. His Lordship has served as a High Court Judge in many parts of the country before appointed as a judge of the Court of Appeal in January 2001 and subsequently elevated to the apex court of the country in January 2005.

Many of us, as junior judges, are personally aware of His Lordship's extensive knowledge, competence and dedication. It is no exaggeration to say that there was hardly anything an accused appellant was able to urge in the Appellate Courts against the judgments. Many a judgments delivered by Justice Amarathunga as a superior court judge bear ample testimony to his commitment, thoroughness and the extensive knowledge of the law. Justice Amaratunga was always conscious of the fact that the counsel before him was only discharging their professional duties and that they were entitled to a hearing, however weak their cases may be. Always courteous and patient His Lordship never refused a hearing and treated both juniors and seniors alike.

In a controversial matter, where remand order granted by Chief Magistrate of Colombo was challenged in the Court of Appeal, the respondent made clear he does not wish Justice Amaratunga to be one of the judges in his case, for obvious reasons. Justice Nimal Gamini Amaratunga showing his impartiality, integrity and disinterestedness declared that, ***"if any litigant does not want Justice Gamini Amaratunga to hear and decide a case, it is not the desire of Justice Gamini Amaratunga to hear and decide against the wishes of the litigant."***

He is clearly one of the greatest judges of our country who cannot be forgotten ever. His judgments continue to have an influence on the life of the common man in the country. We live in a time of change where people expect judges to help society to meet the challenges of change. I would like to conclude this brief tribute by reproducing following excerpts of Holy Sonnets: Death be not Proud, by John Donne;

> *"Death, be not proud, though some have called thee Mighty and dreadful, for thou art not so One short sleep past, we wake eternally and death shall be no more; Death, thou shalt die"*

Finally, as Lord Buddha noted, only inescapable fact in human existence is impermanence. Death is described as one of the five aspects of impermanence, which none can escape until one attains enlightenment. So far as the level of consequence is concerned, there are two kinds or kusala: one leading to rebirth in the pleasant form of existence and the other leading to the end of rebirth. Your Lordship has committed plethora of meritorious deeds with positive merit in your life, hence we would respectfully wish to place it on record that **'Your Lordship may attain Nibbana, eternal peace'.**

Mahie Wijeweera
Asanga Bodaragama

NON-CONSUMMATION OF MARRIAGE; GROUND FOR NULLITY

A.K.M. Patabendige
LLB (Colombo)
Judge of the Provincial High Court (North Central)

INTRODUCTION -

Non – consummation of marriage is a complicated and uncertain area in the realm of Matrimonial or Family Law in Sri Lanka. Roman Dutch Law being the common law of our country, provides no support or certainty in this disputed area.

On the other hand, our apex court on several occasions held that willful refusal to consummate the marriage amounts to malicious desertion and thereby it is a ground for divorce. In this context, the purpose of the writer is to analyze the application of the English law in the sphere of Family Law in Sri Lanka.

MARRIAGE: IS IT A CONTRACT?

It is a well settled norm that the marriage is a contract. However, it is not merely a contract between two parties. A contract in its legal sense, two or more parties agreed to fulfill the terms and conditions of agreement thereon and sign it.

But it is an accepted principle that for the purpose of fulfilling the contract of marriage, it is necessary to consummate it.

WHAT IS CONSUMMATION?

"The consummation of a marriage" can define as the first act of sexual intercourse between two people, following their marriage to each other. The definition of consummation usually refers to penile-vaginal penetration.

The Oxford Dictionary defines it as thus:

> *"The action of making a marriage or relationship complete by having sexual intercourse."*

The Black's Law Dictionary explains as follows:

> *"The completion of a marriage between two affianced persons by cohabitation"*

In view of the above definitions, consummation is an essential part of the completion of a contract of marriage.

THE LAW RELATING TO NULLITY IN SRI LANKA -

The section 607 of the Civil Procedure Code states thus;

1) Any husband or wife may present a plaint to the Family Court within the local limits of the jurisdiction of which he or she (as the case may be) resides, praying that his or her marriage may be declared null and void.

(2) Such decree may be made on any ground which renders the marriage contract between the parties void by the law applicable to Sri Lanka.

In terms of the above section the Family Court can award a decree of nullity on any ground applicable to Sri Lanka.

The Marriage Registration Ordinance No. 19 of 1907 stipulates various grounds which renders a marriage can be declared null and void. These grounds are;

The section 15:

> *Prohibited age of marriage*

The section 16:

> *Prohibited decrees of relationships*

The section 18:

> *Second marriage without legal dissolution of first marriage invalid*

The section 46:

> *If both the parties to any marriage shall knowingly and wilfully intermarry under the provisions of this Ordinance in any place other than that prescribed by this Ordinance, or under a false name or names, or except in cases of death-*

> *bed marriages under section 40, without certificate of notice duly issued, or shall knowingly or wilfully consent to or acquiesce in the solemnization of the marriage by a person who is not authorized to solemnize the marriage, the marriage of such parties shall be null and void.*

It is a question that whether a person can claim a decree of nullity only on the above grounds set out in the Marriage Registration Ordinance.

The section 607 of the Civil Procedure Code states *inter alia* "….marriage contract between the parties void by the law applicable to Sri Lanka"

In the case of **Gunathilake vs. Milinona (1937) 38 NLR 291** held that the law applicable to Sri Lanka is the Roman Dutch Law.

In the case of **Peiris Vs. Peiris 1978/1979 2 SLLR 55** Justice J.F.A.Soza citing with approval by Professor Lee held that under the Roman Dutch Law, which is applicable to this question duress, mistake, fraud and immaturity are grounds on which nullity of marriage can be sought.

The head note of the judgment states thus:

> *"That when section 626(1) of the Administration of Justice Law empowered the District Court to enter a decree of nullity of marriage on any ground set out in the Marriage Registration Ordinance, this did not expressly exclude the other grounds recognized by the Roman Dutch Law as being adequate to found a suit for nullity of marriage. The Court could still exercise its matrimonial jurisdiction in its fullest amplitude although the procedural provisions in regard to the grounds of nullity, unlike the wide language of section 607(2) of the Civil Procedure Code, covered only those set out in the Marriage Registration Ordinance".*

VOIDABLE MARRIAGES -

The Marriage Registration Ordinance sets out various grounds which renders the marriage can be declared as null and void. But our law is silent about voidable marriages.

According to our common law, the duress, mistake, minority are grounds for the voidable marriage.

Not like in a marriage void ab initio, the voidable marriage is valid until a decree of nullity is granted.

However, as far back as 1945, Justice Keuneman in the case of **Navaratnam v Navaratnam 46 NLR 316** applied the English Law principal on voidable marriages to our law.

In this case, the plaintiff instituted action against the defendant for a declaration that the marriage solemnized between them on March 12, 1936, was null and void, on the ground that the defendant gave birth to a child about three months after the marriage and that the plaintiff was unaware that the defendant was pregnant and that the plaintiff before the marriage never had access to the defendant. After the trial the District Judge entered judgment in favour of the plaintiff.

In the appeal, Justice Keuneman relied on the English judgments and held that;

> *"there can, I think, be no doubt that the claim in the present action for a decree of nullity is in its nature akin to the claim for nullity on the ground of impotence, and not to a claim for nullity on the ground of bigamy. In my opinion the marriage must be regarded as good until the decree for nullity is entered, and the domicile of the wife must be regarded as the domicile of the husband up to the date of the decree. The Ceylon Court, therefore, had jurisdiction in the action."*

In the case of G**unathilake vs. Milinona (1937) 38 NLR 291,** the plaintiff instituted action against his wife for a decree of nullity on the ground of incurable impotency at the time of marriage. Justice Akbar opined that such an action could be brought under sections 596 and 607 of the Civil Procedure Code if the ground alleged would render the marriage void by the law applicable to Ceylon.

This principle was reiterated and followed by Justice Gratiaen in the case of **Fernando Vs Peiris (1948) 50 NLR 40.**

Having scrutinized the above judicial precedence, Shirani Ponnambalam in her book titled **The Law and the Marriage Relationship in Sri Lanka at page 365** states that the voidable marriages can be considered as part of our law.

NON CONSUMMATION OF MARRIAGE -

There are instances where the parties register their marriages and live separately in their respective homes without consummating their marriage. Especially, youngsters due to their immaturity and various other reasons register their marriages and live separately even without the knowledge of their parents. However, later on they understand the impossibility and impracticability of living together as husband and wife, and come to court of law to annul their marriage. Most of these cases, they plead that their marriages are confined to the certificate and lived separately without having consummated and opposite parties also do not wish to contest and willing to dispose the case.

However, Roman Dutch Law does not recognize the non– consummation of marriage as a ground for nullity. By contrast, willful refusal of sexual intercourse is a ground for a divorce.

ENGLISH LAW -

The Royal Commission on Divorce in United Kingdom in 1912 had recommended that the willful refusal of sexual intercourse is a ground for nullity. Based on this recommendation, section 7(1)(a) of the Matrimonial Cause Act of 1937 of United Kingdom stated that a marriage shall be voidable, if the marriage has not been consummated owing to the willful refusal of the respondent to consummate it.

This act was repealed and introduced the Matrimonial Causes Act of 1973 and section 12 (a) and (b) states grounds on which a marriage is voidable;

A marriage celebrated after 31st July 1971 shall be voidable on the following grounds only, that is to say—

(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;

(b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it.

In the case of **A v J (Nullity)** [1989] 1 FLR 110, H and W were of Indian ancestry and took part in an arranged civil marriage, which was to be followed by a religious ceremony some four months later. Between the two ceremonies they spent only a few days together because of H's work in the USA. Shortly before the religious ceremony (which it was accepted was a prerequisite to consummation), W refused to go ahead with it, giving as her reason H's apparently uncaring and unloving attitude towards her. H apologized and said he had supposed a formal relationship would be appropriate until they were "properly married", but W refused to accept this apology and maintained her refusal to go through with the religious ceremony. H was granted a decree of nullity for W's wilful refusal to consummate the marriage.

APPLICATION OF ENGLISH LAW -

As I have mentioned earlier, it is important to consider how our apex court judges imported the English Law principals to our system for the benefit of the society and gave a viable interpretation to the law.

His Lordship T.B Weerasuriya in the case of **Pattividana v Samaranayake (1998) 1 SLLR 112** held that

> *"It would be necessary before this question is discussed, to clarify the legal position of a divorced wife vis-a-vis the matrimonial home. Apart from the Roman Dutch*

> *Law which is the source and foundation of our law of husband and wife, English law principles have contributed to the growth of principles on the right to use and enjoy the matrimonial home on divorce."*

In this context, another salutary example is the judgment in the case of **C.A. No. 767/2000 (F) D.C. Colombo Case No.19834/D.** where Justice Dissanayake in concurrence with Justice Somawansa accepted that the non-consummation of marriage is a ground for nullity.

In this case, the plaintiff instituted action seeking a divorce from the defendant on the ground of malicious desertion. The defendant whilst denying the averments in the plaint pleaded that the marriage was not consummated and thereby prayed for a decree of nullity.

Thereafter, the plaintiff had amended the plaint seeking a nullity of marriage and the defendant did not seek to amend the answer and also he did not deny the averments in the plaint.

At the trial before the learned District Judge, the plaintiff had stated in her evidence that their marriage was only confined to the marriage certificate and there was no consummation of the marriage and prayed that the nullity of marriage be entered.

However, the learned District Judge had erroneously entered the decree nisi granting a divorce. But in the appeal, both parties had come to a settlement and vacated the judgment and accordingly entered the decree of nullity.

Though it is a settlement between parties, this is a significant example of our court of appeal by recognizing the non-consummation of marriage as a ground for nullity.

CONCLUSION -

In view of the above context, it is not a bar to claim a decree of nullity on the ground of non–consummation of marriage and also the Family Court has no bar to entertain this type of application and adjudicate in favour of them.

Considering the changing situation of the society, it is time for lawmakers to reconsider the traditional family law concepts and introduce new laws based on the wider liberal approach in order to resolve matrimonial disputes.

MEDICO LEGAL
MANAGEMENT OF TORTURE VICTIMS

ROLE OF THE JUDICIAL MEDICAL OFFICER

Dr. Ajith Tennakoon
Chief Consultant Judicial Medical Officer

Torture is defined by the United Nations Convention against Torture in 1984 as;

> *"any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions".*

Similar definition has being given in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994 of Sri Lanka.

Torture is a crime and serious human rights violation. Despite the fact that torture is illegal, it is occurring in many places in the world and always and everywhere tortures are seldom punished and impunity remains an important impediment for the effective prevention of torture.

Torture survivors should get some kind of redress as compensation for their suffering. Effective investigation and documentation of alleged torture is decisive in proving that torture has taken place, bringing perpetrators to court and ensuring reparation and redress for survivors and their families.

Prevention of torture by proper examination, documentation and reporting should be the moto of all medical officers engaged in medico legal duties in Sri Lanka. It is important that the role of the Forensic Doctor (Judicial Medical Officer) is well understood by all the stake holders in the system of delivery of the justice to the society.

According to the legal definition of the torture Police Officers, Members of the armed forces, Prison Officers, Paramilitary officers, any officers associating with law enforcing authorities can be the torturers. Anyone who has committed an offence, who is suspected of having committed an offence, witness to get evidence or a confession or information may be a victim of a torture act.

Methods used to torture can be physical or psychological. Various methods are being described by the torture survivors. A few commonly practiced methods in Sri Lanka are:

- Prolonged beating with common objects (rubber horses, plastic rigid tubes, batons, wooden poles etc) to various body parts,
- Suspension in various positions: Dharmchakraya, Palestinian hanging etc.,
- Beating to soles (Phalanga),
- Covering the victims head with plastic bag filled with petrol, chili powder,
- Putting chili powder in the nostrils, mouth, eyes or genitals,
- Burning with cigarette butts,
- Burning with melting polythene,
- Keeping in difficult positions for a longer period,

Commonly observed physical injuries are lacerations, bruises (contusions), abrasions, ligature marks, fractures, burns, and etc. These injuries may be in an acute stage or healing stages. Sometimes scars of healed injuries may be present.

ISTANBUL PROTOCOL -

It is a manual on the effective investigation and documentation of torture. The Istanbul Protocol contains the first internationally recognized standards and procedures on how to recognize and document symptoms of torture in such a way that the findings can be used as evidence in court proceedings. It provides guidance for doctors and lawyers who want to investigate whether or not a person has been tortured and report the findings to relevant authorities. It also outlines minimum standards for States to ensure the effective documentation of torture. In the August 1999 the protocol was submitted to the UN High Commissioner for Human Rights.

The College of Forensic Pathologists of Sri Lanka has published a "Handbook on Medico Legal Management of Torture Survivors and Detainees based on the Istanbul Protocol, for Sri Lankan Medico Legal Practitioners" in 2015.

EXAMINATION BY JMO -

In Sri Lankan practice detainees are been produced to the Judicial Medical Officer (JMO) by the Police, soon after their arrest or before producing before the Magistrates. Some times by special departments of Police may produce detainees before recording a statement or before handing over to another department/authority. All survivors who seek medical treatment by admitting to State or some private hospitals are also referred to JMO for medico legal examination. In addition some survivors are referred to JMO by the Courts for medico legal examination and other purposes. When a person is referred by judicial authority it is mandatory to inform the purpose of examination clearly in a letter addressed to the JMO by the registrar, according to the instructions given by the JSC in circular No. 270 issued on 19/12/2001.

BASIC STEPS ADOPTED IN THE MEDICO LEGAL EXAMINATION -

1. proper authority : Court order, Medico Legal Examination Form issued by the Police, letter from prison administrator
2. Proper referral from the hospital or other clinicians
3. Written informed consent of the detainee before examination
4. No police or prison officer is present in the room during the examination
5. No hand cuffs or blind folds during the medico legal examination
6. Security of the doctor and the detainee to be maintained
7. Trustful environment to be created
8. Female attendant to be present always when examining a female victim
9. Assistance from an interpreter if required
10. Detailed history
11. Complete examination
    a. General examination
    b. Evaluation of psychological status

c. Detailed documentation of injuries, evidence of complications, scars,

d. Present complaints

e. Further ancillary investigations

f. Referrals to other specialists for treatment and their opinions

g. Reviews if necessary

12. Detailed documentation using diagrams and photos

13. Brief report to the producing police officer in a police copy of MLEF

14. Detailed comprehensive Medico Legal Report to the courts when the summons is served.

MEDICO LEGAL REPORT-

A medico legal report can be prepared using the existing standard Medico Legal Report printed by the Ministry of Health (Health Form 1135). However this format is inadequate to give all details of examination of victims of many crimes including torture. Most of the JMOs are using a modified 1135 format or a free style Medico Legal Report according to the international standards. The College of Forensic Pathologists of Sri Lanka has developed a new format for the Medico Legal Report for reporting of torture survivors in 2015.

MEDICO LEGAL REPORT SHOULD INCLUDE -

1- History:

Detailed history including date and time of arrest, who arrested, manner of arrest, where he was taken, means of transportation, places and condition of detention, names of the officers who tortured if it is known, methods of torture used, weapons used, time and frequency of each torture session, any treatment given in between torture sessions, conditions of the detained places, facilities, food, sleep, personal hygiene etc.

11- General Examination

i- Present complains

ii- Appearance, demeanor, psychological evaluation

iii- Clothing, hygiene

iv- Evidence of natural diseases

v- Injuries / Scars: type, size, site, disposition, complication, evidence of treatment, evidence of healing, aging, explanation of the victim on how it was caused, associated injuries

111- **Special Examinations:**

Genital examination, Anal examination and Breast examination.

1V- **Investigations:**

X-rays, CT, USS, Nerve Conduction Studies etc.

V- **Referrals:**

General Surgeon, Psychiatrist, Orthopedic Surgeon, Eye Surgeon, ENT Surgeon etc.

VI- **Diagrams and photo attachments.**

VII- **Conclusion and Opinion.**

- Summary of findings
- Interpretation of injuries- type of injury, aging, possible weapon.
- Category of Hurt.
- Important negative findings.
- Psychological status evaluation.
- Other specialist's opinion.
- Judicial Medical Officer's opinion.
- Whether the findings are consistent with the given history on manner of causation, causative weapon and time of infliction.

VIII- **Recommendations if relevant.**

VIX- **Signature and the official stamp of the JMO.**

It is very important to mention that negative medical evidence does not always exclude alleged torture. A Medico Legal Report will be sent directly to courts when summons are served.

A Medico Legal Report can be obtained from the JMO at the written request by the patient himself or a lawyer representing the patient to be used for a civil case or a Fundamental Rights application before Supreme Court. A Medico Legal Report also will be sent to Human Rights Commission on a request.

A Medico Legal Report or a copy will not be given to third party including the Police or Prison by JMO as a copy can be obtained from the relevant courts.

RIGHTS OF THE TRANSGENDERS:

PROTECTION UNDER THE EXISTING LAW

Buddika C. Ragala*
Magistrate, Kandy

INTRODUCTION -

Although the word "transgender"[1] is new to the vocabulary, transgenders are not aliens to the society ever since this social grope is hailing from the beginning of the human society. However, the attention to this 'gender identity'[2] issue came to public debate with the Bidhan Baruah case in India.[3] Due to non–recognition of these people as separate gender category they have to face many hardships in their day to day life, extending to the legal issues[4] to the sexual violence and discrimination. Hence, there is an outcry to recognize them as separate gender category and enact laws to protect their rights and privileges. In the above context, the writer is intend to inquire in to the existence transgenders and the issues faced by them and the related institutions, and the remedial measures in legal aspects as well as practical aspects.

GENDER, SEX, TRANSGENDER -

From the outset it is more important to recognize what is the meaning of the word "gender" and what is meant by the word 'sex' and 'transgender'.

---

* LLB, LLM, Diploma in Forensic Medicine. (Colombo) D.T(CPA).
1 In 1965, Psychiatrist John F. Oliven (Columbia University) coined the term transgender in his reference work Sexual Hygiene and Pathology cited in John F. Oliven, Book Reviews and Notices: Sexual Hygiene and Pathology (August 1965) American Journal of the Medical Sciences 250.
2 Steven Epstein, 'Sexuality and identity: The contribution of object relations theory to a constructionist sociology' (1991) 20/6 Theory and Society 825 at pp825-826.
3 Pullet, Urmila, Transgendered in Sri Lanka: Gender identity and the Law in Sri Lanka India (2012) December SSRN (Internet) at p22 available at <SSRN: http://ssrn.com/abstract=2425503> visited on 3rd November 2016.
4 Kush Kalra, Priyanka Barupal, Law Sex and Crime (Vij Books India Pvt Ltd 2013) at p76

"Gender" refers to "social constructed roles, behaviors, activities that are given society considers appropriate for men and women"[5] For instance boys wear trousers and girls wear frocks. "Sex" refers to the biological and physiological characteristic[6] that defines men and women. Sometimes differentiating sex and gender by physically bit difficult since the gender is to be decided according to their behavior, clothing etc. "Transgender" refers to people whose gender identity, expression or behavior is deferent from those of typically associated with assigned sex at birth.

Although it is more important to identify this social group as third gender, many countries do not willing to identify them as deferent gender from the existing gender category. Yet in real life, there are considerable numbers of transgenders worldwide including in Sri Lanka. Therefore it is necessary to draw our attention to these people and recognize issues faced by them and their rights and privileges.

In this discussion it is more important to identify the extension of this transgender people who have completely changed their sex. Even though they commonly identify as transgender, the individual who has completely change their sex to deferent sex, they should be called as transgendered. Transgendered means, "[t]he People who have completely changed to one gender to another which is deferent from they were originally belong by their birth". (Emphasis is mine). If one who has completely changed their sex at birth to another, do not have fewer problems after completing legal formalities, but the people who do not change their sex and live as it is, has to face various issues.

Transgender people can be heterosexual, bisexual or gay depending on their sexual sensation.[7] People of this gender group is facing many problems including discrimination, denial of rights,psychological pressure social phobia sexual violence etc. Anyway there is no statistics to say how many number of transgenders are living in Sri Lanka since no official survey has been done.

Transgenders are confronted with direct or indirect experiences with discrimination, or sexual assault despite provisions in the Constitution to safeguard citizens 'constitutional rights'[8] against discrimination.[9] Therefore, they suffer due official non recognition of the third gender category. The writer thinks the reason for such non recognition as the long accepted socio-cultural norms in the society. As a result, many transgenders suffer with anxiety, depression or related disorder at higher rates than others.

5 Oxford Dictionary Thesaurus & word power Guide – Sri Lankan Edition at p532.
6 Ibid
7 Louis Crompton, Homosexuality and Civilization (Belknap Press 2003) at p5.
8 Generally read, Thusitha B. Abeysekara, The Need to Expand Sri Lanka's Fundamental Rights Jurisdiction: A Comparative Analysis of The USA, India and Trinidad and Tobago (2010) 22/1 Sri Lanka Journal of International Law 59.
9 Article 12(1) of the Constitution of 1978

In many cases these individuals can be treated to cope the issue but the significant problem is finding affordable resources, such as counseling, hormone therapy, medical procedures and social support necessary to freely express their gender identity and minimize discrimination. These obstacles may lead to distress, including a lack of acceptance from the society.

Due to social stigma and stress, many individual tend to complete their biological transformations through clinical process. There are few who have undergone SSR in the overseas hospitals and completed their transformation. One such example in Sri Lanka who has undergone SRS in overseas and become MFM, who's now living as a female and a professional model.[10]

There are international organizations[11] which are keen on the rights of the transgender people. In Sri Lanka the branch of the Heart to Heart International is functioning to assist transgender. Transgender who wants to undergo complete transformation needs specialized medical practitioners professionally named as Transgender Obstetrician and Gynecologist to perform these SRS. In the United State there are 100 to 500 surgeries where it is two to five times all over the world.[12]

The William Institute, a think tank of the UCLA School of Law dedicated to research on sexual orientation law and public policy estimate that 700,000 Americans are transgendered but last year Fivethirtgeight.com said that there is no national survey and if there were there is no agreement on what transgender mean.[13] Although there are repercussions going on all over the world people who have completed biological transformation male to female or female to male identified as transformed transgender. But due to lack of recognition even still there are so many countries all the world to which are reluctant to identifying these people as third gender since traditionally accepted norms of Male and Female.

Urmila[14] an Indian researcher who has carried out research on the transgender community in India and Sri Lanka has identified this type of person as "Hir". It is acceptable in respect of male or female. According to Urmila there should be an identity

10 You can witness this on you tube video under transgender in Sri Lanka, available at https://www.youtube.com/watch?v=4-sncdH9cgA > visited on 4th November 2016.

11 World Professional Association for Transgender Health(WPATH) , Heart to Heart International available at <http://www.lt.lk/2015/07/heart-/-heart-lanka/> visited on 4th November 2016.

12 Ashifa Kassam, Canada to introduce new laws against transgender discrimination – The Guardian on 17 may 2016 available at <https//www.theguardian.com/world/2016/may/17/canadanew-laws-transgender-discrimination> visited on 17th May 2016.

13 Lenny Bern Stein - Here's how sex reassignment surgery works - Washington Post on 09 Feb 2015. available at <https://www.washingtonpost.com/news/to-your-helth/wp/2015/02/09/heres-how-sexreassignment-surgery-works/> visited on 1st November 2016.

14 Pullet, Urmila, Transgendered in Sri Lanka: Gender identity and the Law in Sri Lanka India (2012) December SSRN (Internet) at p22 available at <SSRN: http://ssrn.com/abstract=2425503> visited on 3rd November 2016.

to these categories as "Sher"[15] anyway; this is a complex situation to transgenders as well as others. There are transgender people who transformed in to both genders. The dealing with these people is somewhat complex rather than difficult in the intermediate stage which is the transsexual period since the specific gender categorization is difficult. Therefore the authorities encounter with them in this stage. Not only that there are some instances where the people in this category who wants to be in the both world and they do not want to be in one category as a male or female.[16]

There are men by sex and feel like women where he does not want to vagina but penis. He want breast to satisfy his boy friend as well as penis to satisfy wife.[17] Upper part for the boy friend and lower part for the wife. Therefore in such cases, identifying third gender is more important to avoid their vulnerability in social life. In many countries, these people are identified as separate category of people who need to be treated as separate entity. In India they are called Hijra and Sri Lankan people used to identify them by slang called "Nochchis" or "Pons".

RELEVANCY TO JUDICIAL OFFICERS -

Judicial officers have to deal with problems of the individuals who brought before them.[18] Most of the time, Magistrates, are dealing with people who brought before them as suspects or accused in connection with offences. Sometimes, District Judges have to deal with mentally ill people under Mental Diseases Ordinance. In the event of a transgender is brought before Court, and circumstances do not allow him being released on a bond or otherwise that person has to be kept in safe custody until the appropriate order is made.

Some occasions, transgenders are brought to Court as mentally ill people. Sometimes relatives of these people assume they are mentally ill. Hence, it is important for the judicial officers to have a knowledge about transgenders and understand whether their state of behavior is a mental illness or not? According to the American Psychological Journal [19] still this state of behavior has not been diagnosed as a mental disorder or mental illness. But there are debates whether this can be diagnose as a mental illness. Some fraction argue that despite the absence of symptoms of mental illness, such behavior need to be diagnose as a mental disorder in order to treat them to face issues relevant to them. Even

15 Emphasis is mine.

16 Pullet Pullet, Urmila, Transgendered in Sri Lanka: Gender identity and the Law in Sri Lanka India (2012) December SSRN (Internet) at p22 available at <SSRN: http://ssrn.com/abstract=2425503> visited on 3rd November 2016.

17 Ibid.

18 Thusitha B. Abeysekara, The Role of a Judge - What it is and What it ought to be: The Independence of Judiciary and Judicial Activism clothed in Judicial Review in Sri Lanka (2015) KDU International Research Conference-2015 162 at pp162,163.

19 American psyological Association. About Transgender People, Gender Identity and Gender Expression, American Psyological Journal (Internet) at p3, available-at <http://www.apa.org/topics/lgbt/transgender.aspx> visited on 30th October 2016.

though the behavior of these people diagnose as mental disorder can we make an order to keep him in separate chamber? No, the reason is mental illness is different from the symptoms of this type of behavior. Then what it is meant by the mental illness?

"Mental illness" is *"A condition where the psychological state is considered as a mental disorder only if it causes significant distress or disability".*[20] "[A]ny of broad range of medical conditions that are marked primarily by sufficient disorganization of personality, mind, or emotions to impair normal psychological functioning and cause marked distress or disability and that are typically associated with a disruption in normal thinking, feeling, mood, behavior, interpersonal interactions, daily functioning."[21] However, many transgender people do not experience their gender as distressing or disabling which implies identifying as transgender does not constitute a mental disorder. Therefore they cannot be considered as mentally ill people and they need to be handled with special care.

In the above scenario it is difficult to make an order to keep them in a separate place which is not for men or women. Prison is governed by the Prison Ordinance and making decisions on the prisoners is under the purview of the prison authority. The lack of legal framework to cater such a situation would hamper the judicial authority in making proper orders, except to drawing the attention of the superintendent of the prison to follow 'necessary action'. It is his discretion of keeping such a person in separate place if the facts warranted. Therefore, in the event of transgender is ordered to be kept in remand custody he has no right to be kept in a separate place.

In the event of a commotion or an unruly behavior inside the prison, authority may keep any person who is likely to be subjected to harassment in separate chamber to control the situation, or else any one has to bear the suffering in silence. Under such circumstances, it is important to understand the issues of transgenders and to have practical approach to such issue and convince the authorities to take necessary actions to avoid the discrimination and harassments faced by these people.

ISSUES WITH PUBLIC INSTITUTIONS -

1- COURTS ;

Until Sri Lanka either legally or socially recognized transgender as a separate gender, Courts cannot make a positive order or make facilities available to these types of people. There are instances where the transgenders come in to conflict with law, has faced sexual harassments in the remand cell while they are in the Court custody. Therefore, Court has to adopt practical measures to minimize the discrimination and the harassment faced by this special group of people.

20 Ibid.

21 Merriam-Webster Medical Dictionary- available at <www.merrim-webster.com>medical> visited on 30th October 2016.

2- POLICE ;

When a person is taken into police custody for committing or on suspicion of having committed an offence, or in any other circumstances, such person should be kept in safe custody until such person brought before a court of law. In such occasions if such person belongs to third gender or a in the intermediate stage of the transformation; transsexual period,[22] the police is also in a dilemma as to where to keep such person until he or she is brought before the court. Sakuni Mayadunne, a transgender who has surgically completed the SRS and transformed to a women, has stated in an interview with a national news paper[23] of her plight in the police station and court of law. She allged that upon her arrest she was kept inside the cell in the Police station allocated for men. Even after she was produced before the court, again she had been kept in a cell where it was for men. According to her, in both instances she had being subjected to sexual harassments of the male prisoners/detainees.[24]

3- PRISON ;

The second stage of the dilemma is coming in to play, when such person is committed to fiscal custody.[25] In the prison, male and female are kept separately. In the event, either a transgender, an intermediate or person who possesses characteristics of opposite gender is handed over to their custody, they do not have facilities keep them in separate place since such a situation is not officially recognized by law.

In a discussion, writer had with one of Superintendent of the Prison, it was revealed that as a practical measure, such different people are kept in isolation to avoid commotion or other issues that may arise among the prison population. The most common and difficult problem that may come up is the struggles/competition among the prisoners to get such different person as a sexual partner. Further, it was transpired, that these incidents ultimately end with heavy fighting and even threat to commit suicide. Beside the above, there are no separate rest rooms, toilets and bathing places for such people inside prisons as well as other public or private institution. They have to use available toilets, bathing places and rest rooms allocated for either males or females. In such instances they are subjected to various harassments including sexual harassments.

22 Natalie Evans-How does a sex change work? The fascinating and eye watering details about Kellie Maloney's by Natalie Evens on mirror on 17 Oct 2014,available at www.mirror.co.uk/news/uk-news/how-sex-change-work-facinating -4455484 visited on 2nd November 2016.

23 I have deliberately used word "her" and "she" for this transgender person since that person has undergone SRS and legal formalities to get changed the original sex at birth.

24 Herath. Kumari- Transgender who demand respect from the society (direct translation of Sinhala news paper) Sunday Lankadeepa on 23.10.2016 at p14

25 Thusitha B. Abeysekara, The Need to Expand Sri Lanka's Fundamental Rights Jurisdiction: A Comparative Analysis of The USA, India and Trinidad and Tobago (2010) 22/1 Sri Lanka Journal of International Law 59 at pp64,65.

In addition such harassments, risk of spreading sexual transmitted deceases among the prisoners is very high, due to them being subjected to sexual harassments or sexual activities by other prisoners.

Therefore, under such circumstances it is necessary to provided them with separate places in the public institutions for their protection, and protect their privacy.

SHOULD THEY HAVE A NEW IDENTITY?

There are transgenders as seen above LGBTs.[26] Some are willing to live as it is but some want to get their sexual organs changed in conformity with their feelings. These people undergo SRS and change their sexual organs and letter on become acquire a different gender. People who totally subjected to complete transformation need to have legal validity to such change. This has to be done making necessary alteration in their birth certificates. To alter the information in the birth certificate, one needs to make a request to registrar of births and deaths. But an alteration of the gender which has got from the birth to another is rather complicated process since the existing information is not belongs to mistaken inclusion. Therefore under such circumstances he or she has to submit all the necessary evidence to prove such gender transformation.[27]

If any event registrar refused to make such alteration such person has to go before the District Court prove such gender change by adducing evidence and obtain an order from court directing the registrar to effect such alteration in the birth certificate.[28] Having completed the above procedure one may have to obtain new identity card according to his/her new gender.

According to the Department of Registration of Persons, it is ready to provide new identity card when an application is submitted by the applicant with the letter regarding the surgery and the amended birth certificate.[29] However, people who remain without changing their sexual organs are unable to obtain new identity card. In addition to that it is necessary to amend and inclusion the provisions to the code of criminal procedure code as well as the penal law to the country to facilitate the criminal justice system go with the new recognition.

26 Brent L. Bilodeau, and Kristen A. Renn. 'Analysis of LGBT identity development models and implications for practice'(2005)111 New Directions for Student Services 25 at p27.

27 Birth and Death Registration Act no 40 of 1975

28 Ibid Section 27

29 Mr. R.M.S.Sarath Kumara, Commisioner of the Department of Registration of Persons- Dailymirror on 15 Feb 2016 available at <www.dailymirror.lk/105419/who> by Hasini Rupasinghe and Yoshitha Perera

SITUATION IN OTHER COUNTRIES -

In the recent past, there is evidence in the various countries where they have shown interest to protect the rights of the transgender.[30] India and Nepal community are in long struggle for recognition of third gender. In Pune, India at Budhar Pet this group is define as Hijra community. Within this community, there various types of Third Genders but they want to identify them according to the position or their sexual act.

Although the India's state policy limited to mainly to two genders; man and women and refused to accept their right to vote, right to own property, right to marry,[31] right to claim identity through passport and a ration card, driver's license, right to education and right to health.[32] However, Indian Supreme Court in a land mark judgment[33] recognizing transgender as third gender.[34] In this ruling, it has further elaborated that center should provide opportunities in all sectors and should make provisions to negate all kind of discriminations and harassments. According to the judgment, a transgender can be a 'gay', 'lesbian' and 'bisexual'.[35]

Argentina has enacted laws relating to gender identity enabling this group of people to choose their identity as their wish.

The North Carolina is the first to enact law known as "Bathroom Bill" by enabling transgender people to use the rest rooms that correspond to the sex stated in their birth certificate.[36] But to response to this law was so bad and protest over there against this piece of legislation and investors threaten the government to withdraw their investment demanding the employees who wants to be in the third gender category should be given their privacy requirement unless they would lose their employees.

Among those countries, Canadian government is ready to introduce legislation to protect Canadian transgenders from discrimination and violence. In 2014, Indian commission has given the right to vote to transgender people as separate sex category of option for other gender.[37] Supreme Court of Nepal mandates that the government establish a third-gender category on citizenship documents. This was held in anti-discrimination case filed

30 Ashifa Kassam, Canada to introduce new laws against transgender discrimination – The Guardian on 17 May 2016 available at <https//www.theguardian.com/world/2016/may/17/canadanew-laws-transgender-discrimination> visited on 24 May 2016.

31 Otis R. Damslet, 'Same-Sex Marriage' (1992) 10 NYL Sch. J. Hum. Rts. 555 at p555.

32 Manoj K. Jha. Transgender right in India. IAS Score.. available at <www.iasscore.in>national-detaials-74> visited on 2nd November 2016.

33 National Legal services Authority vs. Union of India &Ors. writ petition(civil)400 of 2012,Lawyers Collective-supreme court recognizes the right to determine and express one' gender: grants Legal status to 'third gender'.

34 Dhananjay Mahapatral-Supreme Court recognizes transgenders as 'third gender'- The Times India 15 April 2014. Available at <www.indiatimes.com> visited on 2nd November 2016.

35 Litigation is initiated by National Legal Services Authorities- India (NLSA).

36 Ibid

37 Murali Krisnan - India's transgender community gets official recognition in country' electoral roll.27 March 2014 online available:http:www.abc.net.au/news/20142014-03-25/an-india27s-transgender-win-voting-rights/5344998

by Sunil Pant. To defend this group's right they have the NGO called as Blue Diamond Society.

Pakistani Supreme Court has ordered the creation of national identity card on which hijras can identify as distinct gender. The Australian Government has given option to include third gender in their passport subject to several conditions.[38] Germany announces that it will allow partners to register new born as intermediate on birth certificate. The legislation has adopted to mitigate pressures to pursue immediate surgery for babies born with ambiguous physical features.

RIGHT TO RECOGNITION -

On the basis of the gender identity it is necessary eliminate gender based discrimination and it has to be extended to the penal laws as well as to the constitutional provisions. Even in the world famous social media network, Facebook has expanded its gender setting option on user profile. According to this new gender setting, users may select either "neutrals" or "other" as their gender preference. However, some may not want to identify them as different in gender with the fear of further discrimination. This issue is one of the main debates over the world, and most would argue in favour of the recognition of this social group as third gender or separate gender category.

EXISTING LAWS OR ENACTING NEW LAWS; THE NEED -

The clear cut answer to whether there exists adequate legal provisions to cater the needs of transgenders is in the negative But need of such laws is a universally accepted truth. The existing legal frame work identifies only two genders.[39] That is male and female. This is common to the penal law as well as the supreme law of the country; the Constitution. Interpretation clause of the penal code stipulates that the pronoun "He" and derivatives are used of any person, whether male or female.[40] In terms of the section 9 of the Penal Code the word "Man" denotes a male human being of any age and the word "Women" denotes a female human being of any age.[41]

Although our Constitution includes provisions to eliminate all kind of discriminations it identifies only two categories of persons. Further, the article 12(2) of the Constitution contains word "sex" as oppose to the word "gender" as a ground for non discrimination.[42]

38 Applicant who wish to select as X as third gender must supply confirmation letter from the medical professional.
39 LeVay, Queer Science: The Use and Abuse of Research Into Homosexuality (Cambridge, MIT Press 1996) at p88.
40 Section -7 of the Penal Code No 2 of 1883.
41 Ibid section -9.
42 Article 12(2) of The Constitution of The Socialist Democratic Sri Lanka of 1978.

However, as we see above word "sex" is not a synonym for the word "gender". The word "gender" has a broader meaning than "sex". On the above circumstances, what would be the answer to the issue? Is it a new identity after going through the Sex Reassignment Surgery? (SRS) Then what would happen to the partially transformed persons? (trans-sexuals) The answer is to all these problems is to identify them as different gender group, namely Third Gender or Transgender. And in the same time it is necessary bring necessary changes to the existing laws. Thereafter they can be given the opportunity to decide what the gender category they prefer. At the same time it is necessary to bring about changes to the existing laws, furtherance to due recognition of their identity. In order to eliminate the discrimination based on the behavior patterns, it is necessary to add the word "Third Gender" or "Transgender" to the constitutional provisions of the country. [43]

When enacting new laws we can follow the example set out by Argentina. Article 2 of Argentinean Gender Identity Law defines gender identity with a broader definition and given the opportunity to them to choose their identity as they wish.

> *"Gender identity is understood as the internal and individual way in which gender is perceived by persons, that can correspond or not to gender assigned at birth, including the personal experience of the body. This can involve modifying bodily appearance or functions through pharmacological surgical or other means, provided are freely chosen. It is also include other expressions of gender such as dress, way of speaking and gesture"* [44]

The writer believes that the Argentinean approach is more appropriate to resolve this issue in a democratic way.

When the identity of the transgender is accepted, many issues may arise including their legal status, entitlement and privileges. Not only that but also there may be issues such as property rights as well as inheritance. For an example, the inheritance under the Kandyan Law has many differences according to the sex of the heirs. Under the Sri Lankan Penal law the sexual act between same sexes is a crime[45]. Therefore, likewise in India[46] decriminalization of such sexual acts need to be considered.

Therefore, considering this types of issues, existing provisions in these laws should be changed to safeguard their property rights whatever the sex they have taken subsequently.

43 Anne L. Boedecker,The Transgender Guidebook: Keys to a Successful Transition (Anne L Boedecker 2011) at p44.
44 Article 2 of Gender Identity law of Argentina transaction file.worldpress.com/2012/05/Argentina gender-identity-law pdf available at <http://global> visited on 1st November 2016.
45 Section 365.
46 UNAIDS-India Supreme Court Ruling Expands Possibilities For Realization of transgender rights – 16 may 2014- availabal at <www.unaids .org/en/resources/pressecentre/featurestories/2014/may/2014/20140516india> visited on 1st November 2016.

Not only with in the country but in international level too. Thus it is the duty of the Sri Lankan government to eliminate all kind of discrimination based on sexual orientation.[47]

CONCLUSION -

Transgender issue is not a new phenomenon but with the growth of the population the number of people who belongs to this category has gone up. The development all over the world should be considered and should be absorbed to our legal system to development of Human Rights of the all without discrimination. As our courts seek legal development of India, we can follow the path taken by the Indian Supreme Court. [48]

These people face so many issues in their day to day life and those issues should be address by the legal point of view as well as socio-cultural angle and they may be identified as a separate gender category. If this issue is not properly addressed, people who belong to this gender category may end up their life in mental hospitals. Anyway it is a question what would be the response of the Sri Lankans according to their long rooted socio cultural norms and statutory provisions.

47 M.A. Nihal Chandratilaka,, Sexual Orientation and Human Rights: A Comparative Study of Applicable Laws in Sri Lanka and India (MPhil Thesis, University of Colombo) at p55.

48 S. Narrain, "Crystallizing Queer Politics – The Naz Foundation Case and its Implications for India's Transgender Communities (2009) 2 NUJS Law Review 455 at p456.

Justice Nimal Gamini Amaratunga Memorial Award Winning Article

THE DOCK – TO HAVE OR NOT TO HAVE?

Chanima Wijebandara
Additional Magistrate- Colombo.

The dock has been an iconic structure of the criminal justice system of Sri Lanka since its reception to the criminal courtroom during the British Colonial era. Making all suspects and accused of criminal cases stand in the dock during trial continues to be an unchallenged practice. This article evaluates the significance of the dock in trial courts from the perspective of a multi-disciplinary approach concerning law, criminology, psychology and architecture. It presents the arguments that the dock is not a legal requirement of a criminal trial, it violates the Constitution in terms of the rights conferred upon an accused, it cannot be supported by the criminological theory of deterrence and may instead contribute to an increase of criminality by the applicability of labeling theory, it does not consort to modern architectural concept of spatial justice and it may be detrimental to the mental wellbeing of an accused from a psychological viewpoint. Having identified the controversies inherent in the traditional construction of the dock, recommendations are made to bring in reforms to the physical structure of the dock as well as to the manner and criteria it is to be utilized in a trial to achieve a balance between interest of justice and interest of the accused.

BACKGROUND -

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."

Oliver Twist

Charles Dickens, 19th Century England.

The bleak visual imagery of the court room portrayed in this quote[1] from Charles Dickens' novel Oliver Twist, demonstrates that it has not been a pleasant place for an accused or for any other person exposed to the legal process from the early times of its existence. This is the grim reality of the criminal court often depicted in creative literature which reflects the perception of the common man. However, those who have been engaged in dispersing criminal justice for long enough may become desensitized to this reality. Thus, they may fail to comprehend that exposure to the criminal justice process, which is in addition to being inherently intimidating is also bleak and dismal in its physical outlook, may be harmful and even detrimental to the delicate psyche of the human being. The hard core criminal, the white collar criminal, the first time offender, the falsely implicated innocent accused, the layman guilty of statutory offences calling upon strict liability, the juvenile delinquent and the mentally ill brought in for care and protection orders who are invariably made to stand in the symbolic structure of criminality of the court - the "dock" - would all experience these adverse impacts alike though perhaps in varied levels.

In Sri Lankan criminal Courts almost all suspects and accused of criminal cases and the respondents of quasi-criminal cases are made to stand in the dock as a rule at all stages of the case. However, it can be observed that there are no specific legal provisions or judicial authority that mandate or regulate this practice. This has led to a lack of uniformity and consensus among the judges in relation to its usage. For example, some judges on their own volition would allow certain categories of persons such as clergy, women carrying infants, politicians, members of the bar, and other professionals to stand out of the dock while some would allow only upon applications made on behalf of them. Other judges would not allow any category of persons to stand out of the dock under any circumstance. In all these instances, in the absence of specific legal provisions or authorities, the decision is made on the discretion of the judge based on their individual experience, attitudes and perceptions. Hence, often, tension and controversy results inevitably with regard to this issue at the grass root level of the criminal justice administration process - the trial court.

The practice of using a dock in criminal trials has long been abolished in a few countries such as Norway, Ireland and mainly the United States of America. In the USA the accused is generally seated alongside his counsel. The abolition of the dock in the US can be traced back to a series of Judgments. ***Commonwealth v Boyd***[2] being the first of which heralded the development of jurisprudential arguments against the dock in 1914. This case held

1 Cited by Kearney J. in the case of the State v. Allan Woila, [1978] PGNC available at http://www.paclii.org/pg/cases/PGNC/1978/55.html last accessed on 11.04.2016

2 Commonwealth v. Boyd, 246 Pa. 529, 92 A. 705 (1914).

that the dock per se violated a defendant's common law right to consult his lawyer.[3] In the recent times much debate has arisen in other countries as well such as England and Australia on the requirement and suitability of continuing this practice of confining the accused in this colonial structure. There are many arguments brought for and against the issue. Although this discourse has received a high level of concern from the academics and the general public by now in other jurisdictions, it has not yet attracted attention of the legal academia of Sri Lanka. It has not gone beyond discussion at trial court level and only on one occasion it has been the subject of a Supreme Court decision. There are also no reported academic studies conducted in our country on this issue so far. It could be argued that in comparison to other burning issues of the criminal justice system such as court delays, backlog of criminal cases and independence of the judiciary the issue of the Dock is of lesser significance. However, the above mentioned more demanding areas have been widely researched on and are currently being addressed by the authorities while there is little or no discussion on the current topic. Therefore, it would be timely to investigate the legality and necessity of this rarely challenged ancient practice of placing the accused in a separate enclosure in a public forum.

HISTORY OF THE DOCK

Although it is difficult to pin down the precise time period when the practice of the dock began, it is believed to have originated in ancient Rome and Mesopotamia from a time when captives were put in cages.[4] By the eighteenth century, the enclosures for the accused persons have evolved from simple railed enclosures to waist-height constructions with one open side and glass rooms within the court.[5] In the present day, the Dock in its various models of architectural design is an iconic structure often unchallenged and unwittingly accepted as part and parcel of the criminal court house in many jurisdictions of the world including Sri Lanka. Having been a colony of the British from 1796 to 1948 Sri Lanka has inherited alongside its legal system, its court house architecture as well. The dock is one such architectural feature introduced and embedded in our criminal justice system by the British. Therefore, it is pertinent to explore the historical development of the dock in England.

3 Stone J. "Demonising Dangerous Defendants - the use of the dock in crown court trials," presentation available at http://www.doughtystreet.co.uk/documents/uploaded-documents/StonePresentation.pdf_final.pdf last accessed on 07.09.2016

4 Neuman S. "Behind Bars: A Brief History of the defendant's Cage", http://www.npr.org/2011/08/05/138993974/behind-bars-a-brief-history-of-the-defendant-s-cage last accessed on 11.05.2016

5 De Porti S., Chebrout M., Fay L., "The Dock and Physical Restraints: the presumption of innocence put to the test by appearances at trial, Themis Competition" (2012) Available at http://www.ejtn.eu/Documents/Themis%202012/THEMIS%202012%20BUCHAREST%20DOCUMENT/ Written_paper_France%206.pdf last accessed on 27.07.2015

The 17th century marks the beginning of using a separate enclosure for the criminal defendant in England as a likely result of a need to distinguish the defendant form the public.[6] It had become a common feature of the British courthouse design in the Victorian era. During the 19th century, docks have become more elaborate and fortified, the structure of some dominating the courtroom.[7] Its uniform position at the rear of the court, enclosed on three sides and recessed in to the wall has only been introduced in 1970s with formulation of national guidelines while in 1985 they have been made more secure by introducing a rolling bar top.[8] The current version of the secure dock has been introduced only in year 2000 and has continued since then as required by the *Court Standards and Design Guide.*[9] There is also a wide difference in the placement of the accused in court in different jurisdictions. For example, European countries such as Spain, Italy, France and Germany places the criminal accused in a fully enclosed glass cage.[10] Countries in the Middle East, Latin America and Eastern Europe are also known to use cages for the defendant at trial.[11] However, Countries such as USA and Norway are on the other extreme of having no dock at all in their court rooms.

THE DEFINITION OF THE DOCK AND ITS SOCIO-LINGUISTIC IMPLICATION -

As a legal definition of the word was not to be found in any of Sri Lankan legal instruments, the dictionary meaning was resorted to. The word 'dock' in both its noun and verb forms holds various different meanings. The meaning given to the word in the legal context is as follows:

Cambridge English Dictionary[12]: -

> *"The place in a criminal law court where the accused person sits or stands during the trial"*

Chambers 21st century Dictionary[13]:-

> *"The enclosure in a court of law where the accused sits or stands."*

Although this is the literal meaning, it also has other connotations attached to it in usage. Understanding these connotations and the socio-linguistic significance it holds

6 " In the Dock, Reassessing the use of the dock in criminal trials – A report by JUSTICE (2015) available at www.jusitice.org.uk page 04
7 ibid
8 Ibid page 06
9 Ibid page 04
10 Supra note 6, page 02
11 ibid
12 Cambridge Dictionaries online – Cambridge University Press. http://www.dictionary.cambridge.org/dictionary/English/dock last accessed on 17.04.2016
13 2001, Allied Publisher's Pvt. Ltd., India

in different cultural settings is important as it will lay a foundation to understanding the arguments presented in this article in relation to criminological and psychological significance of the dock based on social stigma.

The phrase "in the dock" is an idiomatic expression that means someone or something is being subjected to examination or trial.[14] The American Psychological Association (APA)[15] describes the phrase "in the dock" as meaning:

> *"– on trial in court, especially in a criminal case. – under intense scrutiny, – being tried in a court, especially a criminal court; on trial."*

It employs dock in the sense of "an enclosed place for the defendant in a court of law," a usage dating from the late 1500s, and is used even in American courts where no such enclosure exists.[16] It is however, a British expression, more commonly used in the United Kingdom than in the United States as the origin of the phrase is rooted in the traditional layout of the English courtroom."[17] The enclosed area, symbolically keeping the defendant in custody during the trial is known as the dock possibly stemming from the obsolete Flemish word 'docke' meaning "cage." It is also believed that the word comes from rogue's slang and means an animal pen.[18]

Similarly, it can be seen that the Sinhala translation of the word dock, 'viththi kuduwa' is not a neutral legal term. A direct translation of the word 'viththi' is "defence" and the word 'kuduwa' is "cage". Putting a person in the 'cage' in a court house is a degrading punishment in the eyes of a layman whether convicted or not for the alleged offence. It is inevitably associated with shame. Thus, both the words "dock" in English and "viththi Kuduwa" in Sinhala have negative implications. Therefore, it can be seen that a high level of irony and social stigma is associated with these words though literally they may only mean the specified place for an accused in court.

LEGAL SIGNIFICANCE OF THE DOCK

A close reading of the Code of Criminal Procedure, Penal Code, the Judicature Act and the Evidence Ordinance of Sri Lanka which are the main legislations of criminal law of the country reveal that they do not contain any direct provisions relating to the dock. Even the word "Dock" itself could not be found in any of these legislations. Further, there could not be found any reported Sri Lankan judgments which pronounce the necessity

14 Hubbard M , http://www.wisegeek.com/what-does-it-mean-to-be-in-the-dock.htm accessed 17.05.2016
15 Dictionary.com Unabridged, available at http://www.dictionary.com/browse/in--the--dock last accessed on 16.05 2016
16 Idioms http://www.idioms.in/in-the-dock/ accessed 17.05.2016
17 Hubbard M , http://www.wisegeek.com/what-does-it-mean-to-be-in-the-dock.htm accessed 17.05.2016
18 Rosen L., (1966) "The Dock – should it be abolished?" http://www.rosen-1966-the_modern_law_review last accessed on 05.09.2016

of utilizing a dock for the validation of a criminal trial. Thus, it is apparent that there is no legal basis for making an accused stand in the dock although the practice has been followed in all criminal trial courts of the country. Two main legal concepts of criminal law intrinsically connected and dependent on the existence of the dock are the "Dock Statement" and the "Dock identification". Therefore, it is pertinent to discuss the legal basis of these principles and the effect any abolition or modification of the Dock would have on them.

Dock Statement:

The "dock statement" has been part and parcel of our criminal justice system and our courts have long accepted as evidence the unsworn statement made by an accused from the Dock. However, there is no written legal provision to be found in our legal system that permits an accused to make a statement from the dock in a summary trial in Magistrate Courts or in a trial before High Court.[19] The provisions that facilitate the making of a dock statement are Section 151, Section 184 and Section 201(1) though they do not contain the word dock. The reception of the "dock statement" is a direct result of judicial decisions which have permitted the practice following the English law principle found in the Criminal Evidence Act of 1898. In the absence of any provision requiring the accused to be in the dock or any specific place when making the statement, it can be argued that the validity of the dock statement does not depend on the physical existence of the dock per se. The accused can make a valid unsworn statement irrespective of the place where he is kept in the court room.

Dock Identification:

Similarly, there is no specific statutory provision for the principle of dock-identification in our country. It is a principle developed in common law adopted by our courts through case law. It can be argued that as the word "dock" does not appear in any of our statutes, identification of the accused can be made by the witness irrespective of the place where the accused is seated in court. As long as the accused is in a place clearly visible to the witness, the concept of dock-identification would not be affected in any manner even if a cage by the name of "dock" does not exist. It will only necessitate a change of the name of the principle replacing the word dock by some other suitable word. For example, the phrase "In-court identification" as used the in Australian system can be suggested as a more appropriate phrase. This change will not require any reforms in the form of amendments to legislations but it would call upon some form of judicial activism and creativity.

19 Jayamanne S. "Chasing the Myth and the illusion of the Dock Statement in Sri Lanka", Neethiya, No 21, page 32, the English version: Jayamanne S. "Should the dock statement be continued? Current trends in Sri Lanka and Commonwealth jurisdictions" The Bar Association Law Journal 2016 Vol.XXII pge 147.

Impact on the Right to a Fair Trial:

A "fair" trial is typically understood to be one that offers a range of procedural safeguards, such as: involving a public hearing before an independent and impartial tribunal within a reasonable period; presenting the accused with the evidence against him or her, with adequate opportunity to prepare and present a defense; and allowing appeals against trial court decisions.[20] The 1978 Constitution of Sri Lanka guarantees the right to a fair trial by Article 13 (3). This right is also enshrined in a number of international instruments. The provisions of Article 14 (3) (d) of the ICCPR provide that the accused has a right "to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it". Furthermore, he must be granted with 'adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing'.[21] Accordingly, the accused must have the opportunity – both in terms of material resources and legal opportunity to mount an effective defence and is stated as requiring "equality of arms" between the prosecution and defence.[22]

This right of the accused is argued to be violated in situations where the accused is placed in a dock. The physical segregation would hinder access to his counsel during trial. It marginalizes the defendant as there is great difficulty for the defence counsel in communicating with a client: "There are so many occasions during trial where the client wants to say something and struggles to get their lawyers' attention. There is a compelling need for greater engagement of defendants with their own trial. The dock is undignified. This relic [should] be confined to a museum."[23] It would also place him in a disadvantages and unequal position in terms of facilities such as seating and writing material in comparison to the prosecution. Thus, equality of arms is denied.

Impact on Presumption of Innocence:

The right of an accused to be presumed innocent until proven guilty is provided by Article 13 (5) of our Constitution. It is enshrined in both UDHR and ICCPR and in a number of other international treaties.[24] Article 11 (1) of the UDHR provides that "everyone

20 Tait, D. (2011), 'Glass Cages in the Dock: Presenting the Defendant to the Jury', Chicago-Kent Law Review, Vol 86, No 2, p. 467 - 495. Available at: http://scholarship.kentlaw.iit.edu/cklawreview/vol86/iss2/4 last accessed 19.05.2016

21 Article 14 (3) (b) of the ICCPR, Article 67 (1) (b) of the ICC statute, Article 21 (4) (b) of ICTY and ICTR

22 Cassese A. (2013), "Cassese's International Criminal Law", 3rd Edition, Oxford University Press, Great Britain, p. 352

23 View expressed by Anthony Burton, a veteran criminal defence solicitor in England, cited in Bowcott O. (2015) " Senior judge calls for abolition of security cages from courtrooms" available at https://www.theguardian.com/law/2015/jul/03/senior-judge-abolition-courtroom-docks-security-cage last accessed on 08.09.2016

24 E.g. Article 66 of the Rome Statute

charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". Article 14(2) of the ICCPR provides the minimum standards for protection of the accused in criminal proceedings around the world, on both the national and international levels.[25] This right is believed to be denied when an accused is placed in a dock. In relation to this issue, the UN Human Rights Committee has held: "It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. ………, Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals".[26]

The Amnesty International Fair trial manual[27] in section 15.3 on "Protecting the presumption of innocence in practice" states that, "Care must be taken to ensure that no attributes of guilt are attached to the accused during the trial which might impact on the presumption of innocence. Such attributes could include holding the accused in a cage within the courtroom or requiring the accused to appear in court wearing handcuffs, shackles or uniforms worn by convicted prisoners".

The Impact of the Dock on a Jury Trial:

It is believed that the jurors may be prejudiced against the accused due to the fact that he is placed in a dock. Therefore, a caution in the nature of the following is generally given to jurors in Jury trials: "The defendants sit in this dock because… it is the way in which the court is laid out and it certainly is nothing to a defendant's detriment that he sits in a dock. It is convenient from the court layout, as it is convenient for me to sit there and you to sit there and he then to give evidence". [28] The intention of this direction is to avoid juries prejudicing the defendant during the trial as a result of where they have been ordered to sit. In Dr. Alan Rogers' article "The Prisoner's Dock and the Presumption of Innocence in Massachusetts Criminal Trials" citing an extract from the closing argument to the jury in the murder trial of James Albert Trefethen in 1892 he states that the defense attorney John D. Long began by recognizing the discrepancy between the theory and practice of the law.[29] Jurors knew their oath requires them to assume a defendant innocent until proven guilty, he noted; but "in practical effect when you go in to a court room and see a

25 Kremens K.2011 " The Protection of the accused in International Criminal Law According to the Human Rights Law Standard", Wroclaw Review of Law, Administration & Economics, Volume 1:2, available at www.wrlae.prawo.uni.wroc.pl/index.php/wrlae/article/download/15/16

26 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) cited in " In the Dock, Reassessing the use of the dock in criminal trials – A report by JUSTICE (2015), available at www.jusitice.org.uk page 04

27 Amnesty International Fair Trial Manual (2014), 2nd edition, Amnesty International Publications, United Kingdom, Page 128. Available at https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf last accessed on 07.09.2016

28 R v. Bajwa [2007] EWCA Crim 1618, at [17], jury direction Cited in Justice (2015) page 01

29 Rogers A. (1997) "In the cage: The Prisoner's Dock and the Presumption of Innocence in Massachusetts" Criminal Trials, available at http://heinonline.org/HOL/LandingPage?handle=hein.journals/malghis3&div=8&id=&page= last accessed on 16.08.2016

poor fellow shut up in the dock, with the spikes around him, the handcuff on his hands, you say at once, "That is the prisoner, that is the guilty man".[30] Long urged his listeners not to make that mistake, not to abandon the presumption of innocence to which the defendant was entitled merely because he was "in the cage". These contemplations show that the dock creates a high risk of prejudice against the accused in jury trials.

JUDICIAL DECISIONS -

While a number of foreign and international judgments have dealt comprehensively with the question of propriety of the dock, Sri Lankan judgments that directly address the issue could not be found. The only reported local judgment that lightly touches upon the topic is the case of **Lakshman De Silva v H.W. Senanayake and Another.**[31] It is an instance where the failure to provide facilities such as a table and a chair for the accused had been discussed in the light of his constitutional rights. In this case, the petitioner (accused) was unrepresented by an Attorney-at-law at the trial upon an indictment in High Court. He had requested from the High Court, equal opportunity and facilities afforded to the learned counsel for the prosecution be afforded to him. The facilities so requested were: "Facilities to sit (provided with a chair) to be able to take down notes and to place books, documents (provided with a table) during entirety of this trial, which may be placed in front of the dock".[32] Upon this request being rejected by the High Court Judge, the accused applied for a writ of mandamus from Court of Appeal. He had averred that his fundamental rights under Articles 12 (1) and 13(3) of the constitution were violated as: "…. he could not conduct his defence from the dock, as there were no facilities to keep his books and papers, and to take down notes, and "as the wooded bars of the…caged dock not only denies petitioner's visibility partially and also partial reflection of sound waves, thereby not being able to hear properly the words spoken by witnesses……. ".[33]

The Court of Appeal had refused to issue notice of this application, and also refused leave to appeal to Supreme Court. Thus, the petitioner sort special leave to appeal from the Supreme Court. During hearing of this application, a settlement had been reached upon the undertaking of the 2nd respondent - the Attorney General, that "the petitioner will be provided with a table and a chair for the purpose of keeping his books and documents during the course of the trial in the high Court. If this table and Chair cannot be accommodated within the dock, these facilities will be provided for the petitioner outside the dock".[34] As the petitioner had moved to withdraw his application in view of the settlement, the Supreme Court has observed the following:

30 Trials of James Albert Trefethen and William H. Smith for the Murder of Deltena J. Davis 124 (Boston, Wright & Potter Printing Co. 1893) cited in Rogers A. (1997)

31 1990 SLR IV, 119

32 Ibid page 122

33 ibid

34 ibid page 123

> *"We do not then, and do not now, express any opinion as to whether the petitioner had a legal right, or a constitutional right, to be provided with a table inside or outside the dock, although it seems to us very desirable that an undefended accused should have all such facilities as – are reasonably necessary for the purpose of conducting his defence".*[35]

Although in view of this settlement, the petitioner's grievance had been resolved, it is unfortunate that the Supreme Court did not make a ruling on whether or not these facilities are part and parcel of the fundamental rights afforded to an accused by our constitution. It would have been very desirable had the court addressed its mind on the issue of whether the right to a fair trial had been denied by the failure to provide proper facilities. It would have been an ideal case to formulate guidelines in relation to the minimum standards of facilities due to an accused.

Kearney J. in ***State v Allan Woila*** [36] a case before the National Court of Papua New Guinea discusses at length the question of whether the accused may stand trial other than from the dock as of a right or as an indulgence. It was held in this case that an accused person who is defended by counsel may claim as of right to be allowed to sit in court near his counsel to make effective the rights of an accused under the Constitution that he must have free and unrestricted communication with his legal representative in court during his trial. It was also stated in the judgment that even if the question is one of indulgence only by the court and not as a matter of right, requests to sit near counsel should be very freely granted in the interests of dispensing justice to the individual. In this case, his Lordship observed that: "Nowhere in the Criminal Code is it provided that an accused person must remain in some particular place in the courtroom, during his trial. Nor is there any such provision in the statute law of England. In general, there is no such provision in the statute law of common law countries, although there are exceptions e.g. New South Wales[37] and Nigeria".[38] It was highlighted that;

> *"It is, therefore, as a matter of long-standing practice, that an accused person stands his trial from the dock when the courtroom is provided with one. There is nothing magical about a dock. It is a small enclosure within a courtroom, part of the criminal court architecture developed in England some centuries ago."*

35 ibid
36 Supra note 2
37 Section 400 of the Crimes Act 1900 "In every case, whether of felony or misdemeanour, the presiding Judge shall have power to order the accused to enter the dock or usual place of arraignment, or to allow him to remain on the floor of the court, and in either case to sit down as such Judge shall see fit. Provided that every defendant in a case of libel, or of assault simply not being indecent assault, may remain on the floor of the court as at present."
38 Section 214 of the Criminal Procedure Act 1945 "Where an accused person appears before a court on a summons he may be required to enter the dock or to stand or sit adjacent thereto as may be ordered by the court."

In the Canadian case ***R. v. Gervais*** [39] an application to stand out of the dock had been rejected on the basis that the place for the accused in the trial is in the regular dock reserved for that purpose. As the Canadian Criminal Code (1985)[40] is silent on the issue the following principles as emerging from case law has been considered: (i) The customary position of the accused in the courtroom is in the dock, (ii) The trial judge has discretion as to the position of the accused in the courtroom in individual cases, (iii) The presence of the accused in the dock does not violate his or her Charter rights. Holding against the view that dock is unsuitable in a criminal trial it was observed that;

> *"Some feel the dock is an anachronism that should be abolished. Some feel that a "stigma" attaches to the accused who sits in the dock. Others point out that this view is supported by nothing more than feeling or conjecture, unsupported by any evidence. Some say that the accused is no more stigmatized in the dock than is the jury in the jury box or the witness in the witness box. There are views to the contrary and a number of orders have been made in individual cases to permit defendants to sit outside the dock. Despite these views there is a strong current of judicial opinion that the dock is ordinarily the best place for the accused."*

It was also stated that the modern functional reasons for the dock have to do with the focus of the trial. If the accused remain in the dock they remain at center stage. The focus of the trial remains on them and the judge is able to observe their responses to the evidence as it unfolds. And also that the jury, the judge and the counsel are less likely to be disturbed by the communications between accused and counsel if accused is placed in the dock.

R. v. Ahmad[41] is a judgment of Ontario Superior Court of Justice regarding an application by the accused in a high profile case with charges of terrorism offences to be permitted to sit at the counsel's table during their jury trial. Dawson J. in this judgment discussing the applicable legal principles elaborated that a review of relevant case law reveals two lines of authority. The first line of authority is said to hold that each participant in the trial has a place in the courtroom, and for an accused, whether in or out of custody, that place is the dock, unless the accused establishes to the satisfaction of the trial judge that there is a sound reason to deviate from the usual practice. The second line of authority holds that accused persons should be permitted to sit outside the dock, whether they are in custody or not, unless security considerations are such that the dock is demonstrated to be necessary or at least advisable, to ensure the safety of all involved. The present case following the first school of thought had held that the accused should not be permitted to sit outside the dock.

39 2001 CanLII 28428 (ON SC), available at http://www.canlii.org/en/on/onsc/doc/2001/2001canlii28428/2001canlii28428.html last accessed on 07.09.2016

40 Available at http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html last accessed on 07.09.2016

41 2010 ONSC 1777 (CanLII), available at http://www.canlii.org/en/on/onsc/doc/2010/2010onsc1777/2010onsc1777.html last accessed on 07.09.2016

The Ontario Superior Court of Justice in the case **R v. Minoose**[42] where the applicant charged with armed robbery was being tried before a jury ruled that his request to sit outside the prisoner's dock cannot be permitted. However, court ordered the accused to be given a pencil and paper throughout the trial in order to pass notes to counsel. The constables beside the defendant were ordered to give their assistance to pass those notes to counsel as presented to them. Court also expressed that it is amenable to a reasonable number of short adjournments during the trial if defence counsel needs to discuss a recent note from the defendant.

In ***Svinarenko and Slyadnev v. Russia***[43] it was alleged that keeping the applicants in a metal cage in a courtroom had amounted to degrading treatment prohibited by Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter The Convention). The applicants had been kept in a cage during their jury trial held by the Magadan Regional Court in 2008-2009 on indictment for robberies with violence as members of a gang and other offences allegedly committed in 2001-2002. As described in the judgment, during the hearings the accused had sat on a bench enclosed on four sides by metal rods. Armed police guards remained beside the caged dock. On behalf of the applicants, it was submitted that the applicants like "monkeys in a zoo", had been exposed in a cage to the general public, including the large number of candidate jurors and witnesses from the same settlement, and the applicants' family members and acquaintances who had attended the hearings. Keeping in line with a number of judgments on similar issues, the court held that the applicants' confinement in a metal cage in the courtroom amounted to degrading treatment prohibited by Article 3 of the convention and thus, there has been a violation of that provision. In the judgment, the Court observes that the applicants' exposure to the public eye in a cage must have undermined their image and must have aroused in them feelings of humiliation, helplessness, fear, anguish and inferiority.

The case of ***Titarenko v. Ukraine***[44] originated in an application against Ukraine lodged with the Court by a Ukrainian national alleging that he had been held in a "cage" with metal bars during the hearings before the Court of Appeal. He relied on Article 3 of the Convention.[45] The applicant considered that the State had been responsible for the humiliation experienced by him while held in a "cage" during the hearing, irrespective of whether that was intentional. He had felt discomfort and shame at being separated from the rest of the courtroom, which was full of people. Contrary to the view taken in other

42 [2010] OJ No 4830 (QL) Available at http://www.canlii.org/en/on/onsc/doc/2010/2010onsc6129/2010onsc6129.html last accessed on 07.09.2016

43 Applications nos. 32541/08 and 43441/08 decided on 17 July 2014 at Strasbourg , available at http://at.gov.lv/files/files/svinarenko-and-slyadnev-v-russia.pdf last accessed on 07.09.2016

44 Application no. 31720/02, decided on 20.09.2012, Available at https://lovdata.no/static/EMDN/emd-2002-031720.pdf last accessed on 07.09.2016

45 "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"

similar cases,[46] the court held in this case that there was no violation of Article 3 of the convention. Court distinguished the other cases on the ground that in those cases the applicants were accused of non-violent crimes, they had no criminal record, and there was no evidence that they were predisposed to violence, and the "security risks" were not supported by any specific facts.

Khodorkovskiy v. Russia[47] is a case with similar facts as the above case, where the European Court of Human Rights has held that there had been a violation of Article 3 of the Convention. The Court noted that the practice of placing a criminal defendant in a sort of a 'special compartment' in a court room existed and probably continues to exist in several European countries (Armenia, Moldova, and Finland). In some countries (such as Spain, Italy, France or Germany) the accused are sometimes placed in a glass cage during the hearing. The Court concludes that 'such a harsh appearance of judicial proceedings could lead an average observer to believe that an extremely dangerous criminal was on trial. Furthermore, the Court, agrees with the applicant that such a form of public exposure humiliated him in his own eyes, if not in those of the public, and aroused in him feelings of inferiority'.

In ***Ashot Harutyunyan v. Armenia***[48] the European Court of Human Rights found a violation of Article 3 of the convention on the account that the applicant had been kept in a metal cage during the proceedings before the Court of Appeal. His children, wife, sister, brother and friends had been present and seen him in such a state, and seeing the pain of his relatives had aggravated his own suffering. He has felt humiliated in the eyes of his adversaries. It was declared in this case that the Court undoubtedly disapproves the use of such an indiscriminate and humiliating security measure in respect of the applicant. However, it was held that it did not amount to a violation of the principles of equality of arms or of the presumption of innocence as guaranteed by Article 6 (1) and (2) of the Convention.

In ***Ramishvili and Kokhreidze v. Georgia***[49], the Court, in a very similar factual context as the case discussed above, decided as follows: "...The public watched the applicants [in the courtroom] in a metal cage. Heavily armed guards wearing black hood-like masks were always present ... the hearing was broadcast live .... Such a harsh and hostile appearance of judicial proceedings could lead an average observer to believe that 'extremely dangerous criminals' were on trial. Apart from undermining the principle of the presumption of innocence, the disputed treatment in the court room humiliated the applicants ...."

46 Ramishvili and Kokhreidze v. Georgia, no. 1704/06, §§ 96-102, 27 January 2009; Ashot Harutyunyan v. Armenia, no. 34334/04, §§ 123-129, 15 June 2010; and Khodorkovskiy v. Russia, no. 5829/04, §§ 123-126, 31 May 2011

47 Application No. 5829/04, 31 May 2011

48 Application No.34334/04, Strasbourg, on 15 June 2010.

49 Application no. 1704/06, §§ 98 et seq., 27 January 2009

CRIMINOLOGICAL SIGNIFICANCE OF THE DOCK -

The phenomena of the accused standing in the dock cannot be assessed solely in terms of the law. It is a complex situation which necessary calls upon a criminological viewpoint. The scientific approach to studying criminal behavior known as criminology includes three major aspects namely, making of the law, breaking of the law and reaction for the breaking of the law.[50] There are a wide variety of theories regarding crime and they contribute to an understanding of criminal behavior and provide an important framework for examining current policies and treatment efforts established to deal with or alleviate the crime problem.[51] In this section of the article two such theories, the deterrence theory and the labeling theory will be discussed briefly in terms of their significance to the Dock.

Applicability of the Deterrence theory:

Often, those who argue in favour of the dock tend to believe that it holds a deterrent effect contributing to crime control. Thus, it is important to investigate the merits of this notion. The deterrence theory of criminology is a theory of punishment. In simple terms, it holds that people will refrain from committing offences through fear of punishment. The punishment as a deterrent is expected to serve two-fold purposes: individual and general.[52] In "individual deterrence" the object is to teach the offender a lesson so that he will be deterred from repeating his offence. In "general deterrence", it will demonstrate to the potential offender the consequences if he violates the law. Deterrence theory focuses on crime reduction possibilities of sanctions. Thus, a sanction imposed upon conviction would be a vital requirement for both individual and general deterrence to take effect. Therefore, deterrence cannot be expected at a pre-conviction stage. In a theoretical sense deterrence should not be the intention of placing an accused persons in the dock. Therefore, it can be seen that the deterrence theory of crime control offers no justification to the continued use of the dock.

Applicability of the Labeling theory:

In a very simple sense, the moment a person step in to the dock, a label is attached to him by the society as criminal. The consequences of this can be explained by the Labeling theory, originating in the 1960s in the United States, which brings to focus the role of government agencies, and social processes in general, in the creation of deviance and crime. Labeling theorists focus on the reactions to crime, rather than the causes of crime.[53] They are often referred to as social reaction theories, because they focus primarily on the

50 Sutherland and Cressey cited in Siegel LJ (2007), Criminology Theories, Patterns and Typologies, 9th edition, www.gobookee.net

51 Explanations for criminal behaviour, www.ablongman.com

52 Gour K.D. "Criminal Law and Criminology" (2003), Deep and Deep Publications, New Delhi, Chabra K.S. "Theories of Punishment" at page 689

53 Paternoster R., Bachman R. (2013) "Labelling theory" available at http://www.oxfordbibliographies.com/.../obo/ last accessed on 03.09.2016

consequences of responses or reactions to crime. These responses or reactions typically focus on three sets of actors:[54]

1. Informal social others, such as the friends, parents or partners of persons committing crimes and who disapprove of the offender's behavior,

2. Organizations or institutions such as the criminal justice system, whose function it is to "do something about" crime; and

3. Those who perceive a threat by some behavior and want to see legislation passed to outlaw it. All of these very diverse actions have one thing in common: they are all reactions to crime. They are said to be "labels" because they have the quality of attaching a name or signature to someone or some behavior. It is believed that deviant labels create problems as the person being labeled has to adjust to and deal with, and that under certain conditions labels can lead to greater involvement in crime and deviance. There are two stages of deviance: Primary deviance which is the commission of criminal acts before the individual is caught and punished for them; and secondary deviance which refers to crimes committed due to the label society has placed upon an offender. This shows that the labeling would instigate further deviant or criminal acts rather than deterring.

According to Rev. Derek Kelly who serves as pastor of New Faith Full Gospel Church of Lexington, "When one has been accused of a crime or wrongdoing it plants a type of stigma on that person. People view them differently, which subsequently causes them to be treated differently. Their lives are forever changed through the bureaucracy of human nature. They become a freak show in a parade of presumptuous people who have already sentenced them to a life of disgrace and humiliation. So much so that even if they are acquitted of the crime or wrongdoing, they still suffer public embarrassment. A negative picture has been eternally painted on the canvas of society and the community".[55] The offenders are often more concerned about how they are seen in the eyes of the community and not the authorities. Putting a person in a labeled dock in a public forum is necessarily stigmatizing and would result in branding an offender as a particular "type" of person in the eyes of the public. Depending on the nature and personality of the offender, this may result in secondary deviant behavior. Thus, it can be argued that the practice of the dock would contribute to increase of criminal personalities by the activation of labeling theory.

54 ibid

55 Kelly D. "Are we truly innocent until proven guilty" Available at http://www.the-dispatch.com/lifestyle/20120601/are-we-truly-innocent-until-proven-guilty last accessed on 08.09.2016

PSYCHOLOGICAL SIGNIFICANCE OF THE DOCK -

The psychological wellbeing of the accused during trial is an aspect that has gone unnoticed or is undermined in this country. This section of the article will explore the psychological perspective of the physical structure of the dock. "Psychology" is defined as the scientific study of behavior and mental processes.[56] The terms behavior and mental processes encompass not just people's actions, but also their thoughts, feelings, perceptions, reasoning processes, memories and even the biological activities that maintain bodily functioning.[57] Psychology attempts to explain, predict, modify and ultimately improve the lives of people and the world in which they live.[58] A specialized branch of psychological studies, "Environmental psychology" holds that the built or natural environments that we do all our activities in often have powerful effects on our behavior, thoughts, emotions and well-being.[59] It tries to understand the fundamental causal connections between physical settings and psychological processes.[60]

Facing a trial could be in itself a strenuous stressful process and the stigma attached to the physical segregation in the public trial would increase its' impact. Some people may be more vulnerable than others and may have psychological conditions that can be aggravated by exposure to such situations. For example, the fear of lawsuits is known to be a psychological condition that calls for medical intervention named liticaphobia. Also, the condition of those who suffer from the anxiety disorder claustrophobia, which creates extreme fear of enclosed spaces, may be aggravated. An accused who is acquitted at the end of a trial would undergo anxiety or depression as a result of the trauma of having to appear like a convicted criminal and might even need medical intervention to overcome the disturbed mental condition. An accused who is convicted of a criminal offence would find the reintegration in to the society difficult due to the psychological complications experienced during the trial. It can be observed that there is a high likelihood of an adverse impact on the psychological wellbeing of an accused. Undeniably, an accused should also be treated as humanely as possible with sensitivity in the court process and therefore, it should be a concern of the criminal justice system.

ARCHITECTURAL SIGNIFICANCE -

> *"Architecture is frozen music" rhapsodized Goethe.*
>
> *Court Architecture, however, might more fittingly be called*

56 Feldman S.R. 1996, "Understanding Psychology", 4th Edition, McGrow-Hill, Inc., United States of America, page 05
57 ibid
58 ibid
59 Santrock J.W. " Psychology" 5th Edition , Mc Graw Hill, USA , page ENP 3
60 Ibid page ENP 4

"frozen justice".

But do court buildings ever become "frozen injustice"?

Yes when they contain inhuman caged docks" [61]

The dock is essentially a physical entity and therefore, a part of the court room architecture. Exploring the spatial dimension of justice would help to understand the impact it has on its occupant - the accused and on other participants of the court proceedings. Law and Architecture are both known to share three common features: they communicate, they institute spaces and they regulate our movements.[62] This section of the article brings to focus this interdisciplinary nature of law and Architecture.

Often the notions of law and justice would primarily bring to mind the rules, codes, and written words.[63] The spaces where law and justice are performed and rendered are rarely thought about as if they were neutral and non-existent.[64] However, it is believed that the law courts, to a great extent than almost any other building type, have a symbolic function in their architecture. Court buildings need to represent the concept of justice, equality before the law and the importance of the authority of law, whether the justice is between individual parties (civil justice) or between the crown and individuals (criminal justice)".[65] The dominating presence of the dock in a criminal court room which isolates the accused from the trial proceedings is a sight that would go unnoticed by anyone entering a court room.[66] As a consequence, an independent observer would struggle to avoid the impression that the enclosed defendant appears guilty.[67] Rather than being a generic part of courtroom furniture, the dock in fact forms an extension of the prison cell into the courtroom.[68]

The idea that physical outlook of a courthouse is associated with the quality of justice dispersed within it has been recognised in other countries though it is alien to our legal system. For example, the following quote from a plea for reforming the judiciary in India embodies the essence of this concept:

61 Opined by the European Court of Human Rights Grand Chamber on July 17, in Svinarenko and Siyadnev v, Russia cited by Walker S. M "Caged Injustice" http://www.criminallawandjustice.co.uk/features/caged-Injustice last accessed on 27.07.2015

62 Branco E. P. (2010) "Questioning the connection between access to law and justice and courthouse architecture", www.academia.edu/.../_2010_Questioning_the_connection_between last accessed on 28.04.2016

63 Branco P., Paula C., Izzo N. V., (2011), "Do we need a new type of Court? Considering courthouse architecture and family matters", www.academia.edu last accessed on 28.04.2016

64 ibid

65 Better Court buildings Action plan, 2002, cited in Marrani D. "Palaces of Justice or Places of Justice: the dilemma of post-modernity", available http://ssrn.com/abstract=1650535 last accessed on 28.04.2016

66 Supra note 7

67 ibid

68 ibid

> *"From the dizzy heights of the higher judiciary when we climb down to the lower judiciary the picture that presents itself is dismal and disappointing. The courts have no convenient building or physical facilities.......The stifling undignified worldly environment has made a cultural osmosis, that has no doubt a deleterious effect on the quality of justice dispensed with"* [69]

Although control of territory has long been seen as fundamental to studies of power dynamics in society, it is only recently that social geographers, sociologists and lawyers have turned their attention to the interface between law, place and space.[70] The subject is said to be a particularly interesting one for legal systems which rely on oral testimony and adversarial procedure. "In these jurisdictions performance is all".[71] The courtroom is converted into a stage in which space, sight lines and acoustics are critical in assessments about the credibility of the speaker and the statement they are making.[72] It is said that each time a partition is created or bar installed in a court it has the effect of creating an inside and outside; an 'opposition' or other which can serve to signal segregation, place or inequality. Each time a floor is raised it has the potential to become the physical manifestation of hierarchy and power".[73] ***Kearney J in State v. Allan Woila***[74] states that a noticeable defect of the court architecture is that it does not cater for the need for close contact between an accused and his counsel. Court design guides of other countries would show the concern placed on all aspects of a court house including light.[75] In Her Majesty's Court Service, Court Standards and design Guide, 2010 of UK it states that cage like oppressive environment for the defendants should be avoided.[76] It is suggested that "The ideal criminal court should be like a civil court as much as possible", dignified, convenient and aesthetically satisfying.[77]

---

69 "Decline of Fair Trial in Asia" (2000), Asian Human Rights Commission, in article: Alexander P.J. "Fair trial: the Indian Situation" at page 157

70 Foucault, 1977; Harvey, 1996; Evans, 1999; Fairweather and McConville, 2000; Blomley et al., 2001 cited by Mulcahy L (2007) " Architects of Justice: The Politics of Courtroom Design" available at http://sls.sagepub.com/cgi/content/abstract/16/3/383 last accessed on 28.04.2016

71 ibid page 385

72 Fischer Taylor, 1993 cited in ibid

73 Supra note 71 page 385

74 Supra note 2

75 The Department of the Attorney General, Government of Western Australia, Court Standard Design Brief February 2010. Available at http://www.courts.dotag.wa.gov.au/files/courtsdesign brief.pdf last accessed on 16.08.2016

76 At Page 109 cited in De Porti S. Chebrout, Fay L. The Dock and the Physical Restraints: the presumption of innocence put to the test by appearences at the trial, Themis Competition (2012) supra note 22

77 Rosen L. (1966), "The Dock – Should it be abolished?", The modern Law Review, volume 29, Issue 3, May 1966, page 300, available at https://www.researchgate.net/publication/228042585_THE_DOCK-SHOULD_IT_BE_ABOLISHED last accessed on 01.09.2016

CONCLUSIONS AND RECOMMENDATIONS -

Although, Sri Lanka, has failed so far to identify the necessity of reviewing the propriety of the dock, it is a mainstream debate in some of the largest jurisdictions of the world. It can be observed that the facts holding against the dock far outweighs the justifications presented for its continued existence. It is seen that the dock exists in the criminal courts with no legal requirement or basis. The criminological theories do not support the continuation of the practice. Further, it was presented that the court houses cannot be considered as neutral buildings in the perspective of architectural dimension of justice. It is also observed that the psychological consequences resulting from the practice of the dock is harmful to the mental wellbeing of persons in the dock. Hence, it should no longer be considered a piece of court room furniture that every accused person irrespective of the nature of the offence, nature of the person is to be place in.

Recommendations:

Firstly, it is recommended to formulate policy guidelines as to when, how and to whom the utilization of the dock should be applied so as to maintain uniformity among judges of each court. However, it would not be prudent to lay down a blanket rule to keep all types of accused out of the dock. In order to balance the security concerns and ethical concerns the accused and offences should be categorized and be assigned suitable places in the court room accordingly. A certain level of judicial discretion should be available in this decision making on a case by case basis.

Secondly, a physical change of the dock is recommended to make the courthouse more people friendly and psychologically healthy. The physical outlook should maintain the presumption of innocence visually to uphold the maxim "justice should not only be done but should also be seen to be done". Further, court room design guidelines should be formulated to ensure that all courts of the country consort to a uniform structure. These guidelines should comply with the architectural dimensions of justice.

Thirdly, an accused should be permitted to use facilities and material necessities such as a table, chair, paper and pen to prepare for the defence case. If a request is made by an undefended accused for these necessities, they should be provided by court so as to keep in line with international standards of fair trial in terms of equality of arms between the prosecution and the defence.

Fourthly, new terminology should be introduced for "dock statement" and "dock identification" to erase the misconception that a "dock" is necessary for their legal validation. The phrase "unsworn statement of the accused" which is already in usage and the phrase "in-court identification" used in other jurisdictions can be suggested as appropriate replacements.

Finally, until such significant long term reforms can take place, as a short term remedy to minimize the adverse impacts, it can be suggested that a policy decision be made by the judiciary to allow accused of certain categories of offences to stand out of the dock. And also, in courts where infra-structure permits, seating facilities should be given to all accused irrespective of the nature of the offence or the accused. For these short term remedies to be workable, steps should be taken to raise awareness among the judges on their duties to maintain fairness of a criminal trial, the lawyers on the legal rights of their clients and the general public regarding the rights provided by the Constitution in relation to criminal justice. A more vigilant approach in demanding and providing these rights should be adopted and encouraged. Thereby, the violation of the constitution within the trial court itself should be prevented.

In consideration of all material presented it can be observed that the arguments brought against the dock far outweighs the arguments in favour of it. Therefore, a structural change is vital to make the courtrooms appear visually humane and a theoretical change is necessary to make its usage more rational and pragmatic. Only then can the notion of the criminal court as a "dirty frowsy room" where the accused is on public display in a cage on a stage, as depicted in the opening quote of this article, can be eliminated.

SACRED DUTY OF THE JUDGE IN A PARTITION SUIT

Chinthaka Srinath Gunasekara, LLM (Colombo)
District Judge, Bandarawela.

INTRODUCTION -

This note focuses on some salient features of claims of the person who is **not a party to a partition action** and the duty of the court to investigate their title over the land subjected to partition. It is not necessary here to go back to the history and devolution of the partition law in detail, since the present Partition Act is comprehensive to gain its object. It is not a secret that congestion of large number of partition cases has become a common issue in most civil courts resulting inordinate delay in administration of justice and disappointment for the litigants. That is due to various problems that are to be solved with collective responsibility of parties, attorneys, licensed commissioners, and the court as well. The objective here is to refresh the attention to the imperative provisions pertaining to the claimants who have not made as parties to the case and the procedure of adding them as parties.

THE PARTITION ACT NO 21 OF 1977 -

By repealing the previous Partition Ordinance No. 10 of 1863, (severally amended) and Partition Act No 16 of 1951, the present Partition Act No. 21 of 1977 was introduced, resulting the removal of few chapters of Administration of Justice Law No. 44 of 1973, that covered few limited aspects related to partition law. By enacting same, legislature has taken every attempt to preserve **"the nature of *in rem* Judgment"** within a partition suit, converting the Partition Act as the substantial and procedural law of partition in

Sri Lanka. Special features of it are that some elements of inquisitorial system have been inserted in addition to the adversarial features resulting in additional duties cast upon over the District Judge. The Partition Act is a special legal document comprising some mandatory/imperative provisions which judges should adhered to.

SPECIALITY OF THE AFFECTED PERSONS -

Unlike other civil actions there are three types of claimants in a partition action. First, are the parties to the action who have named as defendants by the plaintiff as relevant parties. In this sense they are not only the co-owners but the parties who have an interest over the land. Even the defendants can join the action in several stages mentioned in the act, depending on the circumstances. The second category is the claimants who have not made parties, but made their claims before the surveyor at the preliminary survey. The third type is the persons who have been disclosed by the defendants (or may be by the plaintiff) and named by court. The judges must be more careful about the second and third types, which this paper mainly focuses on.

It is established that an "*in rem*" judgment will bind all over the world. That is the reason to avail specific provisions that are mandatory to gather them to the main case. Non-compliance of the said provisions may lead for a retrial after lengthy trial and appeals after a long period. Hence it is a sacred duty to investigate the title of all above persons over the subject property.

That sacred duty of the judge has been mentioned in the following way in the case of **Synthia De Alwis vs Marjorie**[1] thus;

> *"A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial. Vide the express provisions to that effect in the partition act in the dicta in the decision in Kumarihamy vs Weragama."*

Duty of the judge to fully investigate the title has been raised in the case of **Kularatne vs Ariyasena**,[2] where it was held that ;

> *"the duty of the judge in a partition action is to ascertain who the actual owners of the land are and it is an imperative duty of the court to fully investigate and decide on the title of each party of the action on evidence and not in any admission".*

1 1997 (3) SLR 113p
2 2001 BLR 6p (CA)

Further in the case of **Chandrasena vs Piyasena**[3] it was held that "in a partition action it is incumbent on the judge to investigate into title of each party". In **Juliana Hamine vs Don Thomas**[4] is also a case that emphasizes the duty of the court even prior to the present partition act.

These series of judgments have elevated the sacred duty of the district judge in a partition action, thereby the district judge has an active and participatory role in a partition action rather than just being an silent umpire.

Section 5 of the Act speaks about the plaintiffs' duty to include all persons who, whether in actual possession or not to his knowledge are entitled or claim to be entitled in his plaint. Not only the plaintiff but also defendants owe a duty to disclose to the court the name and address of every person, not being a party to the action, but also who to his knowledge has any right share or interest to, the land under section 19(1). It confirms how the legislature has taken precautions to preserve the rights of the person who has ***any*** interest to the land to be partitioned.

SURVEYOR'S ROLE AS A COURT COMMISSSIONER -

The surveyors' duty in the preliminary survey is very significant and they are obliged to comply with the imperative provisions such as section 17 and section 18 of the Act, after being appointed as court commissioners. Section 17 deals with the procedure of issuing notices to the parties and oral proclamation by beating of tom-tom. Section 18 deals with the comprehensive procedure of return of the surveyor's commission. After receiving the plan with the report it is advisable to look in to the same whether the surveyor has complied with the section 18 of the Act, where it is mandatory to submit two copies of the plan and report affirmed with an affidavit. The main ambition of the said provisions is expeditious disposal of the case in fruitful manner with due diligence by preserving rights of every party.

The surveyors report is expected to clear out two main things (in addition to other requirements of the report) *firstly,* whether a State land falls within the subject matter, and *secondly,* to trace all the claimants over the subject land. Regrettably so many reports fail to comply with the said requirements, especially the requirement contained in Sec. 18(1) a (iv) of the Act.

Section 18(1)a(iv) of the Act reads thus ;

18(1)a: a report in duplicate , substantially in the form set out in the second schedule to this law, verified by affidavit stating……..

3 1999 (3) SLR 201p
4 (1957) 59 NLR 546p

iv. "the parties to the action who were present at the survey, and the name and address of any person (not being a party to the action) who, at the time of the survey, preferred any claim , the nature of such claim and the date of service of the notice referred to in sub-section (1) of section 16."

The section 16 of the Act explains how the commission should be issued to the preliminary survey and also the procedure and the documents that should be sent to the surveyor[5] along with the commission. Section 16(3)[6] is the most valuable part in relation to the persons who are not made as parties, thus ;

"16(3) "where the court orders the issue of a commission to a surveyor under subsection (1) of this section, it shall in addition order the issue to such surveyor of such number of copies of a notice substantially in the form set out in the Second Schedule to this Law together with the translation thereof, as the court may deem sufficient in the circumstances, to be served on an person (not being a party to the action) or his agent who at the time of the survey may prefer any claim to the land to which the action relates."

No one can neglect the said imperative provisions and surveyors' duty to hand over the said notices and mention the particulars of the recipients in his report and to obtain a receipt to verify same. It is noteworthy that even though the court grants a date to consider the plan to the parties, court has a responsibility to peruse the plan and the report prior to fixing the case for the next step although there is no specific provision for it. If the preliminary plan and the report are not in accordance with the second schedule of the act, best thing is to re-direct the commissioner to comply with section 18. Otherwise it would have to rectify by the surveyor at a later stage. That is why it was mentioned above as advisable to take precautions when the plan is received with the report.

In the case of **Dahanayake vs Alahakoon**[7] a fresh commission was issued since the surveyor had failed to comply with the section 5 of Partition Ordinance.[8]

5 The surveyor should be in the list of court panel of surveyors who reside within the jurisdiction under sec. 73(1) and proper to send commissions them on rotation basis.

6 As amended by the sec.2 of 32 of 1987

7 (1965) 70 CLW 14p

8 This is a case where surveyor had failed to prepare the scheme of partition as per sec 5 of previous Act No .16 of 1951

Prior to the present Partition Act there was no such imperative requirement as per section 18(1)a(iv). In the case of **Haniffa vs Samsudeen**,[9] the district judge held that the final decree was of no force or avail in law because the commissioner had failed to give due notice as provided by section 5 of the Partition Ordinance[10] since it was not mentioned in the report. But in the appeal it was held that the learned District Judge had misdirected himself in coming in to that conclusion. There is no provision of law that requires a commissioner to state in his report whether or not such notices were given. But law changed after enactment of the Partition Act and the amendment No. 32 of 1987. It is evident that the legislature has focused on the significance of such a provision by enacting imperative provisions later.

PROCEDURE OF ADDING PARTIES -

In some cases it is seen that claimants before the surveyor have been made directly as parties to the action, which is completely contrary to the provisions Partition Act. No claimant shall be added as a party, upon his written request and with the permission of court. Therefore practice of making them as parties via surveyors report and amending the caption is alien to the procedure in the Act.

After receiving the plan and the report (either by appointed commissioner or Survey General) as per section 18, defendants to the action can file statement of claims. Through their respective statement of claim they can disclose of any mortgages and leases over the land and if the subject land is larger than which has mentioned in the plaint such defendant has to take steps to clear out the corpus in terms of section 19 of the Act.

At this stage the defendant too owe an imperative duty to disclose or cause to be disclosed to the court the name and address of every person **not being a party to the action**, who to his knowledge has any right, share or interests to, the land sought to be partitioned. This is another path of tracing of any claimant who is not to the party to the action. The salutary provision of the Partition Act with regard to the disclosure of all parties in addition to the original parties is contained in section 20 of the Act. This is the procedural section of substituting/adding necessary parties prior to fixing the case for trial.

It is understood with the above sections that how thoughtfully the responsibilities were devolved of the action thus, firstly, towards the plaintiff, secondly, towards the surveyor thirdly, towards the defendants and finally, to the court.

9 (1965) 70 CLW14
10 Previous Partition act No 16 of 1951

The section 20 of the Act is follows ;

*"20 (1) The **court shall** order notice of a partition action to be sent by registered post*

(a) To every claimant (not being a party to the action) who is mentioned in the report of the surveyor under sub section (1) of section 18, and

(b) To every person disclosed under paragraph (c) of subsection (1) of section 19 by a defendant in the action.

(2) (a) The plaintiff in a partition action shall file in court the notices which are to be sent under paragraph (a) of sub section (1) of this section

(b) A defendant who discloses any person referred to in paragraph (b) of subsection (1) of this section, shall, unless the court otherwise orders, file in court the notice to be sent under that sub section to that person.

(c) Every notice under subsection (1) of this section shall be substantially in the form set out in the Second Schedule to this law.

(3) Any person receiving notice under sub section (1) of this section shall not be added as a party to the action unless he applies by motion in writing to be added on or before the date specified in the notice.

(4) Where such person is added as a party, the court shall forthwith assign a date on or before which such party shall file his statement of claims.

(5) The provisions of section 69 shall not apply to a person to whom notice has been sent under this section."

The court has a paramount duty to send the notice to each and every party, disclosed parties, and every claimant through registered post and received parties should make a written request (except plaintiff and defendant) to intervene to the action. Without such permission there is no other way to make them as parties subjected to the provisions of sec.69.

IMPACT OF NON-COMPLIANCE OF SECTION 20 -

Non-compliance of section 20 of the Act would cause irreparable harm and damage to some persons. If any one does not make a request to add him as a party after receiving the notice, such person has to bear the repercussion of losing his rights. However, if court fails to send the notice to any one, consequently his rights are affected notwithstanding the relevant parties are bound by the judgment *in rem*. In the case of **Perera vs Adline**[11]

11 2000 (3) SLR 93p

the Court of Appeal held that ;

> *"According to sec 48(5) and 48(1) only remedy available to a person who was not a party to a partition action, is to file a separate action to recover damages from any party to the action, if he says that his land has been partitioned."*

Impact of it would be commencement of another money recovery action among the same parties instead of soil rights over a movable property. Furthermore the case will be sent back for a retrial under the powers of appellate forums. In the case of **Hussain vs Naina**[12] it was held that;

> *"where a claimant (not being a party to the action) is mentioned in the report of the surveyor under section 18(1)*[13] *of the Partition Act, the court will ordinarily follow the procedure set out in section 22(1)*[14] *of the act and issue notice in the first instance. The court will not ordinarily add such claimant as a party unless and applies under section 70(1) b, of the Act to be added as a party. However, if the Court adds him as a party under the provisions of section 70 (1), he is entitled to have the interlocutory decree set aside if summons was not served on him."*

Not only the summons, failure to take steps and send notice to a potential party is a reason for set aside the decree of a partition action. This was discussed in the case of **Sivanandan vs Sinnapilla**i.[15]

> *"Where, in a partition action, claimant (not being a party to the action) is mentioned in the surveyor's report, the court has no power to dispense with the service of notice on the person who is alleged to be a claimant. In such a case the notice is imperative under sec. 22(1)*[16] *of the partition act and the provisions of section 77 and 79 should be observed and section 356(b) of the civil procedure code followed in serving the notice. Where these sections have not been strictly followed, Supreme court has power to set aside, in revision, the interlocutory decree entered in the absence of the such claimant more especially if no declaration under section 12 of the partition Act has been filed by the plaintiff."*

The court has power to add as a party a person disclosed in the surveyor's report. This has been emphasized in the case of **Leelawathi vs Weeraman**.[17]

Under section 22 of the previous Partition Act No 16 of 1951, issuing the notice of the action through the fiscal was a duty of court. This was slightly differs from the present law as it requires the notices to be sent via registered post. The importance of that requirement has elaborated in the case of **Abeysooriya Vs Diyonis Appu.**[18]

12 (1968) 71 NLR 73p
13 Partition (amendment) Act No. 16 of 1951
14 ibid
15 77 NLR 300p
16 Sec 22 of Act No. 16 of 1951 (identical to sec.20 of present Act)
17 68 NLR 313p
18 74 NLR 129p

> *"Where in a partition action, the defendants disclose new parties, the trial judge should, as a rule, order the defendant who disclosed the new parties to issue notices to them under 22(2) of the partition act."*

WHO CAN INTERVENE BEFORE THE JUDGMENT ?

The discretion of adding parties who are disclosed and the claimants (before the surveyor) is vested with court. In addition to those two categories if anyone else is interested in intervening section 69 provides for such instances. Three types of persons can intervene in to the action with the permission of the court under section 69.

Even court can make order *ex mere motu* to add some parties under section 69 (1). Other two types of persons can make application by their own to add them as parties prior to the judgment. It is noteworthy that this section has no application to persons to whom notice has been sent under section 20.[19] Court may order any person who, in the opinion of the court, should have been made a party to the action. After issuing a notice, to such person, substantially in the form set out in the Second schedule to the Act, requiring him to make an application to be added as a party on or before the date specified in the notice. Upon such application or application of any other person who, claims an interest in the land to be added as a party to the action court may make order adding them as parties.[20] This is the first category which a party can be added before delivering the judgment and discretion has given the court to decide whether any person to be added or not. It seems even during the trial parties can be added who has an interest over the subjected land but not disclosed by either the plaintiff or defendant. Further there may be persons who had not claimed before the surveyor in the preliminary survey but can be transpired by the evidence at a trial. The trial judge should be vigilant in safe guarding such persons' rights.

The second category mentioned in sec 69, is a party to the action where he has sold his rights of the land to a third party during the pendency of the partition action. Purchaser of such right, title and interest at the sale can be substituted as a party to the action.[21] The procedure to add him is that such purchaser can submit his application (petition and affidavit is not mandatory here) for the substitution.

The third category of persons can intervene at this stage by submitting an application(petition and affidavit is not mandatory). in terms of section 69(3).

> *"where a party to a partition action derives his right, share or interest to, of or in the land to which the action relates under or by virtue of a revocable deed of gift made by any other person or an instrument which reserves to any other person*

19 Section 20(5) of Partition Act
20 Section 69 (1)(a) (b) of Partition Act
21 Section 69(2) of Partition Act

the right to claim a re-transfer of such right, share or interest as aforesaid within a period specified therein, such other person shall be entitled to intervene at any time before judgment in the said action and establish the right claimed by him as if he had been a co-owner at the time of the institute of the action."

All such applicants who intend to intervene shall file a memorandum, nominating a person to be his legal representative (in accordance with of section 81) along with their application. Delay on the part of such applicant of making such application is not a fact to reject the application. But if an applicant has been guilty of unreasonable delay court can order to give security for cost or pre-payment of cost but no authority to dismiss or reject the application.

Through such provisions, legislature has taken every attempt to add all relevant parties who are not before court in various stages of the action and the duty of invoking of such provisions is vested with the District Judge. It must be emphasized that every party has a responsibility to disclose every other person who has any interest over the land to be partitioned. If any party fraudulently or dishonestly fails or omits to disclose such details in his pleadings it would amount to a criminal offense which can be summarily tried by a magistrate with the sanction of Attorney General.[22] In addition to that it could be considered as contempt of court and may be punished in accordance with the provisions of chapter LXV of the Civil Procedure Code.[23]

Even the surveyors are criminally liable for false reports, field notes, and false plans submitted to court and also tantamount to charge of contempt. So it is paramount duty of a judge to be vigilant to preserve the *in rem* nature of partition judgment by adding all necessary parties to the action. In **Gunathilka vs Muriel Silva**[24] it was held that;

"a party who is not a defendant in a partition action and who had made no application to intervene in the District Court can in certain exceptional circumstances come before the appellate court after entering of the interlocutory decree, either by way of revision or by way of an application in restitio in integrum and ask for relief in instances where the district court is made aware of the fact that such petitioner was a person who should properly have been added under section 70 (1)of the partition act before decree was entered."

It will be another problem with regard to the possession after such a judgment of the case resulting an endless dispute. On the other hand procedural errors may reverse the judgment as mentioned above. In the case of **Roslin vs Mary hamy**[25] Court of Appeal held that ;

22 Section 71 (1) of Partition Act
23 Section 71(3) of Partition Act
24 79 (1) NLR 481p (Vythialingam J. dissenting)
25 1994 (3) SLR 324p

> *"Revision will lie to set right a miscarriage of justice in the event of there being in the proceedings a fundamental vice which transcends the bounds of procedural error."*

It is quite clear that the series of judgments has been focused on the proper procedure of adding parties to the partition action deviating from other civil actions. Main ambition of that is to safeguard the interests of even the persons who are not parties. In property issues, not only the Roman Dutch Law but also personal laws like Muslim law and other territorial laws, such as, Kandyan Law and Thesawalamei Law are still applicable in Sri Lanka. Based on such laws, statutory provisions and case law followed by the common law principals are also available with regard to the inheritance rights over immovable properties. Additionally, there may be many interested persons over an immovable property whose claim based either on soil rights or improvements, plantations and cultivation etc. Unlike in other jurisdictions, Sri Lanka as a multinational country with a mixed legal system every person's rights must be adjudicated.

SUGGESIONS TO MINIMIZE PROCEDURAL MISTAKES -

Preparation of a checklist pertaining to the steps of the action and updating it case wise through subject clerks and routine supervision of their work will enhance the working capacity. Conducting awareness programs with guidelines for subject clerks including the registrar will help to proceed with duties without undue delay and will enhance their knowledge. Meanwhile the survey panel can be requested (if necessary) to strictly comply with the provisions of the partition act since they are considered as court commissioners. Suitable officer could be nominated (Registrar/Record Keeper or subject clerk) to look in to the commissioners' reports and report the defects if any. Even the registrar can be directed to file a comprehensive report before the trial.

CONCLUSION

In the case of **Banda vs Dasanayaka**[26] it was held that ;

> *"The court has to safeguard the interests of others who are not parties to the suit, who will be bound by the decree."*

Non-compliance with above provisions may cause irreparable damages not only to those who have an interest on the property but also to the parties of the case, ultimately resulting miscarriage of justice. That is against the legal maxim *"Actus curiae Neminem Gravabit"* (An act of court shall prejudice no one). As the judges have the immunity their

26 2006 (2) SLR 87p

role in judicial accuracy is a must. A sacred duty is cast upon judge to investigate the title of each and every party to the partition action. The words of Lord Denning (as Master of Roles) reflect the importance of the duty of the judge.

> *"In any case whatever your role, I would as master of the Roles, remind you that it is, in the long run on the maintenance law and order that civilized society depends".*[27]

27 Lord Denning, The Due Process of Law, Butterworths, 1993

LAW RELATING TO PROTECTION OF ELEPHANTS

Geethani Wijesinghe LLM (Colombo),
Magistrate, Kurunegala

INTRODUCTION-

The Asian elephant is a cultural symbol and considered as sacred in many South and South East Asian countries. It has become an endangered species both nationally and globally. The Asian Elephant is listed as threatened with extinction in the Red List published by the World Conservation Union (IUCN).[1] Elephant population is decreasing rapidly at present due to various reasons and it is currently restricted to a number of fragmented and isolated populations across thirteen South and South-East Asian countries.[2]

Since ancient times, the elephant, being the flagship animal in Sri Lanka, is always considered as a proud heritage of the country. They were well protected from killing and hunting by our ancient kings and rulers. However, with the colonization, British considered this magnificent creature as a pest to their cultivation and encouraged the killing of elephants by recognizing it as a game of the elite society.

According to statistics, there had been around 12,000 elephant population in Sri Lanka in early 19th century.[3] History says, Major Thomas William Rogers, Assistant Government Agent and the District Judge of Badulla, had hunted 1,600 elephants before he was killed by lightning in Haputale in 1845.[4] Some believes that his tombstone is attacked by lightning strikes even to date, as a result of his horrific hunting activities. This story

1 Ekaratne K., Ferando R.H.H.S., de Silva S., Bambaradeniya C.N.B. & de Silva D.(2003), A comparison of the Conservation and Legal Status of the Fauna and Flora of Sri Lanka, IUCN Sri Lanka, Colombo pg 67

2 Jayantha D., Dayawansa P.N., Airavana, Volume 1: Number 01(February 2006), The University of Colombo and The Department of Wildlife Conservation, Sri Lanka, pg v

3 Dharmawardhana V, Tree Frogs, Sinhala Rice & Gene Pirates, Biodiversity; Third World View(2000) pg 132

4 Muller J.B, Maj.T.W.ROGERS- hunter becomes the hunted, http://archives.dailynews.lk/2005/06/17/fea07.htm,10/21/16

depicts both the Sri Lankans' attitude towards protecting wild elephants and how the British lifted existed protection of this charismatic animal.

Sri Lankan elephants are unique among the world's population and the sub species of Asian Elephant *Elephas maximus maximus* is found only in Sri Lanka.[5] It is estimated that Sri Lanka has the highest density of elephants in Asia.[6] Therefore, it is needless to say that the protecting Sri Lankan elephants, draws a special attention among concerned stakeholders. Even though the British disregarded the existed protection given to wildlife including elephants at the beginning, later they introduced legal protection by Fauna and Flora Protection Ordinance enacted in 1937, with a primary view to regularize hunting. Fauna and Flora Protection Ordinance (FFPO) has now become the principle legislation which protects the wildlife in Sri Lanka, including elephants, with several amendments introduced later on.

Protection of wild elephants became a topic which had drawn an unprecedented attention in the recent past. Environmentalists and civil society organizations raised their voice against capturing juvenile elephants from the wild and domesticated them by using illegal methods. There are number of cases filed before the court of law on this issue and it is said that approximately 54 juvenile elephants have been captured from wild illegally. In this scenario, it is timely to analyze the current law of the country on protecting wild elephants.

OVERVIEW-

This article mainly focuses on the provisions of the Fauna and Flora Protection Ordinance on protecting elephants with a critical analysis of its amendments introduced in time to time. This will discuss the intention of the legislature in introducing the most recent amendment to FFPO in 2009, which incorporated even the provisions of the Offences against Public Property Act No. 12 of 1982. The Article contains a brief comparison of similar laws of the region where elephant habitats are found. Finally, this will project recommendations and suggestions for further development of the captioned legal provisions.

FAUNA AND FLORA PROTECTION ORDINANCE NO, 2 OF 1937 -

Fauna and Flora Protection Ordinance (FFPO) is the principle piece of legislation which is in operation to protect wildlife in Sri Lanka. The elephants have been given a special

5 Ranwella D. & Dr. Fernando, Prutiviraj, The Baby Elephant Suffering from a Trap, in Hambantota, Thambapanni, Vol 03, May 2009

6 Sri Lankan Elephant, https://en.wikipedia.org/wiki/Sri_Lankan_elephant, 11/13/2017

protection in this legislation and it is not an exaggeration to say that the elephants are well protected within our legal framework. There is a dual protection for elephants under the FFPO. Section 6 provides for a blanket protection for all animals within protected areas such as Strict Natural Reserves, National Parks, Nature Reserves and Jungle Corridors, prohibiting hunt, shoot, kill, wound or take any wild animal or have them in possession or under control, whether they dead or alive. Meanwhile, Part II of the Ordinance provides for a special protection only for elephants, which are found in outside of protected areas.

There are number of amendments which were introduced to the principle enactment in 1942, 1944, 1945, 1949, 1964, 1970, 1993 and 2009. In the principle enactment, all Tuskers, Elephants, Buffaloes, Deer and Fowl were protected under the Part II. Leaving the special protection exclusively for elephants, Deer and Fowl were dropped by Act No. 49 of 1993 and the Buffaloes were omitted by the Act No. 22 of 2009. According to the interpretation section of the Act, Elephant includes Tusker as well.[7]

PART II OF THE FFPO - "ELEPHANTS" -

Part II of the Ordinance consists of section 12 to section 29. Section 12 prohibits any person from hunting, shooting, killing, injuring or taking any elephant in any area outside a National Reserve or Sanctuary. Therefore it is clear that the elephants are totally protected whether they are in a protected area or outside.

There are very limited circumstances under the law, which allow an elephant to be disturbed or killed.[8] If any elephant cause or likely to cause damage to any person, house, crop, plantation or other property, the Director General of Wildlife can issue a licence or take steps to have such elephants driven off from an area. The other situation is when it appears to the Director that there is a **serious danger** to life or property by any elephant, he can issue a licence, subjected to condition, to shoot, kill or take such elephant within that area. Such killing, shooting or capturing should be informed to any police officer of the area, prescribed officer or to the Director forthwith. Prior to the 2009 amendment any elephant found trespassing repeatedly to any plantation or cultivation causing serious damage to the owner or likely to cause damage to life or property, the Director was empowered under, to issue licence to follow or pursue or to shoot, kill or take such elephant.[9] This section was repealed by the Act No 22 of 2009 and it is a positive development of the law, as this empowers authorities to issue licence with a wide coverage and there could be a possibility of misusing such permission. However, issuing of such licence is not a common practice and occurred very rarely. According to the sources

7 Section 26 of the Act No.22 of 2009
8 Sections 13(1)(a) &(b) of FFPO
9 Section 14 of FFPO (Repealed)

of the Department of Wildlife, no licence has been issued to kill or shoot any elephant almost in three decades.

Section 20 (1) (a) & (b) describe that any person who act in contravention of the tenor of any licence issued to him and there under hunts, shoots, kills, injures, takes, follows, or pursues any elephant or uses any electric wire to kill, injure or take any elephant or uses any device to harm any elephant is committing an offence.[10] Special feature of the said provisions, which was not available prior to 2009, is that the methods of hunting or killing such as electrocution and using devices, have also been included.

TRADING AND EXPORTING -

Section 19 regulates exporting of elephants. It says, no elephant, whether wild or tame, shall be exported from Sri Lanka to any place outside Sri Lanka except under the authority of a special permit issued by the Director General of Wildlife. This protection applies not only to elephants but also to tusk, tush, any article made out of containing ivory, parts of elephant and any article made out of or containing parts of an elephant.[11] Both these sections have the effect as if they formed part of the Customs Ordinance and the provisions of that Ordinance apply accordingly. Section 12 and section 44 of the Customs Ordinance are relevant in this regard.

Any person who exports an elephant without a permit is liable to pay a fine between Rs.150,000/- and Rs. 500,000/- or/ and to imprisonment of either description for a term between 2 year and 5 years.[12] In case of exporting any tusk, tush or a part of an elephant as described under section 19 (a) (1), such person shall on conviction be liable to a fine between Rs. 50,000/-and Rs. 200,000/- or/ and to a imprisonment of either description for a term between 2 years and 5 years.[13]

any person who takes, dismembers, removes, sells or purchases the carcass, or any part of a carcass of any dead elephant which is the property of the State shall be guilty of an offence and on conviction be liable to pay a fine between Rs. 150,000 and Rs. 250,000/- [14] and/ or to imprisonment of either description for a term between 2 years and 5 years.[15]

10 Section 20 (1) (a) & (b) of FFPO as amended by Act No. 22 of 2009, fines were increased by Increase of Fines Act No. 5 of 2012
11 Section 19A of the Act No. 49 of 1993
12 Section 20(1) of the FFPO
13 Section 19(a) (2) of the FFPO
14 Fine was increased by Increased of Fines Act No. 12 of 2005
15 Section 21(1) of the FFPO

ELEPHANTS IN CAPTIVITY-

Having an elephant in one's possession is considered as a symbol of wealth and a reflection of social statues in the Sri Lankan society. Possessing an elephants has been recognized by the Law itself and there are clear legal provisions to have them in captivity. According to section 22(a), it is illegal to have an elephant in one's custody unless a licence has been obtained from the Director General of Wildlife. In addition, such elephant should be registered in a register maintained by the Director by paying a prescribed fee. If anybody receives an elephant as a sale, gift or by the death of the previous owner, the new owner should take steps immediately to cancel the previous registration and get a fresh registration done under his name. Act is empowered to make regulations stipulating necessary conditions in registration and issuing licences for elephants in captivity.[16]

There is a loud dialogue in the society that elephants in captivity are being kept in very poor conditions without adequate space and other requirements. However, the law provides for the Director or any authorized officer *inter alia* to make necessary inquiries and investigations to ascertain whether the provisions of licence are being complied with.[17]

It was revealed by the media and several environmental organizations recently that juvenile elephants are being captured from the wild and various individuals possess them without valid licences. 'Although there have been less than a handful of baby elephants born into captivity in Sri Lanka since 1980s – not counting those born at the Pinnawala Orphanage- there has been, strangely enough, an increase in the number of registrations of baby elephants at the Department of Wildlife Conservation (DWC)'.[18] However, adequate legal provisions are available to avoid such illegal activities, provided that the strict compliance of the same by the authorities. According to sections 22 (9), (10) & (11) in the event of pregnancy of any registered she- elephant, the owner is required to inform such pregnancy as well as any birth, miscarriage or still birth of the elephant within seven days of the date of the occurrence of any of the said events, to the Director. Even the death of a captive elephant should be informed to authorities before the remains are destroyed.

It is interesting to see that there are two separate penalties for having an elephant which is not registered or in contravention with the conditions of licence and for having an illegal custody of an elephant.[19] Under section 23, the term of imprisonment is much higher. In addition, the court may on the conviction make an order for the disposal of the elephant

16 Section 22(a) of the FFPO
17 Section 22(a)(8) of the FFPO
18 Anver Gazala, A Closer Look at Sri Lanka's Illegal Elephant Trade,3/2/16 ,http://roar.lk/reports/closer-look-sri-lankas-illegal-elephant-trade, 13/11/16
19 Section 22a(7) of the FFPO

in respect of which the offence was committed, having regard to the rights of any other person who may appear to be lawfully entitled to the possession of such elephant.[20]

Law further clarifies in section 23(2) what are the instances of having an elephant becomes illegal. Precisely, the section says the instances where a person can keep an elephant, hence all the other possessions becomes illegal covering a very wide range.

Section says, unless a person;

(a) is the captor of that elephant under the authority of a licence issued under the Ordinance or under any written law repealed by Ordinance No. 2 of 1937; or

(b) is the successor in title to such captor; or

(c) is in possession on behalf of such captor or his successor in title.

(d) has registered and licenced the elephant in terms of section 22A of the Ordinance.

having an elephant in custody of that person, is illegal.

It is not only the elephants which are required to be registered. Any tusk or a tush also has to be registered in a register maintained by a prescribed officer and a licence should be obtained. It is an offence to have in possession, a tusk or tush or any part which has not been registered or without a licence.[21] Disposal of productions, applicability of the Offences against Public Property Act, powers conferred to the Director for inspection, are applicable in respect of tusk or tush in the same way as provided for elephants.

Additionally, where it appears to the Director or to any police officer or other prescribed officer that any person is in unlawful possession of any elephant, tusk or tush, they are authorized to seize such elephant, tusk or tush and detain and then to apply to the Magistrate having jurisdiction over the place where they were seized to make an order for the disposal after a due inquiry.[22]

FURTHER PROTECTION UNDER THE FFPO -

Apart from the provisions of the Part II of the FFPO, there are other salient features in respect of the conservation and the protection of elephants.

As it was mentioned earlier, under section 6 of the FFPO, all plants and animals which are inside of a National Reserve are protected from hunting, killing and other modes

20 Section 23(1) of the FFPO
21 Section 24(3) of the FFPO
22 Section 24 of the FFPO

of disturbances.[23] While the above section is in force, section 58A, goes further and introduce enhanced punishment to anyone who kill, hunt, shoot, injure, capture, do any act to take possession or control of an elephant within a National Reserve or Sanctuary.[24] This provision clearly shows the special protection given to elephants under the Law.

Section 60 A, which was introduced by Act No.22 of 2009 says, if the production is difficult to be moved or transported in any prosecution under the FFPO, in respect of a plant or animal or a carcass, a certificate issued by a wildlife officer not below the rank of a Wildlife Ranger or a police officer not below the rank of an Assistant Superintendent of Police to that effect, shall be admissible *prima facie* evidence of such fact, until the contrary is proved. This is a very practical and a useful provision, especially when it comes to a persecution in respect of an elephants.

Section 60E is another very progressive and an important introduction. It says, proceedings can be instituted by any person, in any court of law, for an order or remedy or restrain in respect of any contravention of the provisions of this Act, whether the rights of such person has been infringed or not by or as a consequence of such contravention. There is a proviso to the section requiring to give 60 days prior notice to the Director General of Wildlife of such proceedings. In the absence of a provision of this nature, it will be quite difficult to institute cases in court by interested and able parties like environmental organizations and concerned individuals. This is a leaping step in the point of environmental conservation.

Amending the section 2(2) by the Act No.22 of 2009, the Minister has been empowered to declare any specified area of land within Sri Lanka (other than land declared to be a National Reserve) as a Sanctuary or a Managed Elephant Reserve which may include state land and lands other than state land. This is a positive inclusion as elephants are losing their habitats rapidly with development activities.

The indemnity clause mentioned in section 60(1) also an important provision as it says that any act prohibited under the FFPO shall not be an offence if it is done for the purpose of protecting any human being from any immediate danger or from injury.

BACKGROUND FOR THE AMENDMENT IN 2009 -

The law relating to elephants has become stronger with the amendment introduced in 2009. On 22nd October 2008, the then Minister of Environment and Natural Resources, Mr. Patali Champika Ranwaka, at the second reading of the bill, has explained the background for the amendment, in the parliament. He has explained four main reasons to bring the

23 Section 6 of the EFPO
24 Section 58A of the EFPO

amendment. Firstly, to increase the fines imposed under the Act, secondly, to avoid loopholes in implementing the existing provisions considering new social developments, thirdly, to give an special attention and a protection for endangered species of the country by amending the schedules of the Act and finally, to introduce better management and protection plans with public participation for the protected areas. He has further stressed the fact that Sri Lanka is among the top 25 bio diversity hot spot countries in the world and, many of our wildlife are becoming extinct due to various reasons. Therefore it is paramount important to strengthen the law to protect the wild life in Sri Lanka.[25]

OFFENCES UNDER THE PUBLIC PROPERTY ACT; BAIL -

Law relating to elephants in captivity has been further strengthened by the Act No. 22 of 2009, by incorporating the provisions of the Offences against Public Property Act. Section 22 (A) (12) of the FFPO says any elephant which has not been registered under that section shall be presumed to be taken or removed from the wild without lawful authority or approval and such elephants shall be deemed to be a public property. It further says, provisions of the Public Property Act, shall accordingly apply in respect of such elephants. Mischief, Theft, Robbery, Dishonest Misappropriation, Criminal Breach of Trust, Cheating and Forgery in respect of public property are identified under the Public Property Act. It is implied by these provisions that an elephant is always be a property belongs to the State and a person can possess an elephant only under an authority of a licence.

The interesting provision in the Public property Act is the bail provision mentioned in section 8 and it says that if there is a certificate from an officer of a rank not below the Assistant Superintendent of Police to the effect that the value of the property is more than Rs.25,000, bail shall be granted only in exceptional circumstances. Therefore the provisions for granting bail too would be applicable in the event of possessing an unregistered elephant.

The section 3(1) of the Bail Act says, provisions of the Bail Act are not applicable to any other written law which makes express provisions in respect of the release on bail. There is an express provision for bail in Public Property Act and hence, the Bail Act would not apply in offences comes under the said Act. This view was confirmed by the Supreme Court, in ***Shiyam vs. OIC, Narcotic Bureau and others*** (2006) 2 SLR 156. Therefore, the Bail Act would not apply for an offence under section 22(A) (12) of the FFPO coupled with the provisions of the Public Property Act, i.e, '*keeping an elephant without a valid registration or a valid licence*'. At the same time, section 20(2) of the FFPO says, that any

25 HANSARD of Parliament of Sri Lanka, Vol 177- No.13, 22/10/2008

offence committed under the Act involving an elephant shall be a non-bailable offence and the provisions of the Bail Act, No. 30 of 1997 and the Code of Criminal Procedure Act No. 15 of 1979 shall apply in respect of such offence. Therefore one can argue that these two provisions are contradictory and the Bail Act would apply in respect of offences comes under section 22 as well. This might arise in a situation like filing an anticipatory bail application in respect of offences for non registration and licensing of elephants.

However, it is to be noted that the logical interpretation of above sections is that the Bail Act would only apply to the offences described in the FFPO, other than the section 22 which describes the offences of possessing an elephant without a valid registration or a valid licence.

INTERNATIONAL PROTECTION FOR THE ASIAN ELEPHANT -

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is the most important international convention in this regard. It is a multilateral treaty which came into force on 1st July 1975 and Sri Lanka ratified the same in 1979. There are more than 35,000 species listed under this convention and it regulates and controls the trade of wild fauna and flora. There are 3 appendixes of species to the convention which vary upon the protection given to them. Appendix I contains about 1200 species identified as threatened with extinction or may be affected by trade, and given the highest protection. Commercial trade of wild-caught specimen is illegal under this category.[26] Asian Elephants are included in the Appendix I of the CITES and hence, the trade of wild captured elephants or parts of them (ivory and tush) are illegal.

PROTECTION FOR ELEPHANTS; OTHER JURISDICTIONS -

India;

It is worthwhile to note that Sri Lanka is the only country which has provided a special chapter of a legislation to protect elephants among other countries in the region with elephant habitats. In India, elephants are protected under the Wild Life (protection) Act 1972. Section 9 of the Act says, No person shall hunt any wild animal specified in schedule I, II, III and IV except as provided in the Act. Schedule I of the Act includes Asian Elephant. Hunting or capturing of elephants is permitted under special circumstances where the Chief Wild Life Warden may satisfied that any wild animal comes under schedule I has become dangerous to human life, disabled or diseased beyond recovery. A permit can be issued to hunt such animal. Act says no person can keep, posses or acquire any elephant without an ownership certificate issued by the Chief Wild Life warden. Ivory trade also is banned under the Act.

26 CITES, https://www.cites.org/eng/disc/what.php,12/11/16

Bangladesh;

All wild elephants in Bangladesh are protected under the Third schedule of the Bangladesh Wildlife (Preservation) Act of 1974. Section 5 (2) of the Act says animals specified in the third schedule are protected animals and shall not be hunted, killed or captured save as otherwise expressly provided in the Act. There are no clear specific provisions regarding domesticated elephants, but certain other provisions are available which could be used to regulate domesticated animals.[27]

Nepal & Bhutan -

National Parks and Wildlife Conservation Act, 1973 is the relevant legislation in Nepal. Section 9 says, wildlife mentioned in schedule I of the Act, are considered as protected and their hunting are prohibited. Wild elephants are included in the schedule I. It further says a rogue wild elephant, a man-eater tiger and wildlife that suffers from disease or have become disabled and may not survive, shall be killed or captured on the order of the prescribed officer. Under the Forest and Nature Conservation Act of Bhutan 1995, Asian Elephants are protected under the schedule I of the Act.

RECOMMENDATIONS -

In a careful analysis of the above mentioned legal provisions, it is correct to say that Sri Lanka has a very strong and comprehensive law to protect elephants, especially with the introduction of the amendment by Act No. 22 of 2009 to the FFPO.

There are number of elephants in elephant orphanage and in the National Zoological Garden in Sri Lanka. It is recommended that new laws should be introduced for better management of such places. Reportedly, there had been instances where the elephants in captivity are ill-treated by care takers. Laws on cruelty to animals should be strengthened paying special attention to elephants in captivity.

Further, there is a concern among environmentalists that the strong genes of magnificent elephants in captivity are not being transferred to the future generations, as many licence holders don't pay much attention of mating requirements of elephants in captivity. Therefore it is time to introduce laws or regulations with the intervention of the government, to protect the gene pool of the elephants in captivity.

Certain concerned parties are with a view that Sri Lanka should introduce a new legislation to give effect to the provisions of the CITES. However, the writer is with the view that as Sri Lanka has very comprehensive provisions in the FFPO prohibiting trade in respect of protected wildlife, introducing another law will create confusions and ambiguities.

27 Islam Anwarul, Conservation of the Asian Elephant in Bangladesh, GAJAH, Volume 25: (2006) pg 21

CONCLUSION -

There is no doubt that this magnificent animal is a precious heritage of Sir Lanka. Every endeavor to protect them from extinction has to be made. Though our legislature has made a commendable effort to strengthen the law in this regard, various threats faced by elephants are rising at present. It is crystal clear that there is a lack of implementation of this well drafted law. Therefore, it is the utmost duty of all law enforcement authorities and the government officials to strictly comply with the relevant legal provisions so that this valuable gift of Mother Nature could be handed over to the future generation.

TO BE HANGED BY NECK TILL DEATH

Girish Kathpalia[1]
Registrar General,
High Court of Delhi, India

INTRODUCTION

To abolish from or retain on the statute book capital punishment is a quandary, which has been most widely deliberated and debated upon in many societies across the globe by criminologists and penologists as matter of staid human concern. The abolitionists versus retentionists debate ignited by the utilitarians like Bentham and Beccaria in England and Europe, who advocated that punishment being an evil in itself should be just sufficient to curb the menace of crime and that no excessive punishment, including capital punishment, ought to be inflicted where some lesser penalty could achieve the same result, remains inconclusive till this moment. In England, the crusade against capital punishment carried on by Sir Samuel Romilly and other reformers, like Sir James Mackintosh, John Bright and Sydney Silverman led to almost complete abolition of capital punishment under the Murder (Abolition of Death Penalty) Act, 1965, laying down that no person convicted of murder shall suffer death sentence and shall be punished with life imprisonment. In the United State of America, the trend for abolition of capital punishment commenced in 1847, when the State of Michigan abolished it except for Treason and since then many more states have followed the suit. Currently, capital sentence is legally sanctified in 33 states and in the federal civilian and military legal systems of the USA. The constitutionality of capital punishment, as violative of the Eighth Amendment of the American Constitution, was challenged before the American Supreme Court in the case of ***Furman Georgia*** reported as [1972] 408 US 239 and the court by a majority of five to four held that capital

1 Former Lecturer, Campus Law Centre, Faculty of Law, Delhi University, India.
Author of Book Criminology & Prison Reforms, Girish Kathpalia, Lexis Nexis 2014

punishment, at least as generally administered, violated the Eight Amendment. Justice Douglas from the said bench observed that the death penalty was cruel and unusual because it was being applied irregularly and selectively to minorities whose members are few, who are outcasts of society and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board. As a result of the *Furman* judgment, 35 States in the US amended the procedural laws to gear up to the constitutional requirements regarding death penalty.

DEBATE; ABOLITIONISTS V. RETENTIONISTS -

The debate between those advocating retention of capital punishment and those advocating abolition thereof hinges mainly on the justification of the death sentence and on non availability of alternate measures.

To begin with, retentionists of capital sentence argue that death penalty carries a very strong symbolic value, and can be rationalized on the basis of its motives, one of which may be vengeance. It is argued that legal vengeance solidifies social solidarity against law-breakers and probably is the only alternative to the disruptive private revenge of aggrieved. However, some of the retentionists avoid the argument of retribution while dealing with the issue of death sentence and instead rely rather more heavily on the deterrent aspect of the capital punishment.

Per contra, abolitionists, generally speaking, counter that capital punishment cannot be justified in terms of retributive purposes in the contemporary civilized world, which has generally rejected any form of retributive punishment. At the same time, whether or not capital punishment necessarily carries deterrent impact has always been a debatable issue.

Chief arguments of abolitionists are as follows. Death being irreversible process, the capital penalty executed on an innocent by the fallible humans, following the fallible processes of law, causes irreversible injustice to the convict and his family. Retribution, in the sense of vengeance, has been strongly abhorred by the civilized society and rather the progressive approach is towards reformation of criminal, therefore death penalty does not fit in the progressive approach of the criminal justice system. The alleged deterrent effect of death penalty remains unproven and there is no convincing evidence to show that death penalty serves any penological purpose. Validity of death punishment is also challenged from humanistic angle that it dehumanizes and degrades on account of its brutality. And it is always the poor people who run greater risk of capital punishment and rich persons are always able to avoid it with the help of their wealth.

As regards irreversibility of capital sentence, no doubt there have been instances where the person, for whose alleged killing the convict was awarded death sentence and was executed, resurfaced, or where some subsequently gathered evidence established innocence of the person awarded death sentence and such person had already been executed, and the State was found helpless in bringing the executed convict back to life. But this can be an argument for judicial reforms, not for abolition of capital punishment. Such errors of judgment leading to wrongful convictions can never be eliminated altogether from any system of justice, so in various countries like India, the statute as well as judicial precedents lay down elaborate procedural checks and safeguards that infinitesimally reduce chances of such errors. Further, the irreversibility argument also fails on the count that it applies not to just capital sentence, but to every form of punishment in the sense that a person wrongly imprisoned, even if just for a day, cannot be given back that time which he was wrongly forced to spend in jail. Mere likelihood of implementation error cannot be a ground to scrap off any law.

So far as penal purpose of capital punishment is concerned, in most of the countries across the world, including India, a large part of population, including notable penologists, judges, jurists, legislators and other enlightened people believe that death penalty for murder and certain other capital offenses does serve as a deterrent, and a greater deterrent than life imprisonment. The very fact that every convict sentenced to death seeks commutation into life imprisonment speaks volumes that capital sentence does bear a strong deterrent effect. Looking at it the other way, there can never be a criminal who, when sentenced to death and brought out to die, would reject the offer of commutation of his sentence for the severest secondary punishment. For, all that a man has will he give for his life and in any secondary punishment, however terrible, there is hope, but death is death and its terrors cannot be described more forcibly.

Even Marchese De Cesare Bonesana Beccaria, who can be called the father of the modern abolitionist movement, conceded in his treatise, *Dei Delitti a della Pana* (Original paper published in 1764), that capital punishment would be justified in two instances, namely, if an execution would prevent a revolution against popularly established Government; and if an execution was the only way to deter others from committing a crime.

If investigations indicate that probability and length of imprisonment do impart significant deterrent effects, then failure of research to demonstrate specifically the deterrent efficacy of capital punishment may be taken more as evidence of shortcoming in the research design and methodology or in the measures of the theoretically relevant variables used than as a reflection on the validity of the deterrence theory itself. The deterrent effect of both, capital punishment and life imprisonment is obscured by the fact that most criminals plan a crime on their belief that they are going to avoid detection and penalty. The deterrent value is with respect to people who do not commit crimes, as they are deterred from becoming murderers by the fact that capital punishment or some other heavy penalty would be meted out to them if caught. We can number its failures. But we cannot number its successes.

The abolitionist argument that it is always the poor people who run greater risk of capital punishment and rich persons are always able to avoid it with the help of their wealth, is fallacious. For, these are defects in the administration of justice and are not concerned with retention or otherwise of capital punishment as such.

Similarly, the argument that courts are sometimes reluctant to find a person guilty of a capital offence due to the severity of the punishment involved, and thus legal interpretation is accordingly strained, pertains only to administration of justice and not validity of the punishment.

Another such fallacious argument brought by the abolitionists is the subjective approach of judges, in the sense that as reflected from line of judgments delivered by them, some are pro death penalty while some are anti, so it becomes a matter of unpredictable chance as to before which judge the matter goes for hearing. This argument also fails to hold water. For, not just in case of death sentence, it is so in every kind of sentencing or for that matter even in the civil issues such as tenancy, matrimonial or commercial disputes etc., which are based essentially on the personal judgment of the judge. One cannot afford to replace the judicial discretion in sentencing, severity of sentence varying from case to case depending on its peculiar circumstances, with computer precision devoid of sensitivity.

Sometimes, abolitionists argue that many murders are committed in the heat of the moment without premeditation on the part of the offender, so it is quite inappropriate to talk of death sentence in such cases. It needs to be pointed out that in such killings death penalty is either not possible or is not awarded. Capital punishment in such cases is not even prescribed as a punishment in many countries, keeping in mind the clear distinction between various manifestations of mind of the criminal at the time of committing the offence. Otherwise also, judges have discretion to award lesser sentence even in cases of murder instead of death sentence in some extenuating circumstances.

The issue of capital punishment, hence involves dialectical quandaries, some of which are not capable of being proved or disproved, and certain assumptions and conjectures are therefore inevitable. The debate between the abolitionists and retentionists is, therefore, bound to be endless.

CAPITAL PUNISHMENT - INDIAN PERSPECTIVE

In India also, the debate between retentionists and abolitionists has kept jurists, law makers and public at large constantly engaged over past decades.

For abolition of capital sentence a bill was introduced in the Lok Sabha in 1956, which was rejected by the House. Thereafter, in 1958 and again in 1962 efforts were also made in the Rajya Sabha to move resolution for abolition of capital punishment but both resolutions were withdrawn after some debate in the House. Although capital sentence till date continues to be on statute book in India as a recognized mode of punishment, over a period of time, by way of various progressive judicial pronouncements, scope of imposition of capital sentence has been narrowed down to the 'rarest of rare cases'. Indian courts, by way of judicially sanctified approach have tilted towards avoidance of this form of punishment.

In India, quite a significant development in this context has been qua procedural law. Under section 367(5) of the Criminal Procedure Code, 1898, as it stood prior to the 1955 amendment, the normal rule was to sentence the murder convict to death and if the court opined to impose lesser sentence of imprisonment for life, then reasons were necessary to be recorded in writing. But the said provision was deleted in the 1955 amendment to the old Code, doing away with the requirement to record reasons for awarding punishment lesser than death. Subsequently, now under the current Criminal Procedure Code, 1973, the court is duty bound to record reasons where it finds the case fit to award capital punishment. Due to such changes in the Criminal Procedure Code and the judiciary's aversion to capital punishment, use thereof has progressively declined.

The Law Commission of India in its 35th report, took the premise that arguments for or against capital punishment valid in other countries need not necessarily be valid for India as well, and after carefully sifting through all the materials collected by them, recorded their views regarding the deterrent effect of capital punishment thus:

> *"In our view capital punishment does act as a deterrent. We have already discussed in detail several aspects of this topic. We state below, very briefly, the main points that have weighed with us in arriving at this conclusion:*
>
> *(a) Basically, every human being dreads death.*
>
> *(b) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.*
>
> *(c) Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State*

Governments, Judges, Members of Parliament and Legislatures and Members of the Bar and police officers - are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.

(d) As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.

(e) Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.

(f) Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it."

Further, in the same report, the Law Commission of India also recognized the existence of retribution element inherent in capital punishment *albeit* in a somewhat subtle form, pointing out that retribution and deterrence are not two divergent ends of capital punishment but ultimately merge into one thus:

"The fact remains, however, that whenever there is a serious crime, the society feels a sense of disapprobation. If there is any element of retribution in the law, as administered now, it is not the instinct of the man of jungle but rather of refined evolution of that instinct – the feeling prevails in the public is a fact of which notice is to be taken. The law does not encourage or exploit it for any undesirable ends. Rather, by reserving the death penalty for murder, and thus visiting this gravest crime with the gravest punishment, the law helps the element of retribution merge into the element of deterrence."

The Law Commission of India in the said 35th Report concluded that the risks involved in the abolition of capital punishment could not be undertaken in the present state of the country for the reasons as follows:

"The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind. It is difficult to rule out the validity of or the strength behind many of the arguments for abolition. Nor does the Commission treat lightly the argument based on irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment and the strong feelings shown by certain sections of public opinion in stressing deeper questions of human values. Having regard, however, to the conditions in India, to the variety of the social upbringing of its

> *inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the abolition of capital punishment. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts.*"

To sum up, it may be observed that the present position regarding capital punishment in India is quite a balanced one. Capital punishment has never been employed in this country with a vengeance. To continue this punishment on the statute book but to use it in rarest of rare cases seems to be the best compromise between the extreme attitudes of the retentionists and abolitionists of the capital punishment.

CAPITAL PUNISHMENT - JUDICIAL APPROACH IN INDIA -

It would be apposite to traverse through the progression of the judicial approach to the issue of death sentence with the help of some of the celebrated judicial pronouncements of the Supreme Court of India.

In the case of ***Dalip Singh vs State of Punjab***, AIR 1953 SC 364 the Supreme Court of India held thus:

> *"In a case of murder, the death sentence should ordinarily be imposed unless the trying Judge, for reasons, which should normally be recorded considers it proper to award the lesser penalty. But the discretion is his and if he gives reasons on which a judicial mind could properly be found, an appellate Court should not interfere. The power to enhance a sentence from transportation to death should very rarely be exercised and only for the strongest possible reasons. It is not enough for an appellate Court to say, or think, that if left to itself it would have awarded the greater penalty because the discretion does not belong to the Appellate Court, but to the trial Judge and the only ground on which an appellate Court can interfere is that the discretion has been improperly exercised…*"

In the case of ***Pandurang vs State of Hyderabad***, AIR 1955 SC 216 the Supreme Court of India held that the sentence should be reduced to transportation where there exists a difference of opinion in the High Court, not only on the question of guilt, but also on that of sentence, since it was a consistent practice that when appellate judges agree on the question of guilt but differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons.

In the case of ***Bhupendra Singh vs State of Punjab***, AIR 1968 SC 1438 the Supreme Court reduced the extreme penalty, observing thus:

> *"A plea was put in for reduction of sentence. Ordinarily, this court, in exercise of its powers under Art l36 of the Constitution does not interfere with a sentence awarded by a Sessions Judge and upheld by the High Court; but, in this, case, there are some special features which we cannot ignore. Even according to the prosecution, the murder of Gurdarshan Singh by the appellant was not premeditated. The act of firing at him appears to be that of a hot-headed person who was incited to do so by his father. The murder was not in any way cruel or brutal. In all these circumstances, we think that the ends of justice would be met if the lesser penalty prescribed by law is awarded to the appellant. Consequently, while upholding the conviction, we allow the appeal to the extent that the sentence of death is set aside and, instead, the appellant is sentenced to imprisonment for life."*

Similarly, in the case of ***Karnesh Kumar Singh vs State of UP***, AIR 1968 SC 1402 the Supreme Court recorded the following reasoning to commute the death sentence awarded by the trial court and confirmed by the High Court:

> *"As regards the sentence of death imposed on appellants Karnesh, Krishna, Kaushal and Chhetrapal, it is difficult for us to agree with that order passed by the Trial Court and confirmed by the High Court. In imposing the sentence of death on these four appellants, the Trial Court made a distinction between them on the one hand and the rest of the appellants, on the other. The distinction was made on the ground that three of them were armed with firearms and that they all fired at Lal Singh simultaneously, that appellant Chhetrapal had shot at Harihar also and finally, that appellant Kaushal had given a hatchet blow to Harihar. In our view, the evidence on which this distinction was made cannot be said to be fully satisfactory. It is true that PW1 while giving evidence stated that the three appellants had fired simultaneously at Lal Singh, that Chhetrapal had also fired at Harihar and that Kaushal had given a hatchet blow to him. But the FIR merely states that three shots were fired at Lal Singh but does not state that they were fired by the three appellants simultaneously, nor does it state that Chhetrapal had fired at Harihar after he had been dragged out on the road. It is hardly conceivable that if PW1 had seen these appellants firing either at Lal Singh or at Harihar, he would have forgotten to make a positive statement about it in the FIR. In view of this omission, it is difficult to build the conclusion with any certainty on his subsequent statement that the three appellants had simultaneously fired at Lal Singh and that Chhetrapal had shot at Harihar after he had been brought out of the house. The possibility of any one or two of them having fired the three shots in quick succession cannot, therefore, be ruled out. In that case the distinction made on the basis that all the three of them had fired at Lal Singh cannot be sustained.*

> *Therefore, the reason given by the Trial Judge for imposing the extreme penalty on these four appellants as against the rest becomes difficult to sustain. It is true that these four appellants were armed with firearms and a hatchet. But the others also were armed with equally dangerous weapons, such as spears and bankas. The said distinction being not sustainable, the proper punishment that should have been awarded to the four appellants in the absence of clear evidence as to who inflicted the fatal blows, should have been the same punishment as imposed on the rest. We have, therefore, to set aside the sentence of death imposed on the aforesaid four appellants and impose on them the sentence of rigorous imprisonment for life. Except for this modification, the appeal fails and is dismissed."*

Death sentence awarded by the trial court and confirmed by the High Court, to the convict for murder was commuted by the Supreme Court in the case of ***Hazara Singh vs State of UP***, AIR 1969 SC 951 observing that if the convict intended, he could have assaulted the deceased with sharp edge of an axe carried by him, instead of using the axe like a stick, so this case does not call for death penalty. In the case of ***Gurdip Singh vs State of Punjab***, AIR 1971 SC 2240 the Supreme Court commuted the death sentence awarded to a murder convict, on the ground that it appeared probable that the convict had fired shots after a provocation extended by the deceased.

In the case of ***Paras Ram vs State of Punjab*** {*SLP(Crl) Nos 698 and 678 of 1973, decided on 9 October 1973 by the Supreme Court of India*} the factual matrix was that the appellant Paras Ram, a fanatic devotee of the Devi, used to hold *satsangs* in which *bhajans* were sung in praise of the Goddess; during one such *satsang*, the appellant at crescendo ceremonially beheaded his four year old son and as such was tried, convicted and sentenced to death for the offence of murder. Death sentence was confirmed by the High Court, which led to the appellant filing a petition for grant of special leave to appeal, contending that the very monstrosity of the crime provided proof of his insanity sufficient to exculpate the offender under section 84 of the Indian Penal Code, 1860, or at least material for mitigation of the sentence of death. Hon. Justice Mr. VR Krishna Iyer, speaking for the bench, refused to grant special leave and summarily dismissed the petition observing thus:

> *"The poignantly pathological grip of macabre superstitions on some crude Indian minds in the shape of desire to do human and animal sacrifice, in defiance of the scientific ethos of our cultural heritage and the scientific impact of our technological century, shows up in crimes of primitive horror such as the one we are dealing with now, where a bloodcurdling butchery of one's own beloved son was perpetrated, aided by other 'pious' criminals, to propitiate some blood-thirsty deity. Secular India, speaking through the Court, must administer shock therapy to such anti-social 'piety', when the manifestation is in terms of inhuman and criminal violence. When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court.*

> *Social justice has many facets and Judges have a sensitive, secular and civilizing role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants."*

In the case of ***Jagmohan Singh vs State of UP***, AIR 1973 SC 947 the factual matrix was that the appellant, who had for long time nurtured enmity against the deceased, concealed himself and co accused carrying country made pistol and *lathi* in the fields and challenged the passing by deceased to settle scores; the deceased tried to run away, but the appellant chased him and shot him dead. Death sentence awarded by the Sessions court was confirmed by the High Court, which followed grant of special leave to appeal limited to imposition of death sentence. In appeal, the constitutional validity of capital punishment was challenged, arguing that the 'right to live' was basic to the freedoms guaranteed under Article 19 of the Constitution. Repelling the contention on the basis of elaborate discussion, the apex court of India held that capital punishment cannot be regarded *per se* as unreasonable or not in the public interest, and consequently, could not be said to be abrogative of Article 19 of the Constitution.

In the case of ***Ediga Anamma vs State of Andhra Pradesh***, reported as AIR 1974 SC 799 the Supreme Court of India observed that *'deterrence through threat of death may still be a promising strategy in some frightful areas of murderous crime'*. It was further observed that *'horrendous features of the crime and the hapless and helpless state of the victim steel the heart of law for the sterner sentence'*.

Subsequently in the case of ***Shiv Mohan Singh vs State (Delhi Administration)***, (1977) 3 SCR 172, same Justice Mr. VR Krishna Iyer, who had written the judgment in ***Ediga Anamma*** (supra) observed that in ***Ediga Anamma*** case the court, while noticing the social and personal circumstances possessing an extenuating impact, had equally clearly highlighted that in India under present conditions deterrence through 'death penalty may not be a time barred punishment in some frightful areas of barbarous murder'.

In the case of ***Ramesh Randas Teli vs State of Maharashtra***, AIR 1976 SC 345 the Supreme Court of India upheld the death sentence on a murder convict, observing:

> *"We find no extenuating circumstances to reduce the sentence. The deceased had done no harm to the appellant. The appellant is apparently a desperate character who would not stop at killing rather than be caught in an attempt to steal after breaking into a house. We do not think that anything less than a death sentence is deserved by him."*

Then, in the case of ***Balwant Singh vs State of Punjab***, reported as AIR 1976 SC 230 the Supreme Court of India observed that even after noticing the provisions of section 354 of the Criminal Procedure Code, 1973, the High Court had committed an error in relying upon the two decisions of the Supreme Court in which the trials were held under the Criminal Procedure Code, 1898, and thence the High Court wrongly relied upon the principle of absence of extenuating circumstances - a principle which was applicable after the amendment of the old Code from 1 January 1956 until the coming into force of the new Code from 1 April 1974. The Supreme Court held thus:

> *"Under this provision (Sec.354(3) CrPC) the Court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence. It is unnecessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case. But we may indicate just a few, such as, the crime has been committed by a professional or a hardened criminal, or it has been committed in a very brutal manner or on a helpless child or a woman or the like. On the facts of this case, it is true that the appellant had a motive to commit the murder and he did it with an intention to kill the deceased. His conviction under section 302 of the Penal Code was justified but the facts found were not such as to enable the Court to say that there were special reasons for passing the sentence of death in this case."*

In the landmark case of ***Bachan Singh vs State of Punjab***, AIR 1980 SC 898 the five judge Constitution Bench of the Supreme Court of India traversing through the debate of retention versus abolition of death sentence recapitulated the earlier precedents and observed thus:

> *"To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provisions as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary to express any categorical opinion, one way or the other, as to which of the two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners' argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to be contrary, a very large segment of people, the world over, including sociologists, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in*

the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Section 235 (2) and 354 (3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. Therefore, it could be concluded that the impugned provision is Section 302, violates neither the letter nor the ethos of Art. 19."

But Hon. Mr.Justice PN Bhagwati, one of the judges dealing with the case of ***Bachan Singh vs State of Punjab*****,** took dissenting view and reserved his judgment, which was pronounced later and came to be reported as AIR 1982 SC 1325. Mr. Justice PN Bhagwati, in his classic dissent advocated rejection of death penalty raising the following arguments:

(a) Death penalty does not serve any social purpose or advance any constitutional value and is totally arbitrary and unreasonable.

(b) Death penalty as provided under section 302 of the Indian Penal Code, 1860, read with section 354(3) of Criminal Procedure Code, 1973, does not sub serve any legitimate end of punishment, since by killing the murderer it totally rejects the reformative purpose and it has no additional deterrent effect which life sentence does not possess and it is therefore not justified by the deterrence theory of punishment. Though retribution or denunciation is regarded by some as a proper end of punishment, it cannot have any legitimate place in an enlightened philosophy of punishment. Death penalty has no rational nexus with any legitimate penological goal or any rational penological purpose and it is arbitrary and irrational and hence violative of Articles 14 and 21 of the Constitution of India. The historical course through which death penalty has passed in the last 150 years shows that the theory that death penalty acts as a greater deterrent than life imprisonment is wholly unfounded. The burden of death penalty is so vital that the burden must lie on the State to prove that the death penalty provided under section 302 of the Indian Penal Code, 1860, read with section 354(3) of the Criminal Procedure Code, 1973, is not arbitrary and unreasonable and serves a legitimate penological purpose.

(c) *The Constitution of India does not in so many terms prohibit capital punishment. In fact it recognizes death sentence as one of the penalties which may be imposed by law. From the legislative history of the relevant provisions of the Indian Penal Code, 1860, and the Criminal Procedure Code, 1973, it is found that in our country there has been a gradual shift against the imposition of death penalty. Life sentence is now the rule and it is only in exceptional cases for special reasons, that death sentence can be imposed. The legislature has however not indicated what those special reasons are for which departure can be made from the normal rule and death penalty may be inflicted. The legislature has not given any guidance as to what are those exceptional cases in which, deviating from the normal rule, death sentence may be imposed. This is left entirely to the unguided discretion of the court, a feature, which has lethal consequences so far as the constitutionality of death penalty is concerned.*

(d) *Death penalty is irrevocable; it cannot be recalled. If a person is sentenced to imprisonment, even if it be for life, and subsequently it is found that he was innocent and was wrongly convicted, he can be set free. But that is not possible where a person has been wrongly convicted and sentenced to death. The execution of the sentence of death in such a case makes miscarriage of justice irrevocable.*

(e) *Howsoever careful may be the procedural safeguards erected by the law before death penalty can be imposed, it is impossible to eliminate the chance of judicial error. No possible judicial safeguards can prevent conviction of the innocent. It is indeed a very live possibility and it is not at all unlikely that so long as death penalty remains a constitutionally valid alternative, the court or the State acting through the instrumentality of the court may have on its conscience the blood of an innocent man. Judicial error in imposition of death penalty would indeed be a crime beyond punishment. This is the drastic nature of death penalty, terrifying in its consequences, which has to be taken into account in determining its constitutional validity. Death penalty is barbaric and inhuman in its effect, mental and physical upon the condemned man and is positively cruel. Its psychological effect on the prisoner in the Death Row is disastrous.*

(f) *Penological goals also do not justify the imposition of death penalty for the offence of murder. The prevailing standards of human decency are also incompatible with death penalty. It is difficult to see how death penalty can be regarded as proportionate to the offence of murder when legislatively it has been ordained that life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be imposed. Death penalty cannot also be regarded as proportionate to the offence of murder, merely because the murder is brutal, heinous or shocking.*

(g) *There being no legislative policy or principle to guide the court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of discretion of the court is bound to vary from judge to judge. What may appear as special reasons to one judge may not so appear to another and the decision in a given case whether to impose the death sentence or to let off the offender only with life imprisonment would, to a large extent, depend upon who is the judge called upon to make the decision. The exercise of discretion whether to inflict death penalty or not depends to a considerable extent on the value system and social philosophy of the judges constituting the bench. The infliction of death penalty is influenced by the composition of the bench, even in cases governed by section 354(3) of the Criminal Procedure Code, 1973. This is clearly violative of Articles 14 and 21. There is an enormous potential of arbitrary award of death penalty by the High Courts and the Supreme Court and in fact, death sentences have been awarded arbitrarily and freakishly.*

(h) *Death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches. This circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21 of the Constitution of India.*

However, the majority of the bench in ***Bachan Singh vs State of Punjab***, AIR 1980 SC 898, after upholding the existence of death sentence on the statute book to be valid, propounded the doctrine of rarest of rare cases as a guideline for imposition of death sentence thus:

> *"There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. Nonetheless, it cannot be overemphasized that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354(3). Judges should never be blood-thirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad*

of legislative policy outlined in section 354 (3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

JUDICIALLY EVOLVED SAFEGUARDS

One of the major procedural safeguards judicially evolved in India while deciding to award death sentence is the pre-sentence hearing. Section 235(2) of Criminal Procedure Code, 1973, lays down 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 according to law. Proviso to section 309(2) of Criminal Procedure Code, 1973, added in the amendment of 1978, contemplates that no adjournment shall be granted for the purpose of only enabling the accused to show cause against the sentence proposed to be imposed on him.

In the case of ***Ram Deo Chauhan vs State of Assam***, AIR 2001 SC 2231 the Supreme Court of India discussed these provisions and held as under:

"…… In Muniappan's case {1981 Cri LJ 726} this court held that the obligation to hear the accused on the question of sentence is not discharged by putting formal questions to him. The judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence. It was the duty of the court to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view. In Malkiat Singh's case {(1991) 4 SCC 341} this court observed that hearing contemplated under section 235 (2) of the Code is not confined merely to oral hearing but also is intended to afford an opportunity to the prosecution as well as the accused to place facts and materials relating to various factors on the question of sentence and if desired by either side to have evidence adduced to show mitigating circumstances, to impose a lesser sentence or aggravating grounds to impose death penalty. It was further observed that sufficient time must be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded as the case may be. It was further observed that the sentence awarded on the same day of finding guilt was not in accordance with law".

In both the aforesaid judgments the amendment made in section 309 of the Code was not taken care of. By Criminal Procedure Code Amendment Act, 1978, a proviso was added to sub-section (2) of section 309 to the effect that *'Provided also that no adjournment would be granted for the purposes only of allowing the accused person to show cause against the sentence proposed to be imposed upon him.'*

In ***Sukhdev Singh's*** case (supra) this court while dealing with section 309(2), third proviso and section 235 (2) of the Code and after referring to its earlier decisions in ***Allauddin Mian v. State of Bihar***, and ***Malkiat Singh's*** case(supra) held (Para 56 of 1992 AIR SCW):

> *"This proviso must be read in the context of the general policy of expeditious inquiry and trial manifested by the main part of the section. That section emphasises that an inquiry or trial once it has begun should proceed from day to day till the evidence of all the witnesses in attendance has been recorded so that they may not be unnecessary vexed. The underlying object is to discourage frequent adjournments. But that does not mean that the proviso precludes the Court from adjourning the matter even where the interest of justice so demands. The proviso may not entitle an accused to an adjournment but it does not prohibit or preclude the Court from granting one in such serious cases of life and death to satisfy the requirement of justice as enshrined in Section 235 (2) of the Code. Expeditious disposal of a criminal case is indeed the requirement of Art.21 of the Constitution, so also a fair opportunity to place all relevant material before the Court is equally the requirement of the said Article. Therefore, if the Court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the Court, the above extracted proviso cannot preclude the Court from doing so."*

The mandate of the Legislature is clear and unambiguous that no adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed upon him. In a case punishable with death or imprisonment for life, there is no difficulty for the Court where the sentence proposed to be imposed is alternative sentence of life imprisonment but if it proposes to award the death sentence, it has discretion to adjourn the case in the interests of justice as held in ***Sukhdev Singh's*** case;

> *"I have no doubt in holding that despite the bar of third proviso to sub-section (2) of section 309, the court in appropriate case, can grant adjournment for enabling the accused persons to show cause against the sentence proposed on him particularly if such proposed sentence is sentence of death. We hold that in all cases where a conviction is recorded in cases triable by the court of sessions or by special courts, the court is enjoined upon to direct the accused convict to be immediately taken into custody, if he is on bail, and kept in jail till such time the question of sentence is decided. After the sentence is awarded, the convict is to undergo such sentence unless the operation of the sentence awarded is stayed*

or suspended by a competent court of jurisdiction. Such a course is necessitated under the present circumstances prevalent in the country and is in consonance with the spirit of law. A person granted bail has no right to insist to remain at liberty on the basis of the orders passed in his favour prior to his conviction."

Death sentence jurisprudence developed in India even further, thereby contemplating judicial scrutiny even after the death sentence is finally upheld. Over a series of judicial pronouncements, the Supreme Court of India held that where the death sentence is not executed after final verdict over inordinate period of delay, the sentence would become inexecutable.

In the case of ***TV Vatheeswaran vs State of TN***, AIR 1983 SC 361 the Supreme Court held thus:

11. While we entirely agree with Lord Scarman and Lord Brightman about the dehumanising effect of prolonged delay after the sentence of death, we enter a little caveat, but only that we may go further. We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay.

……...............

20. So, what do we have now? Articles 14, 19 and 21 are not mutually exclusive. They sustain, strengthen and nourish each other. They are available to prisoners as well as free men. Prison walls do not keep out Fundamental Rights. A person under sentence of death may also claim Fundamental Rights. The fiat of Article 21, as explained is that any procedure which deprives a person of his life or liberty must be just, fair and reasonable. Just, fair and reasonable procedure implies a right to free legal services where he cannot avail them. It implies a right to a speedy trial. It implies humane conditions of detention, preventive or punitive. 'Procedure established by law' does not end with the pronouncement of sentence, it includes the carrying out of sentence. That is as far as we have gone so far. It seems to us but a short step, but a step in the right direction, to hold that prolonged detention to await the execution of a sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the sentence of death. In the United States of America where the right to a speedy trial is a constitutionally guaranteed right, the denial of a speedy trial has been held to entitle an accused person to the dismissal of the indictment or the vacation of the sentence (vide Strunk vs United States, [1973] 37 L Ed 2d 56) Analogy of American Law is not permissible, but *interpreting our Constitution, sui generis, as we are bound to do, we find no impediment in holding that the dehumanising factor of prolonged delay in the execution of a sentence of death has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way as to offend the constitutional guarantee that no person shall be deprived of his life or personal liberty except according to procedure established by law. The appropriate relief in such a case is to vacate the sentence of death.*

21. What may be considered prolonged delay so as to attract the constitutional protection of Article 21 against the execution of a sentence of death is a ticklish question. In Ediga Anamma's case (AIR 1974 SC 799) two years was considered sufficient to justify interference with the sentence of death. In Bhagwan Bux's case (AIR 1978 SC 34), two and a half years and in Sadhu Singh's case (AIR 1978 SC 1506), three and a half years were taken as sufficient to justify altering the sentence of death into one imprisonment for life. The Code of Criminal Procedure provides that a sentence of death imposed by a Court of Session must be confirmed by the High Court. The practice, to our knowledge, has always been to give top priority to the hearing of such cases by the High Courts. So also in this Court. There are provisions in the Constitution (Articles 72 and 161) which invest the President and the Governor with power to suspend, remit or commute a sentence of death. Making all reasonable allowance for the time necessary for appeal and consideration of reprieve, we think that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death."

However, subsequently, in the case of ***Triveniben vs State of Gujarat***, AIR 1989 SC 1355 the Supreme Court held that no specific period could be fixed to declare the death sentence inexecutable, so to that extent, the decision of ***TV Vatheeswaran's*** case (supra) fixing two years limit is overruled, though at the same time, delay in execution is certainly a ground to commute the sentence. The Supreme Court in the case of *Triveniben* observed thus:

"Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the Court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentences should be carried out or should be altered into imprisonment for life. No fixed period of

> *delay could be held to make the sentence of death inexecutable and to this extent the decision in Vatheeswaran's case cannot be said to lay down the correct law and therefore to that extent stands overruled."*

Recently, in the case of ***Ramnaresh vs State of Chhattisgarh***, AIR 2012 SC 1357 the Hon'ble Supreme Court of India, tabulating the possible mitigating and aggravating circumstances, recapitulated the principles that the court has to apply the test of rarest of rare cases for imposition of death sentence; that for imposition of death sentence, the court must arrive at the conclusion that any other punishment, including life sentence would be totally inadequate and would not meet the ends of justice; that life imprisonment is rule and death sentence is exception; that method (planned or otherwise) and manner (extent of brutality) in which the crime was committed and the circumstances leading to commission of the crime. The Supreme Court further held that the aforesaid are the accepted indicators but it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or the other and that it is difficult to state it as an absolute rule as every case has to be decided on its particular factual matrix.

Lately, the Supreme Court of India in the case of ***Sangeet vs State of Haryana***, 2012 (11) SCALE 140 speaking through Hon'ble Justice Mr Madan B Lokur revisited the legal position as regards the criteria of drawing balance sheet of aggravating and mitigating circumstances in order to decide imposition of death or life sentence and concluded thus:

> *"The broad result of our discussion is that a relook is needed at some conclusions that have been taken for granted and we need to continue the development of the law on the basis of experience gained over the years and views expressed in various decisions of this court. To be more specific, we conclude:*
>
> 1. *This court has not endorsed the approach of aggravating and mitigating circumstances in Bachan Singh v. State of Punjab, AIR 1980 SC 898. However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.*
>
> 2. *Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.*
>
> 3. *In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.*

4. *The Constitution Bench of this court has not encouraged standardization and categorization of crimes and even otherwise it is not possible to standardize and categorize all crimes."*

PRESIDENTIAL PARDON -

In India, courts have always exhibited extreme sensitivity to the questions involving death penalty, even in cases of militancy. A glaring example of such ardour of Indian courts to do complete justice after extensive consideration of all arguments raised is the case of Shri Kehar Singh.

On 31 October 1984, when militancy in the state of Punjab was at its crest, Mrs Indira Gandhi, the then Prime Minister of India was assassinated. After full fledged trial, on 22 January 1986, Kehar Singh was convicted for offence under section 120B read with section 302 of the Indian Penal Code, 1860, in connection with the assassination of Smt Gandhi and was sentenced to death by the trial court of Additional Sessions Judge, New Delhi. Appeal filed by Kehar Singh was dismissed by the High Court of Delhi and his subsequent appeal by Special Leave to the Supreme Court also was dismissed on 03 August 1988. A review petition that followed from Kehar Singh also was dismissed on 07 September 1988. Thereafter a writ petition also was dismissed by the Supreme Court. Later, on 14 October 1988 Kehar Singh's son, Rajinder Singh presented a petition to the President of India for the grant of pardon to Kehar Singh under Article 72 of the Constitution of India. In that petition reference was made to the evidence on the record of the criminal case and it was sought to be established that Kehar Singh was innocent, and that the verdict of the different courts that found Kehar Singh guilty, was erroneous. The said petition included a prayer that Kehar Singh's representative may be allowed to see the President of India in person in order to explain the case. Vide letter dated 31 October 1988 from the Secretary to the President referring to the 'mercy petition' informed that in accordance with 'the well established practice in respect of consideration of mercy petitions, it has not been possible to accept the request for a hearing.' Thereafter, on 03 November 1988 a further letter was addressed to the President of India by Kehar Singh's counsel refuting the existence of any practice not to accord a hearing on a petition under Article 72 and requesting a reconsideration of the decision to deny a hearing. On 15 November 1988 the Secretary to the President wrote to counsel of Kehar Singh, informing that the letter had been perused by the President, who was of the considered opinion that he cannot go into the merits of a case finally decided by the highest court of the land and that the petition for grant of pardon on behalf of Kehar Singh would be dealt with in accordance with the provisions of the Constitution of India. Thereafter, the President of India rejected the petition under Article 72, and on 24 November 1988, Kehar Singh was informed of the rejection of the petition. When Kehar Singh's son Rajinder Singh came to know on 30 November 1988 from the newspaper that the date of execution of Kehar Singh had been fixed for 02 December 1988, on 01 December 1988, he filed a petition in the High Court of Delhi praying for an order restraining the respondents from executing the sentence of death, and on the afternoon of the same day the Delhi High Court dismissed the petition. Immediately upon dismissal of the writ petition, Kehar Singh's counsel moved the Supreme Court and filed Special Leave Petition along with Writ Petitions under Article 32 of the Constitution. Even at that stage, despite so many rounds of judicial scrutiny, during the preliminary hearing late in the afternoon of the same day, i.e. 01 December 1988, the Supreme Court decided to entertain the writ petition and made an order directing that the execution of Kehar Singh should not be carried out meanwhile. After elaborate hearings the Supreme Court of India decided that writ petition by way of a lucid judgment, reported as ***Kehar Singh vs Union of India***, AIR 1989 SC 653 holding that the petition invoking power under Article 72 of the Constitution shall be deemed to be pending before the President to be dealt with and disposed of afresh.

In ***Kehar Singh*'s** case (supra), the Supreme Court held that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review; and that there is no right in the condemned person to insist on an oral hearing before the President since proceeding before the President is of an executive character so, as and when the petitioner files his petition it is for him to submit with it all the requisite information necessary for the disposal of the petition; that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by the Supreme Court and accordingly, the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. The Supreme Court further held thus:

> *"We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court in regard to the guilt of, and sentence imposed on the accused. In doing so, the President does not amend or modify or supersede, the judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. In US vs Benz reported as [1930] 75 Law ed 354 at p 358, Justice Sutherland, observed: "The judicial power and the executive*

power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance." The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative."

CONCLUSION-

Capital sentence subject, in itself, is an ocean to write on. On each of the above aspects plus many more, reams can be written. On account of space and word count constraints, above aspects have merely been whisked through to ignite the talk. Another vastly debated subject in India is the mode of execution of death sentence. In India, the method deployed for execution of capital sentence is by way of hanging the convict by neck till death, which is strongly abhorred by many as gruesome and barbaric. Paucity of space coerces the author to completely skip this aspect of mode of execution. However, those interested, may see the detailed discussions in the book CRIMINOLOGY & PRISON REFORMS, Girish Kathpalia, Lexis Nexis 2014.

Quandaries are and will always continue to be myriad, life and death being the age old adversaries. Whether capital sentence should continue on the statute book? Whether in view of the latest surge in terrorism related crimes, scope of capital sentence needs to be widened? Whether the existing test of rarest of rare case for imposition of capital sentence needs to be revisited, and if so, what should be the criterion to be adopted, and if not so, what should be the line of analysis to arrive conclude the rarest of rare test? Whether at all there should be any effort at bringing about mathematical precision in the overall sentencing processes, replacing the individualized approach? And whether execution by the use of lethal injection or any other means needs to be studied in India in order to evaluate pain element in the process in comparison with the execution by hanging? Law and science of sentencing, being dynamic in nature, will keep evolving with time.

COVERING THE COVER

Copyright Law and Covering in Sri Lankan Music

Dr. Gowri Nanayakkara,[1]
Senior Lecturer in Law
Canterbury Christ Church University

INTRODUCTION

As we celebrated the 68th Independence Day early this year, a musical rendition of a song performed at a state-organised event, attracted significant attention and discussion, positively and negatively. Yes, I am referring to Kishani Jayasinghe's[2] operatic rendition[3] of the Sinhala classical song, *Danno Budunge*. While this rendition paved way for wider conversations (which questioned and focused on one's musical knowledge and taste in classical music and operatic music, the cultural clashes between different musical traditions, continued servility to the former colonizers and the political interests that supported such views) this further opened up conversations surrounding cover versions and their (in) appropriateness in a small music industry like Sri Lanka.

In this particular occasion, the subject matter was Kishani making a cover rendition of *Danno Budunge,* which was previously performed[4] by Pandit Amaradeva[5] and prior to him by one Hubert Rajapakse.[6] While the lyrics of this song dates back to 1915, written for 'Sirisngabo' by John De Silva, the musical score is believed to date further back to the period of German composer, Richard Wagner,[7] who believed (by some) to have created the melody for a church song while some credit an Indian composer, Vishwanath Lauji

1 Dr. Gowri Nanayakkara, Attorney-at-Law, Senior Lecturer in Law, Solicitor (England and Wales), Civil and Commercial Mediator, School of Law, Canterbury Christ Church University, UK.
2 http://www.owenwhitemanagement.com/artist/kishani-jayasinghe/ accessed 05 October 2016.
3 https://www.youtube.com/watch?v=plaKsOtC3b8 accessed 05 October 2016
4 While several classical artists have sung this song, Pundit Amaradeva is mostly prominent for singing this particular song in the contemporary music industry.
5 https://www.youtube.com/watch?v=69cIXNpz6Dw accessed 05 October 2016.
6 https://www.youtube.com/watch?v=_Ds_CMOa3J8 accessed 05 October 2016.
7 http://1960medicalbatchcolombo.blogspot.co.uk/2012/12/danno-budunge-s-jehova-thou-hast.htmlaccessed 05 October 2016.

with this melody.[8]

While interests surrounding the ownership of this old song resurfaced after about 150 years from the creation of its melody, this article does not aim to engage with such issues of ownership nor the suitability of operatic rendition of classical songs. Instead, the aim is to engage with a phenomenon in the local music industry, which consists of the artists as creators of music and the listeners as consumers of such music, i.e., covering Sinhala songs by another singer.

During an empirical study I carried out[9] on Sinhala commercial music industry, it was interesting to find that many singers that were interviewed were against other vocalists performing/covering songs they initially performed (base songs). The strong opposition by some listeners relating to Kishani's *Danno Budunge* rendition also seemed to be *inter alia* based on the objection to covering Pundit Amaradeva's performance. Such opposition to covering seems to be quite engrained in our society. The country's legislature too seems to share such sentiment where the practice of cover songs was referred to as murdering the national music and, along with it, the national culture.[10] One government minister maintained the following view during the parliamentary debates relating to the national Intellectual Property Bill in 2003;

> *Do not murder these songs…Siri Nandana Siri Pada Vandimu Samanala Kande (popular old Sinhala song) can anyone else sing this song? Should we let another sing this song [and] destroy a nation? Destroy local music? That song is a very meaningful song by A.J.Karim. We must not let other people sing this song. If they create their own ones that is fine. Why do they have to copy these?* [11]

Accordingly, this paper by relying on the empirical findings will attempt to assess the reasons behind the varying views surrounding covering in Sri Lankan music with the aim of understanding its impact on artists and suggest recommendation in that regard.[12]

COVERING IN THE SRI LANKAN MUSIC INDUSTRY –

The recording of cover versions is not a practice that is completely alien to Sri Lanka. The commercial music industry itself in Sri Lanka was founded on mimicked Indian melodies, which were reproduced by Sri Lankan vocalists. Thus, it is correct to say that

8 T. Rodrigo, 'Danno Budunge- Authenticity, Cultural Freedom and Evolution' The Island, 12/03/2016, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=141865 accessed 05 October 2016.

9 During 2012-2014

10 Alhaj A.H.M. Azwer, Hansard Official Report, 23 July 2003, 1089.

11 ibid.

12 For a detailed discussion on PRR and Copyright Law in Sri Lankan music, see G. Nanayakkara 'Performers' Rights Regime in Sri Lanka: Singers' Melancholia' (PhD thesis, University of Kent 2016)

the foundation of the local commercial music industry was exclusively based on cover versions of Indian songs. Although the local music genre emerged in the 1950s cover versions of foreign songs are not entirely absent in the contemporary music industry. Nevertheless, covering Sinhalese songs, in comparison to foreign songs, is not widely seen.

This is an interesting characteristic of the cover version practice in Sri Lanka. Even given the limited occasions when Sinhala cover songs are made, some of the initial vocalists[13] who participated in this study have not hesitated to express their displeasure towards it.[14] Unlike in the West or even in the neighboring country, India, the Sinhalese cover practice has not been widely exercised enough for it to become a substantial part of the local music market. Although it is not very clear as to why a cover version market for Sinhalese songs has not become prominent, it can be argued that the strong resistance from the vocalists and the need to engender local music genre, which predominantly involved reproving the mimicking of Indian and English songs, may have had an impact on it, at least to some extent.

Out of the few Sinhala cover renditions, the majority of these seem to have been primarily used for the purpose of embarking on a performer's journey into the music industry, while some of them may have been made with the intention to introduce versatile versions or reinterpretations of the base song. Thus, budding artists, who, to a certain extent, mimic the initial vocalist, to attract popularity and lay the foundations for becoming an established vocalist, mainly practice cover versions. One would rarely hear an established vocalist making cover versions of another artist in Sri Lanka.[15] Most artists[16] who were once budding performers making cover versions would not continue on with such practice.[17] The norm seems to be that, once they build up their repertoire, they would limit themselves to performing their own base songs. There appear to be a certain level of stigma attached to performing cover versions in Sri Lanka, as that would indicate that a particular artist is either an amateur in the industry or does not have any of their *own* songs to sing.[18] These views seem to suggest and implicitly accept that, once an initial vocalist performs a base song, the subsequent performances of that song ought to belong to that initial singer.

It seems that there is a silent agreement among the majority of artists in Sri Lanka, where

13 To avoid ambiguous term of 'original singer', the term 'initial singer' is used. The use of 'original singer' could suggest that subsequent singers who make versions of base songs may be inferior in their aesthetic abilities and skills.
14 Interviews with P4, P14 and P3.
15 Exception to this is Bhathiya & Santhush, a modern established duo who perform cover songs along with their own creations.
16 Nirosha Virajini, Nanda Malini and Champa Kalhari.
17 This could also be due to their desire to promote their songs rather than continue to promote cover songs that were sung by another artist, initially.
18 N Diddeniya, Arumasi Gee Sara, (S Godage and Brothers 2002).

they do not cover songs by other singers and therefore expects the other singers not to cover their songs in return. This can be seen as an agreement, albeit not expressly spelt out, to accept and respect the attachment to the songs the vocalists initially perform. Nevertheless, with the introduction of many singing competitions in Sri Lanka, carried out in a similar fashion to *The X Factor* and *American Idol*, not just conversations about cover versions of Sinhalese songs, but also a market for such cover versions seem to have been emerging during the last few years.

THE LAW RELATING TO COVERING –

According to Sri Lankan Intellectual Property Act No. 36 of 2003, the copyright of a song is divided under two categories, while the lyrics is protected as a literary work under Section 6(1)(a) of the Act, the musical score is protected as a musical work under Section 6(1)(e) of the Act. As Section 14 provides, the lyric writer and the composer as the authors of the lyrics and the musical score, respectively, will be entitled for copyright and therefore possess the authority to allow someone (a singer) to perform their song.

The singer as the carrier of the song is only entitled for performers rights, as stipulated under the Performers Rights Regime (PRR) incorporated under Chapter II of the same Act. The singer as the performer is only entitled for rights over the live and recorded renditions of their performances. This allows the singer to authorize the broadcasting of her performance, the recording of her live performances and further allow the reproduction of such recording (Section 17(1) (a), (b) and (c) respectively). She however does not get any claim over the song itself nor any authority over deciding whether another can be permitted to sing the same song.

Accordingly, the authority to permit covering lies in the authors' domain. While the lyric writer and the composer can authorize and provide license to any singer to make a cover rendition of their song, failure to obtain such licensing will breach the authors' copyright over the song. The following section will examine the varying views relating to how covering is perceived musicologically, culturally and sociologically.

COVERING AS A MUSICAL PRACTICE -

Western musical theorists view covering songs in various ways. Challenging views, relating to covering, take varying perspectives, such as covers lacking musical creativity or being used as an easier way of making money[19] by not having to spend on new lyrics and composition. Contrary to the above views, some see the practice of cover versions

19 D Horn, 'Some Thoughts on the Work in Popular music' in M Talbot (ed), The Musical Work: Reality or Invention, (Liverpool University Press 2000) 30 as referred to in J Butler, 'Musical Works, Cover Versions and Strange Little Girls' (2010) 7(1) Volume ! La revue des musiques populaires 6.

as an important method of learning various musical skills from the base song,[20] or 'an opportunity to engage in a dialogue with music other on their "own" and with other performers who have been involved in "covering" that or similar music'.[21] Regardless of how cover versions are viewed musicologically, it has been argued that cover songs have 'always been an integral, multifaceted, attribute of popular music'.[22]

Proponents of cover versions argue that the cover phenomenon can be viewed as a 'manifestation of rampant recontextualisation in music as artists revisit, re-interpret and re-examine a significant cross section of musical styles, periods, genres, individual records, and other artists and their catalogue of works'.[23] The reinterpretation of one artist's version is regarded as the most widely discussed concept of cover songs, where a sufficiently well-known base song is used in this regard. When such cover versions become more popular than the previous version, the new interpretation may become a base song for further reinterpretations.[24] Inter-language parodies, another form of covering, are common in India and Indonesia, where it can be argued that cover songs 'could be seen as revitalisingand empowering regional cultures',[25] as the most popular songs are made available in various other languages apart from the dominant one, to facilitate its enjoyment by other regional cultures.

Opponents of cover versions also raise varying arguments. The main criticism of covering is lack of authenticity and originality, on the basis that cover versions are mere repetitions and, therefore, effecting cultural exhaustion due to lack of new songs and excess of imitations.[26] Other concerns seem to revolve around issues of ownership and morality; taking someone else's creation and being disrespectful to the artists who created the base songs are considered as unacceptable practices.[27] These concerns relate to the notions of intellectual property law, which promotes and regulates the maintenance of ownership, originality and authenticity of authors' or creators' work.

20 H S Bennett, 'The Realities of Practice' S Frith and A Goodwin (eds), On Record: Rock, Pop and The Written Word (Routledge 1990) and M Bayton, 'How Women Become Musicians' S Frith and A Goodwin (eds), On Record: Rock, Pop and The Written Word (Routledge 1990); D Horn, 'Some Thoughts on the Work in Popular music' in M Talbot (ed), The Musical Work: Reality or Invention, (Liverpool University Press 2000) 30 as referred to in J Butler, 'Musical Works, Cover Versions and Strange Little Girls' (June, 2010) 7(1) Volume ! La revue des musiques populaires 6.

21 D Horn, 'Some Thoughts on the Work in Popular music' in M Talbot (ed), The Musical Work: Reality or Invention, (Liverpool University Press 2000) 30.

22 G Plasketes, 'Re-flections on the Cover Age: A Collage of Continuous Coverage in Popular Music' (2005) 28(2) Popular Music and Society 137, 144.

23 G Plasketes, 'Like a Version' in G. Plasketes (ed), Play it Again: Cover Songs in Popular Music (Ashgate Publishing 2010) 2.

24 Kurt Mosser, '"Cover Songs": Ambiguity, Multivalence, Polysemy' <http://www.popular-musicology-online.com/issues/02/mosser.html> accessed 10 September 2014; In Good Copy Bad Copy documentary, it is shown how the song 'Crazy' being re-interpreted through sampling by artists in Brazil, and that Barzilian recording later becomes a base song for a further sampled recording back in the USA. 'Good Copy Bad Copy' <http://www.youtube.com/watch?v=ByY6j0qzOyM> accessed on 04 March 2014.

25 Peter Manuel, 'The Cassette Industry and Popular Music in North India" (1991) 10(2) Popular Music 189, 198 referring from P Yampolsky, 'Hati Yang Luka, an Indonesian Hit' (1989) 47 Indonesia 1.

26 Plasketes, 'Like a Version' (n 55) 2.

27 ibid.

Borrowing practices, such as cover versions, challenge the ambiguous and legally forged concepts of originality and ownership. The imposition of these concepts ignores the 'existence of practices of copying in the pre modern West, in the margins of Western culture, and in non-Western cultures… and the fact that different societies have had attitudes to copying that differ radically from [one's] own'.[28] It can be argued further that 'culture, being an interdependent phenomenon, requiring each such act of dependency to render an accounting, which copyright law demands [*interalia* in borrowing practices], would destroy the very synergy on which cultural life rests'.[29] The consequences of such destruction are described by Coombe, who argues that these dialogic practices that involve borrowing 'come into tension with the monologism of a modern legal discourse that bestows monopolies over meaning under the authority vested in the form of property'.[30]

As discussed above, various culturally, anthropologically, musically and sociologically strong arguments welcome the practice of cover versions, although arguments challenging such views are also present. While supporting views focus on the freedom of creativity, opposing views focus on the protection of the creativity of authors more strongly and the protection of the public from inferior copies to a lesser extent. Nevertheless, when examining the wider impact of covering, it is safe to conclude that the positive cultural impact surrounding covering does outweigh the negativities.

PERCEPTIONS AND IMPLICATIONS OF COVERING IN THE SL MUSIC -

As discussed in the previous section, covering in the Sri Lankan music industry is distinctive, since foreign songs are covered without much hindrance but Sinhalese covers are highly contested. Thus, this section of the paper attempts to explore the underlying reasons behind such contestations.

Talking to the interviewees, a clear division of views emerged regarding the practice of cover versions. While the majority of singers were not in favour of cover versions, all of the authors and the majority of the singer–songwriters were in favour of the practice of cover versions. Some of them disliked what they perceived as the arbitrary manner in which the practice is carried out by some artists in Sri Lanka, where they do not seek the permission of the authors. It must be noted that, although authors and singer–songwriters were not against making cover versions, most of them currently do not receive any financial benefit

28 Such as China, where it is considered a great honour to be copied faithfully by a good artisan. It shows off the skill of the workman, and it also shows off his sense of respect for those who came before him. M Boon, In Praise of copying (Harvard University Press 2010) 6-7.

29 W Gordon, 'On owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 Virginia Law Review 149, 168 as referred to in Rosemary J Coombe, The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law (Duke University Press 1998) 68.

30 Rosemary J Coombe, The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law (Duke University Press 1998) 68.

from this practice.[31]

According to one author, 'They [singers] think this [the song] belongs to them after singing it, no one else has any rights to it. That is singers' sentiment.'[32] The response from one of the singers confirmed this position: 'I strongly object to people singing *others'* songs in order to earn money…Why can't they [cover singers] do good new songs and let *our* songs be?'[33] The attachment this singer maintains towards the songs he initially performs is clearly visible when he refers to his initially-performed songs as 'ours' and the practice of cover singers as 'singing others' songs'.

When considering the various opposing views of the vocalists with regards to cover versions, it seems that their discontent revolves around two main concerns. Firstly, the singers seemed to have a sense of attachment towards the base songs they performed. Since some of the interviewed vocalists seemed to have contributed to the very creation of the song and/or become the driving force behind the popularisation of the song, they seemed to have created emotional connection with the songs. They therefore seemed to be contesting any act by a subsequent singer that would disconnect them from their songs. Secondly, vocalists wish to receive optimum remuneration from the songs they perform. Some interviewed artists maintained that, as a result of covering, the initial vocalists were replaced by the covering artists, limiting the remuneration opportunities for the initial vocalists significantly. These issues of belonging and loss of revenue, as effects of covering, will be explored further in the following sections.

BELONGING AS THE SINGER OF THE SONG -

This connection that singers feel towards the songs they perform should be understood in light of the cultural practice of creating a song in the Sri Lankan context. Although many songs may be created as a result of the invitation of a recording company, or by a simple request by a singer, some interviewees indicated that there is still a group of artists who take the song-making process very personally and passionately.[34]

As one artist stated:

> I personally get involved in the creation of my songs. I would go in search of a particular lyric writer and spend time with them explaining the type of song I need written. The same with music compositions. I particularly love Professor Sunil Ariyaratne as a lyric writer. Although he sometimes says that he is too busy,

31 The only exception was P13 who said that he has a mechanism in place where he signs agreements with new artists and let them perform his songs for a small fee. Interview with P13.

32 Interview with P5.

33 Interview with P14.

34 Interviews with P11 and P4.

> I would still go to him and with much craving get a song from him. I remember one of the lyric writers was a Health Officer working in Galle (Southern Province) at the time. I was not even married then. I took an intercity bus from my home in Ratmalane (Western Province) to Galle. It is quite a distance. I think I sent him a postcard earlier, about coming to see him. There were no phones in the 90s. He was waiting for me at the bus stop. Then we discussed about the songs and with him I went to meet another lyricist in Galle. We had lunch at their house. I connected with everyone on a personal level. I remember one of Nilar's [popular lyricist] songs, he wrote, he could not find an appropriate vocalist to sing it. He wanted someone with courage to sing his song. I said 'I will sing it'. I recommended Master Kemadasa as the best person to compose music for that song. So we both went to meet Master at his house and staying with him got the music composed. It took a lot of effort and commitment to make my songs…35

Labeling this process as commissioning could undermine this personal aesthetic journey of an artist. Conversations about money, according to many interviewed artists, rarely take place in these dealings.36 As another vocalist mentioned, 'It didn't cost us anything to get songs created those days. If you go to Clarence Wijewardene [popular singer–songwriter] and tell him that you would like to sing a song, he would invite you to come and write the lyrics and the music for you then and there and would not charge anything from you.'37

Another artist's experience relating to covering was explained as follows:

> One of my songs that I sang for a teledrama where I was also acting in, another artist stole that song. When Clarence Wijewardene [popular singer-songwriter] died, he [cover artist] went and tactfully bought all his songs by paying Clarence's wife. My song was also in them. That song was written for me by Clarence. I am the artist. Sometimes this song goes on the radio and the presenter says my name but it is the other singer's recording. I privately hate him for what he did and think of him as a song-thief. Singer does not own the song. [but] the viewers got used to that song through my voice. It was through my voice they enjoyed the song and my performance as the character in the drama. It is not right when sung in a different voice. I have an objection to that.38

Thus, for such artists, their songs are more like a part of themselves, very carefully and selectively created and nurtured. They feel that they possess a certain level of ownership towards those songs and therefore object to any breach of that connection through covering. Even monetary gain for a singer would not seem to justify the breach of that

35 Interviews with P11, P3 and P4.
36 Interviews with P14, P11 and P3.
37 Interview with P3.
38 Interview with P4.

attachment, as this artist indicated:

> *My songs can be sung by anyone in this world. Because they are my fans. I have sung other artists' songs for pleasure. But never on stage for pay. I am against artists who cover songs for monetary gain. It is wrong… If I wish to make a cover song of Maestro Amaradeva, I will have to trace all copyright owners to obtain permission. Why would one go through all that hassle when they can make their own songs? Initial rendition is the best. It is the foundation of that song. I am strongly against covering even if it ensures payment for the initial artist.*[39]

Thus this vocalist maintains a strong sense of attachment with the songs they initially performed, and objects to any appropriation of such songs through covering. For singers, it seems that covering breaches that all-important connection they created and maintained with the songs they initially performed, as they believe that the cover artist creates a new connection, replacing the initial attachment.

This relationship of belonging between the singer and the song sometimes, as discussed earlier in this section, seems to commence even before the song is written, as the initial idea for the song may only be in the mind of the singer. The vocalist then, as discussed above, makes an effort to carefully select the best lyricist and the best composer who can do justice to the song that he/she needs creating. The involvement in this process at a personal level and the important creative decision-making by a singer inevitably creates an emotional attachment to the song that is ultimately conveyed to the viewers through the singer's rendition. Such attachment, as some academics argue, can be about feeling a sense of belonging.[40] This may be why the vocalists refuse to feel disconnected from their base songs as a result of covering. In the Sri Lankan singers' situation, belonging seems like an ongoing relationship between a singer and a song they work on, in order to introduce and deliver it in the most artistic way to music listeners, in each of their renditions. Thus, for singers, the base songs they performed belong to them. That is where those songs belong. That is their proper place. That is where they fit: with that particular singer.

Nevertheless, such a relationship of belonging does not have room within copyright law and PRR, where all the property rights of a song are recognised and exclusively awarded to the authors. Such selective foundations of property rights under copyright law do not allow an alternative narrative of a singer's belonging to be registered within this regime. While copyright law recognizes the lyric writer and the composer as owners/copyright holders of a song, PRR is limited in recognising only the vocal renditions of a singer,

39 Interview with P14.

40 S Keenan, 'Subversive Property: Law and the Production of Spaces of Belonging' (PhD Thesis, University of Kent 2010) 19; D Cooper, Governing Out of Order: Space, Law and the Politics of Belonging (Rivers Oram Press 1988) 16; E Grabham, '"Flagging" the Skin: Corporeal Nationalism and the Properties of Belonging' (2009) 15(1) Body and Society 63; Nira Yuval-Davis, Kalpana Kannabiran and Ulrike M Vieten, 'Introduction' in Nira Yuval-Davis, Kalpana Kannabiran and Ulrike M. Vieten (eds), The Situated Politics of Belonging (Sage 2006) 2.

that is the connection between the singer and the rendition but fails to acknowledge the singers attachment to the song. As a result, under copyright law, it is acceptable to replace the singer and, along with her, the rendition from a particular song but not the authors. This ignores the aesthetic and emotional relationship of belonging that the singers engender with their base songs. Thus the copyright law and PRR are unable to recognize the singers' relationship of belonging with a song and, accordingly, be able to address the cover versions problem for singers in Sri Lanka.

LOSS OF REVENUE -

The next theme regarding covering, the remuneration, is raised by the majority of the vocalists interviewed. Some interviewees indicated that new performers get contracted to perform cover versions for media companies and, more importantly, at live shows, both locally and internationally, and, as a result, the initial singer sits at home losing out on his/her potential income.[41] In a small musical industry, where performers are predominantly vocalists rather than singer–songwriters, and the majority of them with a limited musical repertoire,[42] such competition could result in a significant loss of opportunity to perform at live shows, where the vocalists gain a substantial proportion of their revenue.

Sometimes the initial vocalist has to compete with cover performers.[43] As one vocalist stated:

> *There was a group of singers going for an overseas show. There were established artists as well as newcomers. There had been a certain new performer, who makes cover versions of an established senior artist, and they were both going for the same show. The new artist had told the senior artist, while on the plane on their way to an overseas musical show, that she was planning on singing some of the senior artist's songs and therefore asked her not to sing them. The senior artist had got very angry with her and basically asked her to get lost. Those are her [veteran artist's] songs, no? How dare these newcomers say things like that?*[44]

This incident shows that the initial performer may be required to compete with a new and younger performer, who sings versions of the songs that the initial performer performs.

On another level, as some participants pointed out, new artists have managed to earn significantly more by covering the base songs that have been performed by a senior artist for decades.[45] As one of the participants explained:

41 Interviews with P14 and P3.
42 'WIPO Report Based on Consultation with Stakeholders and Detailed Examination of Current Copyright and Related Rights Protection System in Sri Lanka' (World Intellectual Property Organisation February 2009); Interview with P13.
43 Interview with P11.
44 Interview with P11.
45 Interviews with P8 and P14.

> *One of the new singers who became popular through a singing competition by performing a particular prominent artist's songs, even after winning the competition continued to sing songs of that prominent artist.[The new singer's voice resembled the voice of the prominent artist.]I heard that while the prominent artist charged Rs.5000/- for a performance, the new artist charged about Rs.40,000/- to cover the same songs. Still the new artist managed to get more offers to perform. The prominent artist was not pleased.*[46]

The practice of cover versions therefore seems to have negatively affected the income generation of certain vocalists whose base songs have now been covered. Accordingly, the concern of cover versions has created significant animosity among vocalists in Sri Lanka.

As noted earlier, the emergence of media-backed national singing competitions has somewhat challenged the settled industrial practice relating to covering, where the finalists in these competitions carry on performing covers even after the competition has ended. This situation seems to have had an impact on the wider music industry and covering, as more artists now attempt to try out covering than before. Nevertheless, the displeasure towards it does not seem to have subsided yet.

As this discussion reveals, the practice of cover versions affects the artists in the music industry in various different ways, which can predominantly be seen as relating to broader themes of belonging and remuneration. The ultimate concern, however, is whether the Sri Lankan copyright law and PRR take such differing impacts and concerns into account in their provisions.

CONCLUSION -

Under the Sri Lankan IP Act, cover versions can be authorised by the copyright owner, along with various other economic rights granted under the Act. The copyright owners may not necessarily be the authors; most often they will be the recording companies, as the tendency is to transfer all the rights of the authors to the recording companies. In light of the lack of a proper royalty scheme and the recording companies obtaining rights over the songs, authors in Sri Lanka do not derive any remuneration from cover versions. Vocalists, who are significantly restricted in terms of their revenue as a result of the practice of cover versions, are a concern that seems to have been overlooked by the copyright regime and PRR. On the same vein, issues surrounding the justifiability of removing the opportunity that these once-performed songs provide the budding performer, as well as hindering the audience's opportunity to enjoy the reinterpretations of base songs, make the cover issue an even more difficult dilemma to resolve.

46 Interview with P14.

In conclusion, I wish to make a recommendation for a potential solution for the cover issue. In this regard, I believe an appropriately drafted contract between the authors and the initial singer would be helpful and beneficial to both parties concerned. While a contract may not go against the existing copyright laws by preventing covering completely when the authors are willing to provide licenses, considering the underlining reasons for vocalists' disapproval, perhaps such a contract could have a clause where covering could be limited for a reasonable period of time, which would allow the initial vocalists the opportunity to exclusively perform the songs (maintain belonging) and generate revenue (remuneration) during that period. While this would still mean that the authors' entitlement under copyright law is restricted for that period, considering the fact that many authors were significantly under remunerated for many decades, ensuring a remuneration share from each performance of their songs would perhaps, make the situation more agreeable for them.

BEST INTEREST OF THE CHILD AS A RATIONALE FOR JUDICIAL DECISION MAKING

SOME VIEWS ON THE SUPREME COURT APPEAL CASE NO. 17/2013

Dr. Hemamal Jayawardena[1]
Hasini Jayawardena[2]

INTRODUCTION –

The Supreme Court Appeal Case No. 17/2013 may be considered as an important case for number of reasons. Among these are the facts that it;

1. Recognizes the best interests of the child as a criteria for judicial decision making in no uncertain terms
2. Re-examines the power of the judiciary to interpret the law, going beyond the *prima facie* intention of parliament that enacted the law.
3. Affirms the SC. Reference 03/2008 which also deals with the power of courts to interpret law.
4. Attempts to resolve an ethical dilemma on whether it should protect the liberty of a man who has committed a crime, for which the parliament intended taking away his liberty for 10 years, in the presence of a competing interest of his young child needing a father.
5. Raises concern whether external circumstances such as the fact that the accused was a poor man or a labourer; that he was married to the victim's sister; that the accused and his wife did not have children; that the accused's wife had left the country without his consent; the fact that it was the

1 Principal Author; MBBS (NCMC), MSc (Applied Psychology); MSc (Forensic Medicine) MD (PGIM), Attorney at Law; LLM (Harvard)
2 Research Assistant, LLB Student (Royal Institute, Colombo, Sri Lanka)

accused who informed the Registrar of Births and the acceptance of fatherly responsibilities by the accused, were considered or should be considered by courts in its decision making.

6. Challenges the principles of retributive justice and preventive justice which many consider should be the cornerstone of the criminal justice system.

Out of all these issues, this article only deliberates on the first and last points and leaves the rest for other jurists to debate on. Some of these issues have already been brought to light by legal luminaries such as Emeritus Professor Savitri Goonesekere.[3]

FACTS; IN BRIEF -

The Attorney General filed indictment against the accused at the High Court of Kurunagala for allegedly committing the offence of rape punishable in terms of Section 364(2) (e) of the Penal Code with regard to a girl less than 16 years of age. At the time of the appeal she would have been over 26 years. The accused pleaded guilty to the charge and the learned High Court Judge convicted him on his plea of guilt. It is not known whether the sexual act was physically violent or whether it was with the concurrence of the underage girl as no evidence was led due to the plea of guilt. A term of 2 years rigorous imprisonment suspended for 10 years, a fine of Rs. 5000/- and an order to pay Rs.200,000/- as compensation were made.

The Attorney General appealed to the Court of Appeal, which set aside the High Court punishment, substituting it with the minimum mandatory term of imprisonment that may be imposed for the offence of statutory rape, which was 10 years of rigorous imprisonment.

This article discusses the impact of the judgment of SC Appeal Case No. 17/2013 which is the appeal to the Supreme Court against the aforesaid judgment of the Court of Appeal.

The Supreme Court in its reasoning indicates that the sole question to be decided is whether a minimum mandatory sentence imposed by statute stifles the hands of the Court in imposing the punishment thus taking away the judicial discretion in sentencing. Court referred to the Supreme Court in case of SC Reference 03/2008, which recognizes the imposing of sentences below the minimum mandatory sentence after considering the circumstances of that particular case.

Based on points, such as, that it is the Judge who sits in a Court of first instance is the

3 Savitri Goonesekere, Administration of justice and victims of sexual violence, The Island, May 13th, 2015;http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=124621(Accessed November 2nd 2015)

person who gets the opportunity to hear the case, to see the case with his own eyes, to smell the case, to feel the case, to fathom the case and to observe demeanor of witnesses, it argued that the judges hands should not be stifled by the legislature in sentencing. In this particular case while the Attorney General and the Appellant are the parties to the case, a third person appears to take over the decision making process of the Court; the 10 year young child who was the product of the unlawful sexual activity that took place years ago between the accused and the victim.

The reference by Court to International Laws and its influence in the judicial decision making is of great significance to jurisprudence in Sri Lanka. Sri Lanka is considered as a dualist country where International Conventions apply domestically only after domestic laws are enacted to enforce such conventions. Reference is made to the Convention on the Rights of the Child to which Sri Lanka is a party. The judgment refers to Article 03 of the aforesaid Convention which states that "*The best interest of the child shall be the primary consideration in any matter, action or proceeding concerning a child, whether undertaken by any social welfare institution, court of law, administrative authority or any legislative body*". It also refers to Article 7 which refers to a child's right to know and be cared for by his parents.

It is noteworthy to mention that the judgment does not refer to the International Convention on Civil and Political Rights Act (ICCPR), No. 56 of 2007 which is domestic law in Sri Lanka. Section 5(2) of the ICCPR Act states that;

> "*in all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interest of the child shall be of paramount importance*".

Section 5 (1) states that "every child has the right to have his or her birth registered and to have a name from his or her date of birth".

At this juncture, it is relevant to discuss some predominant views of the purpose of criminal justice.

Oliver Wendell Holmes, Jr in 'The Common Law' states that "even a dog distinguishes between being stumbled over and being kicked."[4] Although he does not elaborate more on the nature of 'Animal's in this seminal work, considering the context of the forgoing pages, it appears, that his implication, here, is that the dog suffering pain as a result of accidental stumbling by a man would NOT attempt to bite but a dog being kicked would generally try to bite the offender. Whether the dog does this in self-defence or in retribution or revenge, we do not know. But in man, the animal in the so called highest

4 Oliver Wendell Holmes, Jr. 'The Common Law' Edited by Paulo J. S. Pereira, Diego M. Beltran, University of Toronto Law School Typographical Society (2011)

pedestal of evolution, it appears that there is a hunger for retribution, even at the expense of the innocent. As Mahatma Gandhi has emphasized, *"an eye for an eye only ends up making the whole world blind"*

Whatever other theories that we try to justify, in our efforts to display the high moral grounds for our thoughts and actions, the criminal justice system often appear to be driven by retributive justice. This is not necessarily a bad thing. Take the case of a murder. If the State does not provide for retributive justice in a timely manner, a relative may take steps to act on his/her passion to take revenge outside the frame work of the law. If such a norm is established, the country could go into anarchy. "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community."[5]

Another justification for punishment in criminal justice is the sense of protection, it gives to society. Once a convicted murderer is removed from the society through the enforcement of capital punishment he is no more a threat to that society. However, there is growing evidence that permanently disposing a criminal by killing does not protect the society as violence tend to beget further violence.

Punishment does have a deterrent effect. Others in society witnessing the punishment will be scared to commit the same or similar crime in fear of punishment. One may argue that the deterrent effect would apply to only crimes that are committed in public or crimes that the public come to know through media. This could make many of us uneasy, as it can send a secondary message that crimes committed in secret do not warrant justice based on the deterrence principle.

It is the duty of the authors to emphasize the role of media here, that the media should always focus and highlight the punishment for the crime committed rather than the crime itself. Unfortunately, very often in Sri Lanka, the media tend to graphically showcase how a crime is committed through CCTV clips etc, which only the police should have access to and thereby teach the public as to how a crime is committed.

Criminology theory dictates that there are three essential factors for punishment to be deterrent. It should be prompt, predictable and proportionate. Unfortunately, it takes approximately 5 years (62.5 months) for a criminal case to be taken up for trial in High Court.[6] Disposal of cases in High Courts are anything but prompt. The lack of a prompt response to crime takes away its deterrent effect substantially. There should be predictability in that, whenever a particular crime is committed, there should be a specific punishment. If the zeal with which the police pursues the case or if punishment varies

5 Ibid (4)

6 Edirisinghe PAS, Kitulwatte IDG, Sihanada AAS, Bulathsinhala BAAR Justice delayed – Justice denied; A study on time intervals of medico - legal examinations, reporting and giving evidence in cases of alleged child abuse victims. Medico - Legal Journal of Sri Lanka 2011;1:20 – 26p

according to who you are, then there is no predictability. The fact that the people with power receive different treatment before law is another reason to erodes the deterrent value of punishment. Proportionality means that more serious crimes deserve more serious punishments. Enacting laws as dictated by interest groups with disproportionate punishments can sometimes do more harm than good. As judges may tent to take the law into their own hands and abuse the process as their whims and fancies.

As stated before, the 'first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community'. As the famous Latin legal maxim says '*Lex iniusta non est lex*' which means that '*an unjust law is no law at all*'. At the same time we are also reminded of '*Judicis Est Jus Dicere Non Dare*' which means that '*it is the duty of a judge to administer justice, not to make law*'.

Disproportionate punishments may have other complications. For example, death penalty for crimes less offensive than murder may incline a criminal to commit rape and murder than rape alone. Theoretically speaking, justice is supposed to be impartial and blind. If the upholding of justice takes into consideration certain aspects of a wrongdoer one may argue that justice is NOT being upheld. Article 105 of the Sri Lankan Constitution clearly assigns the role of administration of justice to courts. Article 12 of the Constitution states that all persons are equal before the law and have a right to equal protection of the law. It is immaterial whether it is a man, a women or a young child. The image of 'Lady Justice', a metaphoric personification of the moral driver of criminal justice systems shows a long armed, blindfolded lady with a balance in one hand and a sword in the other.

Getting back to the case under discussion (SC appeal 17/2013), it appears that this case takes a unique approach. Rather than focusing on the principles of retributive and preventive justice as expected in any criminal appeal, the Court invents a principle of 'protective justice' to rationalize its judgment. It argues that, in the event the appellant was sent to jail for a decade, the girl child of 10 years would not get the love and affection, care and support of the father to whom she looks up to. This upper guardian of all children in Sri Lanka is greatly concerned by the child's inability to ever understand the concept of the state punishing her father and depriving him to her and causing her suffering, for no wrong ever committed by her. The Court takes the position that all her meaningful childhood would have ended by the time her father comes out of his 10 years of rigorous imprisonment term, and at that time she would be 20 years of age.

It is worth noting that, according to statistics from the North Central Province (NCP), 35% of cases of 'Statutory Rape' are incidents of sexual intercourse with the girl's concurrence with a boy or young man, while they were having an 'affair'.[7] Attorney

7 Yasantha Kodagoda, Deputy Solicitor General, Criminal Justice Response to Child Abuse in Sri Lanka, Interactive Dialogue on Child Abuse in Sri Lanka for the Staff of the United Nations, 29th August 2012 UN Office, Colombo, Sri Lanka

General's Department takes long time to process indictment in fit cases to be indicted. Indicting 'boyfriends' will not be in the best interest of the child victims and in fact not be in the interest of justice, because it would creates undue delay in trying major crimes such as gang rape, rape and murder etc. During a meeting of the Medico-legal Society a few years ago, several proposals were made to amend the existing laws. One such proposal was, 'where the offence of Statutory Rape has been committed on a girl of 14 – 16 years with her consent by her lover, who is under 21 years of age, during the pendency of a love affair, the Police is authorized to institute criminal proceedings in the Magistrate's Court, and for the magistrate to impose a suspended term of imprisonment if the accused pleads 'guilty'. If the accused pleads 'not guilty', for the magistrate to engage in a 'paper committal', and upon determining that there is sufficient material, to transfer the case to the High Court to conduct of the trial.[8]

As a common law country, Sri Lankan judges will always contribute to the evolution of the law. While this article does not intend to pass judgment on whether it is a good or bad judgment, it salutes the Learned Judges for bringing the principle 'Best Interests of the Child' into Sri Lankan law, taking leaf out of the General Comment No. 14 (2013) of the Convention on the Rights of the Child.[9] It is expected that the judiciary will take forward the new principle invented to protect the children of Sri Lanka leaving out any bad secondary signals that the judgment may sent to wrong-doers.

8 Draft proposals of the Medico-legal society on expediting the Criminal Justice Response to Child Abuse, Medico- Legal Society, 2014

9 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, United Nations Ref: CRC/C/GC/14; Committee on the Rights of Children, 29 May 2013 (http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf Accessed 2nd November 2016)

REAL EVIDENCE:

MYTH AND REALITIES

Jayaruwan Dissanayake, LLB (Hons), LLM,
Magistrate- Horana

INTRODUCTION -

"Evidence" is the tool by which courts conclude as to the existence or non existence of a fact in issue or relevant fact. In other words it is by which court decides whether material fact is proved,[1] disproved[2] or not proved[3]. In criminal matters prosecution is required to prove the ingredients of an offence beyond reasonable doubt. However the standard of proof in civil matters is balance of probability. Trustworthiness and acceptability of the conflicting standards put forward by rival witnesses are weighing[4] by the Judge by using the tool of "Evidence". Consistency, spontaneity, probability, means of knowledge, interest/ disinterestedness and demeanor of the witness are taken into consideration when evidence is evaluated. Logically relevant and sound evidence might not always be accepted in court of law due to the restrictions in Evidence Ordinance[5].

Real evidence which is commonly identified and introduced as material evidence or physical evidence is considered as one branch of the tree of "Evidence". It is required to identify its meaning, evidential value as well as risks of giving prominence to this evidence by perusing legislative provisions and case law.

1 Sec. 3 of the Evidence Ordinance (interpretation) - After considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man might under the circumstances of the particular case, to act upon the supposition that it exists.
2 Sec. 3 of the Evidence Ordinance (interpretation) - After considering the matters before it, the court either believes that it does not exist or considers its non existence so probable that a prudent man might under the circumstances of the particular case, to act upon the supposition that it does not exist.
3 Sec. 3 of the Evidence Ordinance (interpretation) – When it is neither proved nor disproved
4 Court has to separate wheat from the chaff
5 Sec. 5 of the Evidence Ordinance – Evidence may be given in any suit or proceeding of the existence or non existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no others.

REAL EVIDENCE -

Real Evidence is introduced by certain writers only as the productions of a case.[6] However; when perusing the court proceedings, the scope of real evidence is broader than that. It certainly includes the productions of a case such as things used to commit crime, blood, corpse, wounds, photographs,[7] films, recordings and sample of breathalyzer tests. E.R.S.R. Coomaraswamy[8] states that compulsory blood tests, pictures, appearance of persons,[9] demeanor of witnesses, view or inspection[10] and observations in scene visits[11] (View the locus in quo) can also be considered as Real Evidence.

LEGISLATIVE PROVISIONS RELATED TO REAL EVIDENCE -

As per section 03 of the Evidence Ordinance, "Evidence" means and includes,

A) Oral Evidence[12] &

B) Documentary Evidence[13]

As per the above definition; Real Evidence is not recognized as a piece of Evidence and there seems no role for the Real Evidence to play. Interpretation clause itself omits Real Evidence.

However; second proviso to section 60 of the Evidence Ordinance provides as follows.

> *"Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the court may if it thinks fit require the production of such material thing for its inspection"*

It is clear that real evidence or productions of a case is not essential for proving a case and it is not necessary to be produced before court as a rule. It must be produced for inspection only when court demands for such production. Such demand may surely be made in a theft/retention of stolen property case where the presumption under section 114 (a) is used for the conviction. There are many instances that our courts used to acquit the accused when productions are not tendered to court during the trial. It

6 Materials used for committing the crime (such as weapon, knife, stick, vehicles, bottles or other containers in excise offences) or subject matter of crime (such as stolen goods, cheques)
7 Mendis Vs. The King (1950) 52 NLR 486
8 The Law of Evidence Vol. II Book I Pages 13-39
9 Physical characteristics such as strengths, weaknesses, deformities, left or right handed, short/tall
10 Productions kept out of the court or immovable
11 Fernando Vs. The Queen (1972) 76 NLR 160, Barnes Vs. Pinto 40 NLR 125
12 All statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry; see Chapter IV of the Evidence Ordinance
13 All documents produced for the inspection of the court; see Chapter V of the Evidence Ordinance

should be noticed that there are difficulties[14] in producing such materials before court and sometimes perishable productions[15] may not be identified as it is handed over to the court. As per the legal provisions available in "Evidence Ordinance" it is crystal clear the fact that such acquittal per se on the basis of non production of real evidence during the trial is incorrect.[16]

There may be instances where adverse inference might be drawn for not producing real evidence for inspection of the court. Presumption under Section 114 (f) of the Evidence Ordinance[17] provides as follows;

> *"That evidence which could be and is not produced would if produced, be unfavorable to the person who withholds it"*

However; this presumption should be drawn in exceptional circumstances by courts and it should be handled with care. For an example; if reasonable explanation is given for not producing real evidence; this adverse inference should not be drawn. It is very subjective and unique which may differ according to the facts and circumstances of each case before courts. Mere failure to produce real evidence would not itself upset the conviction and in all circumstances may not adversely affect the standards put forward by prosecution.

Application of Real evidence in civil suits is described in section 117[18] of the Civil Procedure Code. As per that provision; rules in the civil procedure code regarding the admission of documents in evidence would equally be applied for the material objects.

EVIDENTIAL VALUE OF REAL EVIDENCE -

There seems classification of "Evidence" as Direct Evidence and Circumstantial Evidence. Direct Evidence is; evidence given by someone who has perceived it by his/her own senses. It is much easier to decide whether something is proved when direct evidence is given on that subject. Due to the importance of direct evidence; these are called positive evidence as well. Circumstantial evidence on the contrary is collateral or remote evidence which are supportive[19] to prove the facts in issue or relevant fact. Though the evidential value per se is bit lower; these evidence if handled with care would be stronger as direct evidence.[20] There may be fabrication of evidence; but it is difficult to fabricate

14 If the subject matter is a train, plane or ship

15 Timber which was produced before the court might be decayed when the case is taken up for trial. If evidence is clear as to the production; it is not justifiable to release the accused only on the basis of non identification of timber during the trial. Production keeper may be called as a witness if clarification is needed of the production.

16 R Vs. Hunt (1814)1823 AER 456 , R Vs. Francis 43 AER 97

17 See Queen Vs. Kularatne (1968)71 NLR 529 and King Vs. Gnanapragasam (1948) 50 NLR 77

18 Sec 117- "The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence"

19 Mohamed Sameem Mohamed Akram Vs. A.G. CA 76/2013 Decided on 17/07/2015

20 R Vs. Crippen (1911) 1 KB 149

circumstances. This may be the reason to say that "Man may lie; but circumstances do not".[21] When examining the scope of real evidence; it can easily conclude that real evidence falls under the circumstantial evidence rather than direct evidence.

There is no hard and fast rule regarding the application of real evidence in a case. Since real evidence is considered as circumstantial evidence; it should be given an equal value. It must be noted the fact that evidence is given by witnesses regarding an incident they have encountered or perceived through their own senses. It is the witness who could reiterate the incident before court.

Finally it is the trustworthiness of the witness that matters rather than the type of evidence (direct/circumstantial/real/documentary) whichever is given. When clear oral evidence is given by a witness[22] it would suffice for the prosecution to prove its case. Quality of the evidence matters rather than the quantity.[23] When productions are marked before the court; due attention should be paid as to whether those were identified and marked through the competent witness.

If two eye witnesses are giving evidence alike as to the stab injuries by an accused over victim and when medical evidence are also supportive; one cannot acquit the accused for inability to identify the knife. Sometimes the knife may never be found by the investigative officer. However, that inferiority would not itself acquit the accused since there is ample evidence to prove his culpability.

Certain rules can be identified as to the application of real evidence.

1. When direct evidence is clear and trustworthy about the fact in issue; Real evidence plays a trivial role[24]
2. When direct evidence is not much strong about the facts in issue; Real evidence plays a major role and might cure the weakness of the direct evidence
3. When direct evidence is so weak or contradictory about the facts in issue; although real evidence plays a major role it might not cure the deficiency or prove the standard of the prosecution.[25]

21 R Vs. Blandy (1752) How. St.tr.1187

22 Sumanasena Vs. A.G. (1999) 3 SLR 137

23 Sec. 134 of the Evidence Ordinance – no particular number of witnesses shall in any case be required for the proof of any fact

24 If two witnesses are giving consistent evidence per se and inter se in a matter under forest ordinance while describing the productions taken into their custody with measurements; that would suffice even though productions are not identified during the trial. Those productions may be decayed. In such a matter; real evidence plays a trivial role. Inability to identify productions in court can be neglected.

25 If two witnesses are giving evidence which is totally contradictory to each other; identification of the production and clear description of the production during the trial would not suffice to convict an accused.

4. When direct evidence is weak about the facts in issue and direct and circumstantial evidence is available regarding relevant facts; real evidence plays a major role.

It is clear that real evidence plays only the role of circumstantial evidence where it cannot be given much prominence than which it deserves.[26] Real evidence will be assisting to strengthen the standard of the prosecution and could not cure all the inferiorities of a case.

PERPLEXITY OF REAL EVIDENCE -

Relying heavily on real evidence would make certain perplexities and there seems a risk on relying only upon such evidence. Sometimes, "***corpus delicti***" could not be found. If murderer had destroyed the dead body; there cannot be any evidence as to the identification of the dead body. Early legal jurisprudence emphasized the necessity of identifying corpse for without which culprits were set free. However; the present legal thinking is that; cogent circumstantial evidence would suffice[27] even though the dead body cannot be found unless there is an admission[28] by the accused as to the death of the victim.

Sometimes real evidence may lead to malicious prosecution. There seem certain instances where police and other officials are making accusations against persons who are not in good terms with them. In such matters productions are readily available. Sometimes introduction of the offensive items to the accused could be experienced. Therefore availability of the production itself should not be given much prominence.

Accidents might happen in real crime scenes. Soon after the crime an innocent person might be present in a crime scene. He/she might be doing the rescue part; but may be convicted if real evidence is given too much importance.

Further; demeanor of the witness would lead to serious wrong conclusions. Real culprits who have regularly visit courts could give clear evidence and hence demeanor itself should not be used to decide the trustworthiness of the witness.

Thieves and other regular culprits who are planning their next offence would make necessary arrangements to mislead the investigators. Usually they will use vehicles belongs to others in committing the crime. In the recent past; such culprits are used to discharge or deposit the fruits of the crime on the premises of some innocent person. Hence; it is unsafe to rely only on the real evidence.

26 So as to safe a conviction based on Circumstantial evidence; it must be consistent per se and inter se, aim only at the accused / culpability of the accused and no inference can be drawn other than the culpability of the accused.

27 King V. Harry 1952 NZLR 11(New Zealand case), R. Vs. Chamberlain (1984) 51 ALR 225 (Australian Case)

28 Sec. 420 of the Criminal Procedure Code

Scene visits[29] would be another area of illusion. When fraudulent party get to know that there will be a scene visit by the court, he/she will make all necessary arrangements to reconstruct the place for their sake. When court visits[30] the scene; it is a tampered illusionary scene that could be observed and it may lead to wrong conclusions. Furthermore; there will be hearsay evidence and utterance of unnecessary facts which might entered into the judicial mind.[31]

CONCLUSION

Real evidence is circumstantial evidence. It should be given the same merit and consideration as circumstantial evidence. In **King Vs. Gunarathna**[32] it was decided that circumstantial evidence is a rope with several strands. One strand may not sufficient to bear the weight. But several strands when taken together would be sufficient to prove a case. Production of the real evidence and identification of it during the trial is not compulsory. Inability to produce real evidence would not per se acquit the accused. It is required to evaluate all the evidence before the court including real evidence and finally court has to conclude as to the culpability of an accused (in criminal case) or proof of the facts in issue (In civil cases). Overestimate on real evidence may lead to serious miscarriage of justice.

29 Perumal, Excise inspector Vs. Fonseka (1937) 9 CLW 131

30 The Queen Vs. Ghandi (1961) 60 CLW 111, Basnayaka C.J.

31 Krishnapillai Vs. Konchippali (1951) 53 NLR 95 – Statements made at the scene by witnesses should be made on oath or affirmation and there should be opportunity for cross examination

32 (1946) 47 NLR 145

PUBLIC POLICY- THE UNRULY HORSE

Lal R. Bandara, LL.M (Colombo)
District Judge, Anuradapura

International Commercial Arbitration is a private arrangement of dispute resolution, chosen by the parties to the dispute, as an effective way of resolving the disputes without recourse to a court of law.

Sometimes it is called a hybrid system for the specific features it bears in the process. It commences on private agreement, and, continues through private proceedings almost entirely based on the concept of "party autonomy". Yet it ends with an award that has a binding legal force and effect and which on appropriate circumstances the courts of most countries will recognize and enforced.[1]

Once the tribunal has rendered the award, the existence of the tribunal comes to an end. But the final outcome of the tribunal, that is to say the award rendered, creates important and lasting legal consequences. Though the award is a product of private arrangement, it constitutes a binding decision on the disputed parties.[2] In the absence of voluntary compliance, it is capable of getting enforced through a court of law, established by the constitution of a particular country where the enforcement is sought for.

Enforcement of an arbitral award is the most important aspect of the entire exercise of international commercial arbitration. If the award is not complied voluntarily, judicial intervention is needed to get the award enforced. But, the judicial proceedings for enforcement are not continuation of arbitral proceedings.[3] Arbitration Proceedings are not synonymous with proceedings before a court of justice for the enforcement of an arbitral award.

1 Allen Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, Sweet and Maxwell, London,2004,forth Edition,p.13
2 Ibid pp.12,13
3 State Timber Corporation V MoizGon(pvt) Ltd (220) Bar Association Law Journal, P.44

In Sri Lanka the conduct of arbitration proceedings, recognition and enforcement of the arbitral awards, matters connected and incidental to arbitration are regulated by the Arbitration Act No 11 of 1995.(herein after referred to as Arbitration Act)

A party to an arbitration agreement pursuant to which an arbitral award is made can apply to the high court to get the same enforced.[4] The high court may set aside the arbitral award rendered by the arbitral tribunal held in Sri Lanka, if it is proved the existence the grounds set out in sec 32 of the Arbitration Act. If the award is in conflict with the public policy of Sri Lanka, that will be a ground to set aside the arbitration award.[5] The grounds on which recognition or enforcement of a foreign arbitral award can be found in section 34 of the Arbitration Act. Recognition or enforcement of a foreign arbitral award, irrespective of the country in which it was made, may be refused by the high court, if it is contrary to the public policy of Sri Lanka.[6]

It is quite clear that the concept of "public policy" has a vital role to play when the arbitration award is submitted for execution. But the term "public Policy" is not defined in the Arbitration Act. Thus one could say that execution of arbitral award is left in the complete darkness, when the award is challenged for being contrary to the public policy of Sri Lanka.

In this context, it is time worthy to construe and understand the term, "public policy", in connection to the Arbitration Act.

The term public policy is necessarily a very controversial issue in terms of defining. One cannot say to a certainty what elements comprise of the concept of public policy. It may reflect some moral, social, economic or legal aspects as well as political principles of a given state where that is applied. Long ago, in 1824 it was described as an unruly horse, envisaging how serious the issue was.

> *"…. A very unruly horse, and once you get astride it, you never know where it will carry you. It may lead you from sound of law. It is never argued at all, but, when other points fail."*[7]

In the celebrated judgment of Parsons, The Judge Joseph Smith, defined the term in an exclusive manner. It has provided some basis to define the term and more frequently than not, it has been quoted by almost all the academics and practitioners over the years. That important saying reads thus. It would be called the execution is against the public policy as if,

> *"…..only where enforcement would violate the forum state's most basic notions of morality and justice".*[8]

4 Sec 31 of the Arbitration Act
5 Sec: 32(b) of the arbitration Act
6 Sec : 34(1) b of the Arbitration Act
7 Richardson V Mellish (1824) 2 Bing 228; 1824 – 340 ALL ER Rep 258
8 Parsons and Whittemore Overseas Co. Ins v SocieteGenerale de industries du papier RAKTA and Bank of America, 508 f 2d 969 (2nd CIR 1979)

It is to be noted that this is a very vital interpretation, in respect of the term used in article V of the New York Convention. This indicates the limitations of the application of the exception.

When it comes to the Sri Lankan context, the legislature had two main objects when it introduced this new piece of legislation. They are;[9]

i. To give effect to the New York Convention[10]

ii. To make comprehensive legal provision for the conduct of arbitration proceedings and the enforcement of awards made there under.

This Act is entirely based on UNCITRAL model law. The grounds contained in section 32 and 34 of the Arbitration Act, are in essence reflects the article V of the New York Convention and article 34 and 36 of the UNCITRAL Model law. The provisions contained in section in sec 34 in the Arbitration Act are in *parimateria* with Article V of the NYC.

There is a solid nexus among above mentioned three legal instruments, namely, the New York Convention (NYC), UNCITRAL Model Law, and the Arbitration Act. So that, to understand the concept of public policy, the interpretations and the definitions of the term, which were made on either one, would apply indiscriminately to the others as well.

Article V of the NYC in which the grounds for refusing the recognition and enforcement are embodied, is divided in to two groups. The first group in Article V(1), comes in to operation on the request of a party concerned, while the second group, article V(2), applies *ex officio* as pleased by the enforcing court. The ground of public policy is placed in the second group. Such is the case in respect of the section 34 of the Arbitration Act no 11 of 1995.

In order to examine the connection between the public policy and the rest of the grounds, the two groups are summarized as follows.

In the Article V(1) of the NYC, five grounds are included in five sub- articles. In their chronological order, those grounds are;

i. Parties' incapacity or invalid arbitration agreement

ii. Absence of notice or fairness concerning the arbitral process.

iii. The award exceeding the scope of submission to the arbitration

9 See the preamble of the Arbitration Act no 11 of 1995

10 This convention was the first of series of major steps taken by the united nations since its inception to aid the development of international commercial arbitration. It has described as single most important pillar on which the edifice of international commercial arbitration rests.

iv. Invalid composition of the arbitral tribunal

v. Non binding nature , annulment or suspendence of the arbitral award.

The second group in Article V(2) is consist of two grounds. They are;

(i) Non arbitrability of the dispute

(ii) Contravention of the public policy

It is to be noted that there is a direct nexus between 'public policy" contained in Article V(2) and the rest of the grounds contained in article V(1). It is inclusive of substantive as well as procedural factors in the concept of public policy. In this substantive form, mandatory laws, fundamental principles of law, public order, good morals, national interests, and foreign relations can be identified.[11]

When it comes to the procedural contents of the concept of public policy, the factors in the nature of fraud or the corruption by the part of the arbitrator or the arbitral procedure, breach of natural justice or due process, lack of impartiality, the doctrine of *res judicata,* annulment of the award at the place of arbitration can be identified.[12]

It is evident that article V(1)b and V(1)d reflects the essential elements of the due process of law. Article V(1)b ensures the necessity of notifying the parties to the arbitration and the availability of reasonable opportunity to present their respective cases. Article V(1)d deals with the composition of the arbitral tribunal.

Although the arbitration is a private arrangement by the parties, the drafters of the NYC have not intended to depart from the basic notions of the concept of Natural Justice which forms the basis for every developed legal system. It is undoubtedly accept that factors which fall in to the "due process of law" are part and parcel of the very concept of public policy.

If there is a corruption of fraud by the part of the award or the arbitral process, the award could be challenged for being against the public policy.

A contract having as its aims and object traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of states in the international community.[13]

With referring to the enforcement of arbitral award, English judge Sir John Donaldson went on to say as follows;

11 Interim Report on Public Policy as a bar to Enforcement of International Arbitral Awards – P.15 International Law Association- London Conference- 2000

12 Ibid pp. 24,25,26,28,29

13 Europian Gas Turbines SA V Westman International Ltd 30 Sept 1993,(1994) Rev. Arb 359 and reported in (1995) xx Year Book 198

Consideration of public policy can never be exhaustively defined. But they should be approached with extreme caution. If it has to be shown that there is some element of illegality of that enforcement of award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.[14]

It is quite clear that in the concept of public policy, there is some degree of illegality is involved. But, that that is not the sole criteria to decide the issue.

A famous scholar of the subject, Mark A. Buchanan has defined the concept in this way.

> *"Final parameter of the law, while it is reflected in and often expressed by statutory and constitutional statements of law, also dictate either, consent or constraint, permission or prohibition, when statutes and constitutions are silent".*[15]

As far back as 1853, the English House of Lords defined the concept of public policy in this way.

> *"..that principal of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good".*[16]

It can be noted that when interpreting the term, the wordings such as "injurious to the public", "against the public good", offensive to the member of the public", "against the morality", "against the legal principles" etc, are frequently used by the various judges, scholars, law practitioners over the years. But the interesting point is, idea denoted by these words does not seems to be scrutinized by the persons concerned indiscriminately in all parts of the globe. True values represented by these words would be drastically differs from one country to another.

Dr. Lew has stressed the point that comprehensive definition of the concept has never met.

> *"It is clear that (it) reflects the fundamental economic, legal, moral, political, religious and social standards of every state or extra national community. Naturally public policy differs according to the character and stricter of the state community to which it pertains, and covers those principles and standards which are so sacrosanct as to require maintenance at all costs without exception".*[17]

14 Deutsche Schachtbau and Tiefbohrgesllescaftmbh V Rsa Al Khaimah National Oil Company (1987) 2 Lloyd's Rep 246p.254

15 Mark A Buchanan, "Public Policy and International Commercial Arbitration". (1988) 26 American Business Law Journal 511

16 Egerton V Brownlow 1853 4 HCL 1

17 Lew, Applicable law in the international commercial arbitration, Oceana, 1978,p.532

This is a very broad definition. This suggests an unqualified application of the concept which is based on much expanded grounds. This version of public policy is not compatible with the concept contained in the NYC.

Public policy is a variable notion defending on so many factors, which could be differed from one country to the other. This has caused a lot of judicial inconsistency in its application. It remains undefined owing to the vague nature of the concept. Most developed arbitral jurisdictions have adopted similar conceptions on public policy. But each state has its own concept of what required by its public policy. Yet precise definition of the concept of public policy is neither possible nor desirable.

In order to get rid of this troublesome scenario, it could be said that the correct approach should be not trying to define the concept but to set guidelines of its application.

EQUALITY AND EFFECTIVE ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES:

-OVERCOMING THE BARRIERS IN SRI LANKA-

Lasanthi Daskon Attanayake,
Attorney-at-Law[1]

INTRODUCTION -

Martha Nussbaum (2006)[2] identifies that the problem of doing justice to people with physical and mental impairments is one of the paramount issues of social justice in today's world. People with disabilities are 'people' first, with entitlements to rights, privileges and equal opportunities on par with people without disabilities. The UN Convention on the Rights of Persons with Disabilities (CRPD) which entered into force in 2008 and ratified by the Government of Sri Lanka (GoSL) in February 2016, explicitly and elaborately recognizes the human rights of persons with Disabilities.

DEFINING DISABILITY -

By the late 19th century, the individual approach to disability, which was based on professional 'medicalized' diagnosis, treatment and/or the measurement of recovery, was widely accepted in Western industrialized societies.[3] This model focuses on bodily impairment within the person and assumes that the 'abnormalities' have to be cured or remedied. For many years, the dominance of the medical or the functional-limitation model and its influence on disability policy imposed paternalistic legislation focused on care, institutionalization and segregation which failed recognize the perspective of persons with disabilities.[4]

1 External Faculty, Department of Disability Studies, Faculty of Medicine, University of Kelaniya

2 Nussbaum, M.C.(2006), Frontiers of Justice: Disability, Nationality and Species Membership, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, London, England p.2-3

3 Barnes, C. & Mercer, G. (2010), Exploring Disability, Polity Press, UK and USA, p.18

4 Michigan Disability Rights Coalition (n.d.), Models of Disability, http://www.copower.org/leadership/models-of-disability accessed 16.10.2016

Disabled activists and their organizations in the West became increasingly dismissive of this individual, medicalized model of disability during the 1970s and 1980s and started shifting focus towards organization of society and introduced the Social Model of disability.[5] The social model primarily recognizes the structural patterns of exclusion which result in making particular impairments a source of disadvantage and the positive actions that are required to challenge these patterns.[6]

In the 21st century disability was re-classified as a human rights issue which brought in paradigmatic changes to the understanding and definition of disability.[7] The Convention on the Rights of Persons with Disabilities (CRPD) signaled this shift from traditional charity-oriented, medicalized approaches to one based on human rights. The entire process of drafting of the CRPD revolutionalized the global approach to disability and human rights and created visibility for disabled people within the landscape of human rights.[8]

Accordingly, the CRPD recognizes disability as an evolving concept that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.[9] A set of overarching and foundational principles which guide the interpretation and implementation of the Convention are identified in Article 3. These cross-cutting principles provide benchmarks against which each right is measured;

- Article 3 (General Principles)
- Respect for inherent dignity, individual autonomy including the freedom to make one's own choices
- Non-discrimination
- Full and effective participation and inclusion in society
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- Equality of opportunity
- Accessibility
- Equality between men and own

5 Barnes & Mercer (N.2), p.31
6 Lawson, Anna (Eds.) (2005), Disability Rights in Europe: From theory to practice, p.219, A New Generation of Equality Legislation? Positive Duties and Disability Rights, O' Cinneide, C., Hart Publishing, USA
7 Kothari, J. (2012), The Future of Disability Law in India, Oxford University Press, India
8 OHCHR, Human Rights of Persons with Disabilities, http://www.ohchr.org/EN/Issues/Disability/Pages/DisabilityIndex.aspx, accessed on 16.10.2016
9 Preamble, CRPD, 2007

- Respect of the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities

(OHCHR)[10] (CRPD, 2006)

These General Principles are considered a legal treasure trove which ensure that people with disabilities are equal and meaningful participants in the mainstream.

DISABILITY LAW IN SRI LANKA -

A close review of pre-1978 disability related legislation and incorporations of organizations reflect charitable and remedial understandings of disability in Sri Lanka.[11] Despite having acceded into the CRPD in February 2016.

The existing disability rights law; the Rights of Persons with Disabilities Act No. 26 of 1998; principally provides for the establishment of the National Council for Persons with Disabilities (NCPD). The Act severely lacks a codified statement of rights despite the pretence of being concerned with rights. Therefore, until the CRPD is incorporated into domestic law, people with disabilities in Sri Lanka are limited by the narrow construction of rights in the Act.[12]

Section 23 of the Act restricts itself to discrimination rights in the areas of employment, education and public access and gravely lack a philosophical framework to support interpretation and generate the development of politics and law reform.[13]

The Supreme Court unanimously reinstated the right to access the built environment in accordance with the Act and the Accessibility Regulations of 2006[14] in the only Fundamental Rights Application filed in relation to rights of persons was disabilities by a person named Ajith Perera[15]. Despairingly, adherence to the determination is negligible as it looks to the Act for punitive measures[16] wherein there is no specific punitive measures set out.

10 Office of the High Commissioner for Human Rights, n.d, Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors, Professional training series, No. 17, New York and Geneva, viewed 6 October 2016, http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf

11 Campbell, F.K. (2013), A Review of Disability Law and Legal Mobilisation in Sri Lanka, Law and Society Trust, Sri Lanka

12 Campbell (N.9)

13 Campbell (n.5)

14 The Disabled Persons Accessibility Regulations No 1 of 2006

15 Ajith Perera vs The Attorney General (SC FR 221/2009)

16 “Failure to comply with this court order shall be a serious punishable offence and shall attract punitive repercussions as set out in the law”

A draft disability rights bill encompassing the full spectrum of civil, cultural, economic, political and social rights of persons with disabilities has been on the drawing board for almost a decade. Persons with disabilities, their representative organizations and advocates have expressed concern over certain aspects of the latest available draft,[17] specifically highlighting concerns over the lack of an independent implementation mechanism for rights promotion and protection in accordance with the CRPD.

PERSONS WITH DISABILITIES AND ACCESS TO JUSTICE -

Any person who feel wronged or mistreated in some way seek redress through the justice system of their respective countries. Access to Justice is a broad concept that encompasses peoples' effective access to the systems, procedures, information, and locations used in the administration of justice. Furthermore, people could also be called upon to participate in the justice system i.e. as jurors or witnesses in a trial. People with disabilities have often been shut out of the justice system and denied fair trial and equal treatment before courts, tribunals, law enforcement officials, prison systems, and other bodies that make up the justice system. Also persons with disabilities have limited or no opportunities to be a part of the administration of justice.[18]

The CRPD explicitly recognizes these aspects of discrimination and couples non-discrimination with reasonable accommodation. This version of substantial equality, essential for gaining human rights traction for socially, economically and historically marginalized groups rejects the position that civil and political rights are negative rights and require no action by States, and may require differential treatment in order to full fill the obligations.[19]

Accordingly, the CRPD incorporate dynamic, intersecting and over-arching rights of equality before the law which enumerate obligations on; changing those laws that discriminate against people with disabilities, elimination of stereotypes, accessibility and equal recognition before the law.[20]

In Article 5, the CRPD provides for 'equality before the law' and in Article 12 it reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law and recognizes the 'legal capacity' of persons with disabilities on an equal basis with others in all aspects of life.

Article 13 of the CRPD specifically refers to persons with disabilities and their right to access justice:

17 not available for the public

18 Ortoleva, S, "Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System," 17 ILSA J. Int'l & Comp. L. 281 (Spring 2011). http://womenenabled.org/pdfs/abstract-inaccessiblejustice.pdf

19 Lord, J.E. & Brown, R.(n.d.), The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities

20 Ortoleva, (N. 17)

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

This Article further obliges states parties to promote appropriate training for those in the arenas of administration of justice, including police and prison staff.

ACCESS TO JUSTICE IN SRI LANKA -

Although the barriers encountered by people with disabilities are not entirely accessibility barriers, the aspect of access to the built environment is a crucial factor keeping people with disabilities out of the legal system. For a person with a mobility impairment 'getting into court' could mean confronting flights of stairs, navigating through crowded corridors, struggling to get inside a packed and inaccessible courthouse.[21] The level of accessibility in those courthouses where access is provided (including the Apex courts), has not been assessed and therefore may fall far beyond the standards of 'reasonable access'.

The quagmire is that both people with disabilities; women and children in particular are at much higher risk of violence and abuse than their non-disabled peers. Stigma, discrimination, ignorance , lack of social support and institutionalization are some of the factors that increase their vulnerability to violence.[22]

Ignorance of the laws, policies, legal procedures due to lack of availability of information and modes of communication are a crucial factor that keeps people with disabilities out of the legal system. There is no evidence of availability of legal instruments in accessible formats, in user-friendly formats and in plain language. Specific groups such as blind and vision impaired communities therefore are neither aware of the mechanisms available or procedures to follow to obtain legal redress.

Communication barriers for people who are unable to understand and/or vocalise, either due to deafness, hearing or speech impairment or other motor impairments which affect their speech and language abilities, are a complex issue which at times require individual remedial measures within the system of justice. For example, in the Sri Lankan context, all deaf, hard of hearing or speech impaired persons may not have the standard sign language proficiency and may rely on dialects that are unique and personal. In such

21 Wood, E.F. (1990), Towards a Barrier-free Courthouse: Equal Access to Justice for Persons with Physical Disabilities, http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_artj7640_barrierfreect_tb.authcheckdam.pdf accessed on 16.10.2016

22 World Health Organization(WHO) (2012), Prevalence and risk of violence against adults with disabilities: a systematic review and meta-analysis of observational studies, http://www.who.int/disabilities/publications/violence_children_lancet.pdf?ua=1 accessed 16.10.2016

instances, a professional sign language interpreter is unable to either make him or herself understand or interpret the statement by the individual who could be party to a case.

In terms of persons with mental disabilities, the Mental Diseases Ordinance (No. 1 of 1873) is in conflict with the present day interpretation of mental disability which is rights based. Persons with mental disability in the Ordinance are characterized as not having deliberative capacity, incapable of improvement and generally as suspicious characters.[23] The stigma surrounding mental illnesses affect their representation within the judicial system and the concept of 'unsoundness of mind' is fluid in its application and needs to be broadly discussed and interpretations sought for.

The foregoing are only a fraction of the complexities surrounding disabled peoples' access to legal systems and justice. Profound underrepresentation of legal professionals and law enforcement officials with disabilities and the severe lack of visibility of disability concerns and disability representation in law reform processes are results of larger issues relating to access (to education, employment etc.), representation, transparency and the right to information in Sri Lanka. The foundational principles of the CRPD are fundamentally based on participation, celebration of diversity, empowerment while embodying a clear message of full and active participation of people with disabilities in society.[24]

In Sri Lanka, quasi-legal social frameworks and policy as well as legislative infrastructure are ill-equipped to undertake the enormous task of promoting legal cultures that enhance disabled peoples' quality of life in ways congruent with other citizens.[25]

CONCLUSION -

Disability rights group in Sri Lanka emphasize that the incorporation of CRPD principles into domestic law with enforcement and implementation mechanisms in place are the primary and mandatory measure to ensure that people with disabilities are able to live with dignity and participate equally in society.

It is important for Sri Lanka, as a State Party to CRPD, identify the contexts and means of denial of access to justice by persons with disabilities and understand the ways in which this exclusion harm people with disabilities as community as well as individually. The structural nature of denials of access to justice of persons with disabilities require to be remedies through temporary special measures or programmes of affirmative action.[26]

23 Campbell, (N. 9)
24 Former UN High Commissioner for Human Rights, Louise Arbour, http://www.ohchr.org/EN/Issues/Disability/Pages/DisabilityIndex.aspx accessed on 16.10.2016
25 Campbell, (N.9)
26 Ortoleva, (N. 17)

INTERNATIONAL ARBITRATION;

IMPACT OF JURISDICTIONAL CHALLENGE

M.Ganesharajah[1]
Magistrate, Batticcaloa

INTRODUCTION -

Arbitrator's powers differ according to the agreement entered and stipulated in the arbitration law of a particular State. It is a fundamental duty of the arbitrator to come to finding on the jurisdiction. Awards pronounced without jurisdiction have no legitimacy to enforce. The award rendered without jurisdiction may subject to set aside. Therefore the arbitrators shall resolve the dispute with regard to jurisdictional issue at the first instance where the jurisdictional issue may have raised before tribunal as well as court of the particular state. In such instance the arbitrator should decide whether the tribunal may deal with jurisdictional question or should it be referred to a Court of Law.[2]

Jurisdiction should be determined before deciding substantive issues in dispute. There is no necessity of full inquiry by the arbitrators on the jurisdictional issue. Jurisdictional may not arise if the both parties in relation to the dispute participate in constituting the tribunal and introduce their respective claims and counter claims without reservations. Tribunal may ask the parties to confirm the jurisdiction of tribunal regarding the issue. The recent laws on arbitration consider on merits without challenging the jurisdiction by way of submissions.

1 LLM-USA (SCHOL), PGD-Conflict Resolution, PGD IN International Relations, PGD IN International Trade Law, Dip in Management Dip in Advance English.LLM IN University of west London (final),International Human Rights Award Winner -UK, Visiting Legal Expert on Human Rights-ICJ, Thailand Bankok, Former State Counsel-Attorney General's Department, SL.

2 Applicable laws and procedures in international commercial arbitration Section C: Jurisdictional issues in arbitration L. Mistelis with the assistance of J.D.M. Lew

There is an exception if the objection is outside the reach of party autonomy in a given dispute. Full inquiry may be necessary if one party expressly contests the jurisdiction of tribunal and left out to participate in arbitral proceedings. Tribunal decision is important in these cases. To avoid delay in arbitral proceedings and to strengthen the jurisdiction of arbitration tribunal, different techniques have been adopted by modern arbitration laws.

ARBITRATION ACT OF 1996 -

The detail provisions of 1996 Act can be summarized as below:

(1) Under Section 30 of the Act, arbitrators have the right to decide their own jurisdiction and deliver the award.

(2) Whether they decide their jurisdiction and render award under their jurisdiction or on substantive dispute award may be challenged according to section 67 of the act.

(3) If the tribunal refuses its jurisdiction and the seat of arbitration in England, with consent of the other party, the issue can be resolved or under section 32 of the act.

(4) If one party challenges the jurisdiction it can fall under section 72 and section 67 of the act.

(5) The section 9 of the act deals with the stay of judicial proceedings on the grounds of null and void, inoperative and incapable to enforce.

(6) Section 31 deals with objection should be raised as soon as aware of the jurisdictional issue.

(7) Section 31(3) deals with objections is not made on time and the court refuse to enlarge the time.

(8) Section 73(1) enumerates to deal with invalid objections and the party waived the right to object.

(9) Objection on due time may be dealt according to section 31(4) of the act, and appeal against the award on jurisdictional grounds stipulated in section 67 of the act.

(10) Agree on preliminary ruling may be handled under section 32 of the arbitration act.

KOMPETENZ-KOMPETENZ AND SEPARABILITY -

Kompetenz-Kompetenz principle is used to determine the tribunal's own jurisdiction or competence and is used to overcome the conceptual problem arising out of decision of an arbitrator on his its jurisdiction. This legal fiction is used to determine the own jurisdiction of the tribunal. How the assumption of these powers can be justified is stipulated in various international instruments.[3] Even though the provisions are not existed tribunals assumed the right to rule their own jurisdiction in a traditional form.[4]

Severability and other techniques were used to strengthen the jurisdiction of tribunal. To decide its own jurisdiction Kompetenz-kompetenz is used to empower the tribunal. Severability affects the outcome of this decision. There are important decisions with regard to Kcompetenz-kompetenz.[5]

In a land mark case of Supreme Court of USA held, Federal Arbitration Act gives power to arbitration tribunal to decide its own jurisdiction.[6] Also stated this question subjected to contents of arbitration agreement. This principle is recognized by US Supreme court.

This was reaffirmed in the case of **Howsam v. Dean Witter Reynod**[7] and in the case of **Green Tree Financial Corp vs Bazzle.**[8] US Supreme Court has recognized the doctrine of Komptennz-Kompetenz. The objection must be within the jurisdiction of the arbitrator in order to avoid waiver there are two types of objections claiming there is no valid agreement and the dispute is outside the scope of the agreement. This is not an objection to jurisdiction of the arbitrator deciding issues vide **Rock-Tenn Co v United Paper Workers International Union AFL-CIO, 184 F.3d 330 at 335–36 (4th Cir 1999)** (party in the arbitration proceeding had disputed "whether the dispute was arbitral", but this is not an objection to jurisdiction of the arbitration panel to decide the issue).

Recently, courts review the party to the dispute must assert the objection specifically that the arbitrator doesn't have the authority to resolve the dispute. This was discussed in a land mark case **Halcot Navigation Ltd Partnership & Stolt-Nielsen Transp. Group, 491 F. Supp. 2d 413 (S.D.N.Y. 2007).** The US Supreme Court has ruled on this issue and the answer is in the affirmative.

3 The reference was first made in Article 36(6) Statute of the International Court of Justice (ICJ) which allows the ICJ which to ruleits own jurisdiction. A comparable competence was recognized for arbitration tribunals in the European Convention Article V(3). Since then the doctrine has found recognition in the ICSID Convention Article 41(1) and is now firmly established in most modern arbitration laws.

4 See Model Law Article 16(2), also England, Arbitration Act s.31; Germany, ZPO s.1040(2); Netherlands, CCP Article 1052(2).

5 Exploring the blurred line of jurisdiction of courts and arbitral tribunals: Kompetenz-Kompetenz,a perfect principle? By Abhilaksh Gaind,3rd year student ,National University of juridical Sciences.

6 See First Options of Chicago, Inc. v. Kaplan US Supreme court decision

7 537 U.S. 79 (U.S.S.Ct. 2002)

8 539 U.S. 444, 456 (U.S. S.Ct 2003)

> *"Arbitrability issue to an arbitrator, does not waive a party's right to have such issue decided by the court after the conclusion of the arbitration, provided that the party has also objected to the jurisdiction of the arbitrators to decide such issue"*

Arbitral tribunal is legally competent to decide its own jurisdiction provided due to certain circumstances the judicial review may be exercised. The arbitrability would be reviewed by the judiciary if the agreement is silent on that. Also court stated issue of arbitrability will arise in limited instances where the parties seek judicial intervention rather than the decision of arbitral tribunal.

The Supreme Court recognized and spelled out that the arbitrator is fully deserved to make decision in procedural issues and clearly stated the court has no authority to intervene on such matters. Article 16 and article 16(3) of Model law appreciate the principle of Kompetenz-Kompetenz. Article 16(1) provides tribunal may rule on its own jurisdiction the validity and existence of the arbitration agreement. Methodology to be adopted by arbitral tribunal is provided in article 16(3) and it may do so during the period of deciding the preliminary questions of law or during the finality of the award.

PRIMA FACIE VIEW Vs COMPLETE JUDICIAL SCRUTINY -

The normal construal of the language used in Article 8(1) of the UNCITRAL Model Law realizes the fact that complete judicial deliberation over the jurisdictional issues is purely in accordance with the law. Although the phrase in Article 8 (1)-" *finds that the agreement is null*" may very well be interpreted to determine prima facie whether the agreement is valid, but a clear and a pain reading of the provision in question points out the objective of the court of law, that is, a complete discernment of the validity of the arbitration clause.[9] The parliamentary intent can be gauged from the fact that a certain clause replicating the French Civil Code and thereby restricting the powers of the court for a full judicial review of the jurisdiction was not accepted by the legislature.[10] This is generally followed by a large number of UNCITRAL jurisdictions like Germany, Canada, New Zealand and Hong Kong.

However, it may be noted that Article 8 (1) nowhere provides for a mandatory full review on the jurisdiction issues by a Court of law. For this reason, a court of law may just be satisfied that a prima facie judicial consideration is proper for a particular case. Interestingly, some judicial decisions have allowed for a prima facie judicial review, for it based its reasoning on this form of interpretation of Article 8 (1) of UNCITRAL Model Arbitration Law.

9 Bachand,Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?, 22 Arb. Int'l 463, 463 (2006).

10 H. Holtzmann& J. Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary ,484-486 (1989).

In a landmark decision, **Gulf Canada Resources Ltd v. Arochem International Ltd**,[11] the British Columbia Court of Appeals held that the Court of law should not determine the validity of the agreement. Further, it stated that a prima facie consideration is enough for the courts to undertake in order to determine the jurisdiction of the arbitral tribunal. The same principle was upheld by the Hong Kong High Court in **Pacific Int'l Lines (Pte) Ltd v. Tsinlien Metals and Minerals Co.**[12]

In another breakthrough in the case of **Shin-Etsu Chemical Co. v. AkshOptifibre Ltd**,[13] the Supreme Court of India, held that in the cases of international commercial arbitration, there has to be a clear departure from the full judicial review of the jurisdictional issues of the arbitral tribunal, for a prima facie view is the correct approach.

SCOPE Vs VALIDITY OF AGREEMENT-

An additional speculative and interesting area of Kompetenz-Kompetenz is an exploration of different kinds of objections with regards to the question over jurisdiction. The question is whether the objection in question is pitched at the legitimacy or the ambit of the arbitration clause, how should these objections of distinct nature be handled?

It may be argued that an interlocutory review by the judiciary that Article 8 (1) of the Model Law is only applicable in the condition where there is a dispute over the legality of the arbitration agreement as against the ambit of an agreed legal arbitration clause. However, the opposition argues that it has only been divulged by the said provision and the above interpretation may not be held as the indubitable one, for it does not explicitly mention about the applicability governing the scope of the arbitration clauses.

This interpretation has been upheld by some of the national judicial systems. In the landmark case of **Rio Algom Ltd v. Sammi Steel Co. Ltd**,[14] Courts stated that the sole role of the judicial system is to determine the legality and validity of the arbitration clause. It further held that the adjudication of the scope of the authority is the prerogative of the arbitral tribunal.

Latest decisions under section 67 of the Arbitration Act of 1996 by the Commercial High Court of UK revealed the power of the court under section 67.

Section 67 made available to the parties to challenge an award on the basis the tribunal lacked substantive jurisdiction and pray to get declaration to set aside the award.

11 66 BCLR2d 113 & 114 (B.C. Court of Appeal 1992).
12 XVIII Y.B. Comm. Arb.180 (H.K. S.Ct. 1992) (1993).
13 XXXI Y.B. Comm. Arb.747, 783-784 (Indian S. Ct. 2005) (2006)
14 XVIII Y.B. Comm. Arb. 166 (Ontario Court of Justice 1991) (1993).

In **Integral Petroleum SA v Melars Group Ltd [2015] EWHC 1893 (Comm) ("Integral Petroleum") and Hellenic Petroleum Cyprus Limited v Premier Limited [2015] EWHC 1894 (Comm) ("Hellenic Petroleum"),** the Commercial Court has affirmed and stated scope of and the implications of making an application to challenge an arbitral tribunal's substantive jurisdiction under section 67 of the Act.

PRINCIPLES ILLUSTRATED UNDER SECTION 67 OF THE ACT -

In Integral Petroleum and Hellenic Petroleum, the court restated the parties according to section 67 of the Act the Court can re-hear the issues on the tribunal's jurisdiction and does not simply review the award. Court can hear the case afresh and comes to its own decision regarding substantive jurisdiction to determine the dispute.

As there was no binding agreement between the parties, the arbitrator had no substantive jurisdiction. As a result, the court held that the arbitrator's award was of no effect and set-aside.

These cases provide parties to a London-seated arbitration that any substantive disagreements regarding jurisdiction of an arbitral tribunal may result the award being challenged for lack of substantive jurisdiction in section 67 of the Act.

The Court:

1. can re-hear witness and submissions afresh to determine jurisdictional issues;
2. Not limited to reviewing the evidence which was taken before the arbitrator; and
3. Not bound by the decision of arbitrator either on facts or law.

Further, that a failure to challenge a jurisdictional award (whether partial or final) within the time limit under section 70 of the Act may lead to an award becoming final and binding prohibiting a party from raising the same challenge under section 67 of the Act.

Further both cases remind that parties have a need to be vigilant in drafting their dispute resolution clauses (especially arbitration agreements). Also, that dispute resolution provisions are sufficiently clear in their effect and intent.[15]

Finally, for an enforcement of an award, under Article II of the NYC, it is essential that the parties agree to an arbitration agreement that is in writing.

15 http://www.lexology.com/library/detail.aspx?g=5b216a71-4ff6-4930-ab24-d0f660fd1e15

PRESUMPTIONS IN THE PRINCIPLE -

It has been observed that there is a complete unanimity amongst the various legal systems for the availability of judicial consideration in the course of arbitration. However, there is a complete deviation in the legal jurisdictions with regards to the apportioning of the authority between courts and the arbitral tribunals.[16] For this reason, the author feels that this apportionment should be subjected to proceedings to proceedings basis which ought to be regulated by some typical presuppositions.

Jurisdictional dispute on arbitration agreement should be submitted to arbitrator only as it is within the scope of arbitration agreement. It maintains uniformity among model law countries and English and US judgments. It is submitted there should be no form of judicial intervention over the arbitration clause.[17]

If there is a challenge only on validity of parent contract not the arbitration clause kompentenz kompetenz may not be considered. Arbitrator has legal authority to look into legality of parent contract thereby arbitrator can avoid the issue on jurisdiction.[18]

The judicial access to challenge jurisdiction is another important factor considered by the decisions of Model Law nations like Unite Kingdom and USA.[19]

ARBITRATION AGREEMENT; DUAL JURIDICTION -

The problem with regard to determine valid and binding arbitration agreement is another issue courts and arbitrators may face. Arbitrators are empowered to determine their own jurisdiction on timely objections during the proceedings as well as the court also have the authority to do so any claim in court action. This differences raise question about duplication of work effects on final determination of court and tribunal etc.

If the agreement is null and void or incapable to perform the courts have different stands to refer the cases to arbitrators it is seen in case laws of different jurisdictions, some courts took the stand the arbitrators should determine.

To evaluate prima facie evidence of existence and validity of arbitration agreement courts went into more details and substantive issue such as the validity of main contract. It is my view that the prudent and reasonable approach should be implemented by courts to evaluate all circumstances of the cases. Model arbitration law section 8(1) gives power to courts to evaluate the validity of arbitration agreement. If there is no arguable case

16 G. Born & P. Rutledge, International Civil Litigation in United StatesCourts 522-540 (4th ed. 2007
17 See supra pp. 891-894, 931-937, 962-964
18 See supra pp. 916-920
19 Law Debenture Trust Corp. Plc v. Elektridetermining m Finance BV [2005] EWHC 1412 (Ch).

before court to invoke the jurisdiction of the court undue delay and abuses would be the outcome.

Under Model Arbitration Law section 16(3) decision on jurisdiction treated as preliminary matter and if such decision is done prior to the award on the merits based on the discretionary right of the arbitrators to resolve the jurisdictional challenge the Model Arbitration law leaves this to determine to national procedural laws. In international arbitration there is a practice to make final arbitral award on the decisions of after resolving the procedural matters.

DECISION; *FALSA NOMINATIO NON NOCET* -

Courts looked into the problem in different directions and decisions on jurisdiction are used to set aside the final arbitral awards. But the different authors view is the section (16(3) never allows double or multiple court proceedings one under section 16(3) and another in section 34(2). It will discourage arbitrators to resolve the jurisdictional issues in their preliminary decisions.

SCOPE OF ARBITRAL AUTHORITY: ALLEGATIONS OF FRAUD -

When courts had to evaluate, in a preliminary fashion, the validity and scope of the arbitral agreement, they were usually expressing favorable views about the use of arbitration, and interpreted broadly the authority of arbitrators.

One important exception in some jurisdictions is; one party blame the other party for fraudulent behavior but most of the courts decided fraud and deceit are not within the ambit of the arbitration agreement. In practice allegation in both side mischief and fraud happen and will affect the effectiveness of arbitration award. Therefore, there should be uniformity with regard to objections for the harmonization of global practice.

INOPERATIVE AGREEMENTS -

Inoperative agreement which is interpreted by courts in different case laws some courts interpreted the right full abandonment of agreement and force the party when the party wish to go for litigation.

When the right to object of a party is lost and it was interpreted and understood differently by courts in different jurisdiction. The Canadian court has strict rule with regard to objection on jurisdiction the court encourage separate plea for the jurisdiction prior to the substance. Some courts are much more flexible accepting the objections after several years. The clause *"not later than when submitting.... first statement on the substance"* should be interpreted in plain language and objections should be raised in advance or simultaneously with substance of the dispute.

EXISTENCE OF A DISPUTE -

Only the disputes can be referred to arbitration. The evaluation of differences between parties should be left to arbitrators to take a decision. The courts have taken the right approach and there is a presumption the dispute is existed in a case where there is no clear claim in the dispute.

It may be noted some courts expressed opposing views regarding the powers on interim measures. The provision in Modern Arbitration Law clause 17 provides court to dismiss the interim measures. The UNCITRAL revision on interim measures contributes resolution of such issues once it completed and implemented.

PROCEDURAL DIFFERENCES; COMMON LAW Vs CIVIL LAW -

The reasoning of different jurisdictions differs on procedure or on culture of the procedure. In Common Law countries if the lack of jurisdiction is raised the court will stay the proceedings. But in Civil Law countries court will dismiss the claim as agreed upon in arbitration agreement. These differences have greater effect in long term in case laws in substantive reasoning of courts. In Canadian courts debate is going on whether the stay of proceedings should be mandatory or discretionary measure by court. Only gradually these differences would be reduced and harmonization in international arbitration would be achieved.[20]

CONCLUSION -

The doctrine of Kompetenz-Kompetenz became important in the international commercial arbitration but the uniformity in laws should be achieved, the subject is still in progress. Although greater development has taken place but different jurisdictions determined differently and interpret differently to reduce costs and instill confidence in business communities. Uniform set of principles should be established and it will take a long time. At the same time, the courts should pave the way to develop the principle through their interpretations. Courts must actively involved in development of natural

20 Exploring the blurred line of jurisdiction of courts and arbitral tribunals: Kompetenz-Kompetenz,a perfect principle? By Abhilaksh Gaind,3rd year student ,National University of juridical Sciences

justice and the interest of litigants, thereby making sure that arbitration clause should be executed and effectuated in the right direction.

BIBILIOGRAPHY -

(1) Applicable Laws and Procedures in International Commercial Arbitration-Section C: Jurisdictional Issues in Arbitration L. Mistelis with the assistance of J.D.M. Lew.

(2) Exploring The Blurred Line of Jurisdiction of Courts and Arbitral Tribunals: Kompetenz-Kompetenz,a Perfect Principle? By Abhilaksh Gaind, 3rd year Student ,National University of Juridical Sciences

(3) Jurisdiction: Challenging The Arbitrator's Assertion or Denial of Jurisdiction-Section 30, 32 and 72 of the Arbitration Act 1996.

SECTION 154 OF THE EVIDENCE ORDINANCE:

HOSTILE WITNESS WITH SPECIAL REFERENCE TO ENGLISH AND INDIAN LAW

Mahie Wijeweera,
District Judge, Tangalle

INTRODUCTION -

As *Bentham* aptly stated 'Witnesses are the eyes and ears of justice". Nonetheless, Evidence Ordinance, which closely governs the use of testimony of witnesses, contains several rules on examination of witnesses and admissibility of evidence. Amongst them, section 142 of the Evidence Ordinance of Sri Lanka requires that leading questions cannot be put to the witness in examination-in-chief or in re-examination, except with the permission of the court. As it happens, directing leading questions to witness is one of the luxuries only afforded in the course of cross-examination. General rule dictates cross-examination of a witness to be conducted only by an adverse party. Right to cross-examine witness by the party calling him is clearly the exception and is embodied in sec.154 of the Evidence Ordinance. This section authorises the court, in its discretion, to permit the person who calls a witness to put any question to him, including questions, which might be put in cross-examination by adverse party. Section 154 of the Evidence Ordinance reads as thus;

> *Question by party to his own witness: "The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party"*

COMMON CAUSES FOR THE WITNESSES TO BE TREATED AS HOSTILE -

a. Influenced by Interested Party -

This can range from threat or intimidation to being bribed. Moreover, some witnesses refrain from telling the truth because they fear some kind of threat or harm may result in the future. On the flip side, influence or threat may also emanating from the Law Enforcement. It may actually be the case that witness was threatened or induced to lie by Police to state something false and now he wants to set the record straight, during the trial. In such situations, in fact, it is not justifiable to treat the witness as hostile, merely because he is uttering something unfavourable to the version of prosecution.

b. New to Court Atmosphere -

Though it may often go unnoticed, courtroom is not a friendly place for anyone who has no legal background, this is especially worse for witnesses. Witnesses' apparent hostility due to unfamiliarity with court atmosphere can be rectified to great extent by taking simple measures to ease pressure on them. These include, but not limited to, ensuring they are not addressed harshly, recording evidence without postponements and arranging a waiting area with basic facilities for witnesses until their case is taken up.

c. Illiteracy and Ignorance -

I cannot help but to quote following passage from His Lordship Justice Jayasuriya, one of the best Judges Sri Lanka has ever produced with an unprecedented level of knowledge in Law of Evidence, in **Wicramasuriya v. Dedoleena.**[1] *"A Judge, in applying the 'Test of Probability and Improbability' relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."* Same observation is equally applicable in the case of illiterate, uneducated and less talented witnesses, who face imminent risk of being labelled as hostile witnesses, merely because of their inherent weaknesses.

d. Loss of memory due to delayed trial

Of among all the possible reasons a witness may be treated as hostile, this is the most unacceptable and unpardonable, because this is nothing but one of the tragic results of ailing criminal justice process in Sri Lanka. There is a glimmer of hope and it can be said with some hope that light at the end of the tunnel is to visible, nonetheless, thankful to recent Circulars by the Judicial Service Commission intended to clear backlog in the courts of Sri Lanka.

1 1996, 2SLR,96

INTERPRETATION OF SEC.154 EVIDENCE ORDINANCE -

Indian Legal Literature

One cannot help but venture into plethora of decided cases in India relating to this subject to have clearer and precise understanding of the scope and substance ofsec.154 of the Evidence Ordinance. Sri Lankan Evidence Ordinance was word to word replica of its Indian counterpart at the time it was introduced. Naturally, Indian Law of Evidence was regularly updated and changed according to the needs arisen with passage of time. Unfortunately, Sri Lanka has not followed suit. However, even at present there is no substantial difference between Sri Lankan and Indian law of evidence. Be that as it may, Evidence Act in India is the brainchild of **Sir James Fitz Stephen**, eminent English jurist, who was tasked by the Crown to introduce suitable legislation relating to Law Of Evidence in British Colonies under the flag of the ''empire on which the sun never sets''. To his credit, it shall be stated these legislations he master stroked bears testimony to his ingenuity. Most of these legislations in respective countries are almost intact to date and very much alive, i.e. India, Sri Lanka and Malaysia.

Why was the Evidence Act drafted by Sir Stephen is so unique in its Character -

Soon after Sir Stephen pushed Indian Evidence Act of 1872 into a law, which is his greatest legacy ever, he was to codify English penal laws. Perhaps, it was his success in creating Indian Evidence Act which has convinced the law makers in his own country to entrust with him this astounding task. Following quote by Sir Stephen will no doubt be helpful in understanding his mindset, when he was tasked with codification of penal laws in England.

I quote Sir Stephen, "*To compare the Indian Penal Code with English criminal law is like comparing cosmos with chaos.*"

This is evidence he has taken great pain in devising innovative provisions in his endeavour in drafting Indian Evidence Act, without just importing English Law to India. It goes without saying Indian Evidence Act was a clear deviation from the English model of the common law, which prevailed in England during the era. Sir Stephen, to his credit, correctly understood the depth of the task assigned to him by colonial rulers. He, as any genius of his level of intelligence, did not try to import common law principles as a whole to fill the gaps of new piece of legislation. Nonetheless, basis of Indian Evidence Act is the law of England freed from superfluities, technicalities and local peculiarities. Thus, he created practical, as simple as possible, set of rules with contrasting difference to complicated and voluminous common law rules. Therefore, it is not prudent nor advisable to import English Common Law provisions, relying on the of principle of *Casus Omissusin* interpreting Law of Evidence in India or Sri Lanka, for that matter.

Hostile, Adverse and Unfavourable Witness in English Common Law -

It is important to note that the English statute and common law principles of evidence, which prevailed at the time Indian Evidence Act was enacted, differs materially from the law contained in the Indian Evidence Act in many aspects. One of the key differences is with regard to cross-examination and contradiction of a witness by a party. Under the English Law, a party was not permitted to impeach the credit of his own witness by general evidence of his bad character, shady antecedents or previous conviction. In contrast, in Sri Lanka and India, this can be done with the consent of the court under S.155 (see the wordings of sec.155). Under the English Evidence Act of 1865, a party calling the witness, can 'cross-examine' and contradict a witness in respect of his previous inconsistent statements with the leave of the court, only when the court considers the witness to be '**adverse**'. As already noticed, no such condition has been laid down in Ss.154 and 155 of the Sri Lankan Evidence Ordinance and Indian Act. Moreover, grant of such leave has been left completely to the discretion of the court, while the exercise of which is not fettered by or dependent upon the 'hostility' or 'adverseness' of the witness.

In this respect, Sri Lankan Evidence Ordinance and Indian Evidence Act were well in advance of the English Law, according to some jurists. They argue even after amendments brought into these provisions in the United Kingdom by section 119 of the Criminal Justice Act 2003, which is the prevailing law in the United Kingdom at present, English Law is not practical as Sri Lankan or Indian counterparts. Section 119 states *"if a witness declines to answer or answers in a way inconsistent with their previous statement, they may be treated as a hostile witness"*. If they do not admit the truth of a previous inconsistent statement, it could be admitted under section 119 of the Criminal Justice Act 2003, as evidence of the matters stated. Nonetheless, the common law rules applicable to hostile witnesses remain valid, as much as to fill any lacuna in law. When a witness gives evidence under oath begins to change materially from the account that he provided earlier in a pre-trial statement, the counsel or barrister can apply to the judge for a decision as to whether or not witness is hostile. The judge has to decide between a hostile witness and an unfavourable witness.

As evident from above facts, it goes without saying, English Common Law and Written Law contains quite different provisions relating to hostile witnesses. Hence, it is crystal clear sec.154 cannot be interpreted in light of provisions in English Law, relying on *casus omissus*.

Why Sec.154 is Different from Provisions in English Common Law -

To summarise, following are the main differences of two provisions.

- Unlike in English Common Law, sec.154 does not make it a condition precedent for a judge to declare a witness as hostile, before permitting him to be cross examined by the party who has calls him.

- Moreover, sec.155 of Sri Lankan Evidence Ordinance permits to impeach the credit of his own witness by general evidence of his bad character, shady antecedents or previous conviction. In contrast, this is not possible in the United Kingdom.

Lessons for Sri Lanka on how Eminent Indian Judges Overcome this Confusion -

In **Sat Paul v. Delhi Administration**[2] Indian Supreme Court held:

> *"To steer clear of the controversy over the meaning of the terms 'hostile' witness, 'adverse' witness, 'unfavourable' witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that, in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared 'adverse' or 'hostile'. Whether it be the grant of permission under Sec.142 to put leading questions, or the leave under Section 154 to ask questions which might be put in cross- examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court"*

It is clear by the foregoing passage, the discretion conferred by Section 154 on the court is unqualified and untrammelled, and is apart from any question of 'hostility'. It is to be liberally exercised whenever the court from the witnesses' demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. Therefore it is of paramount importance, in the order granting such permission it is preferable to avoid the use of expressions, such as 'declared hostile', 'declared unfavourable'.

GUIDELINES ON EXERCISING JURISDICTION UNDER SEC.154 BASED ON RATIOS OF DECIDED CASES IN INDIA -

A. Court can permit Examination under sec.154 only after being satisfied that it is warranted under the circumstances to grant such permission, judiciously.

2 AIR 1976 SC 294

It shall be emphasised that merely because a witness speaks truth, which may not suit the prosecution or defence, the discretion to allow the party concerned to cross-examine his own witnesses should not be granted by the judge. The sanction of permitting the cross-examination of witness by the party calling him is an extra-ordinary phenomenon and permission should be granted only in exceptional cases.[3] The courts are, therefore, under a legal obligation to exercise the discretion vested in them in a judicious manner by proper application of mind and keeping in view the attending circumstances.[4]

B. At What Stage of Examination of a Witness sec.154 can be Invoked?

It was held in **Middolla HarijanaThimmaiah vs State of Andra Pradesh**[5] that section 154 does not confine the exercise of the power vested with the Court to the stage of examination-in-chief or to any particular stage of the examination of the witness.

It is wide in scope and the discretion is entirely to the Court to exercise the power when the circumstances demand. The rationale behind the decision by Supreme Court was the possibility of witness in his ingenuity may convert any restriction to his favour. Such witness may, during examination-in-chief, faithfully conform to what he stated earlier to the police, but in the cross-examination can introduce statements in a subtle way, contradicting in effect what he stated in the examination-in-chief.

C. Evidentiary Value of a Testimony by Witness after an Order under sec.154 permitting a Party to Cross-Examine his own Witness

Indian Courts, including the Supreme Court of India, has held time and again that the evidence of a prosecution witness cannot be rejected *in toto* merely because the prosecution chose to treat him as hostile and cross examine him.

The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof, vide: **Bhagwan Singh v. The State of Haryana**[6] **Rabindra Kumar Dey v. State of Orissa**[7]**Syad Akbar v. Stateof Karnataka**[8] **and KhujjiSurendra Tiwari v. State of Madhya Pradesh**[9]**, State of U.P. v. Ramesh Prasad Misra.**[10]

3 Dahyabhai Chhaganbhai Thakker v. State of Gujarat (1964) 7 SCR 361,368
4 Gura Singh vs The State Of Rajasthan (AIR 2001 SC 330, Also reported in 2001 Cri LJ 487
5 2005 (1) ALT 537
6 AIR 1976 SC 202)
7 AIR 1977 SC 170
8 AIR 1979 SC 1848
9 AIR 1991 SC1853
10 AIR 1996 SC 2766

Therefore, it is crystal clear that Supreme Court of India held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been expressed in **Sarvesh Narain Shukla v. Daroga Singh**[11] **Subbu Singh v. State by Public Prosecutor**[12] **Muniappanv. State of Tamil Nadu**[13] and **Himanshu Chintu v. State**.[14]

Recently as in 2012, the Supreme Court of India in the case of **Ramesh Harijan vs State Of U.P.**[15]reiterated that the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. Bottom-line is, witness does not become unreliable merely because he was cross examined by the party who called him in the first place and it shall not result in *ipso facto* rejection of his evidence for that fact alone.

LEGAL POSITION IN SRI LANKA IN LIGHT OF DECIDED CASES -

It is not surprising to see there is only a handful of reported cases in Sri Lanka relating to sec.154 of the Evidence Ordinance, unlike in India, due to vast difference of number of decided cases in India and Sri Lanka, attributed to population difference of two countries. Nonetheless, these few cases are of high standard in terms of critical analysis of law relating to the subject in comparative jurisdictions.

In **King v. Fernando**,[16]first reported case on this subject, it was observed that the fact that a witness is treated as adverse and is cross-examined as to his credit, does not warrant a direction to the jury that they are bound in law to place no reliance on his evidence. It was held it is for the jury to examine the whole of the evidence of such a witness so far as it affects both parties favourably or unfavourably for what, in their opinion, it is worth.

Most recent decided case in Sri Lanka on this subject is **Moses vs AG**.[17] In that judgment His Lordship **H.S. Yapa J**, apparently, relied on the *ratio decidendi* of Indian Supreme Court case of **Keshoram Bora v. The State of Assam**[18] in his judgment, which was reproduced as below:

> *"While it is true that merely because a witness is declared hostile his evidence cannot be rejected on that ground alone, it is equally well-settled that when once a*

11 AIR 2008 SC 320
12 (2009) 6 SCC 462
13 AIR 2010 SC 3718
14 (2011) 2 SCC 36
15 2012, 5 SCC 777
16 46 NLR 254
17 1999, 3slr, 401
18 1978 AIR 65 - SC 1096 para 6

prosecution witness is declared hostile the prosecution clearly exhibits its intention not to rely on the evidence of such a witness and, hence his version cannot be treated as the version of the prosecution itself".

Clearly this excerpt of Indian Supreme Court decision depicts precise legal position in India relating to sec.154, which makes absolute sense. It appears His Lordship **H.S. Yapa J** correctly came to conclusion that merely because a witness is declared hostile his evidence cannot be rejected on that ground alone. Surprisingly, it was reported later in that judgement as thus:

"However, more recently the view has been expressed that such evidence has no value and cannot be relied upon by either party"

One possibility is, this may be a *bona fide* mistake during the process of editing, when it was summarised or pruned for the purpose of record in Sri Lanka Law Reports. Other possibility is, with all due respect to His Lordship **H.S. Yapa**, this was a *bona fide* mistake by author of the judgment. However, this author is absolutely confident that latter scenario is not to impossible, due to His Lordship's industry, knowledge and thoroughness eminent from every aspect of his illustrious career as a prosecutor and judge.

Whatever the case may be, *stare decisis* dictates lower courts are free to choose and follow either one of the conflicting decisions of courts of similar hierarchy. Moreover, **King vs Fernando** was a three judge bench judgment of Court of Appeal, while **Moses vs AG** was decided by two judge bench, by Court of Criminal Appeal, which was of similar hierarchy as present Court of Appeal.

It is timely that Sri Lankan law relating to sec.154 be updated, to clear any ambiguity which may have resulted due to foregoing conflicting decisions.

CONCLUSION-

It should be emphasised that when invoking powers under sec.154 courts are only exercising inherent power vested with it, which is distinguishing lies from truth, but filling the lacunae in the prosecution case. It is opportune to remind the judgment of **Jennison v. Backer,**[19] where English Bench declared *"The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope"*

Delays of justice shall be addressed effectively to prevent miscarriage of justice. Moreover, "Witness Protection Programmes" in Sri Lanka must be operated effectively under the newly enacted Victim Protection Act to minimise witness tampering and obstruction of justice. Protection for witnesses during and after trial of a case are of utmost importance, to enhance public confidence to come forward as witnesses of crimes, without having second thoughts about it.

19 1972 (1) All E.R. 1006

LAWFUL INTEREST RECOVERABLE IN BANKING TRANSACTIONS

Manjula Karunarathna,[1]
District Judge - Hambantota.

"Interest" is an inseparable part of the business of banking and therefore, it should inevitably be given a prominent place in the banking transactions.

According to Black's Law Dictionary (6th edition) page 812, "Interest" is the compensation allowed by law or fixed by parties for the use or forbearance of borrowed money.

"Interest" is Compensation paid by the borrower to the lender for deprivation of the use of his money. It is not capital. It is rather the accumulated fruit of a tree which the tree produces regularly until payment and it may be due by express agreement of the parties or by legal implication.

ARE BANKS ENTITLED TO CHARGE COMPOUND INTEREST?

Under and in terms of section 03 of the Civil law ordinance, the law governs the banks and banking is English Law, unless it has been modified by the local legislation.

The following types of interest can be identified in financial transactions.

I- Simple interest - the interest Computed upon the capital alone, without adding the interest for the respective period

II- Compound interest - the interest computed on the capital and the accrued interest

III- Legal interest- the interest granted in a judgment or a money decree, from the date of the judgment, until settlement in full.

The legal interest is determined by the Monetary Board of the Central Bank of Sri Lanka

1 B.Com(SP)Marketing, University of Sri Jayawardanepura, Attorney-at-Law

from time to time and in terms of the Gazette Extra ordinary No.954/2011 and dated 20th December 1996, the legal interest as at present is 18% per annum, with effect from 1st January 1997. (As per the extra ordinary Gazette No.1946/6 21st December 2015, the legal interest from January 2016 is 5.98% per annum)

In **National Bank of India vs. Stevenson (16 NLR 496)** Justice Pereira clearly stated that, according to the law governing Banks and Baking in Sri Lanka, Banks can charge compound interest .

RECOVERABLE INTEREST UNDER CIVIL LAW ORDINANCE -

Section 05 of the Civil Law Ordinance No: 5 of 1852 (as amended) read as follows.

> 5. Provided that no person shall be prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby or from recovering interest at the rate of twelve per centum per annum on any contract or engagement, in any case in which interest is payable by law and no different rate of interest has been specially agreed upon between the parties, <u>but the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal.</u> (emphasis mine)

According to the above section, parties can agree on a rate above 12%. However, the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal.

In **Sinnathamby Cumaravaley and another Vs. Muttatamby sitteraupuvalpulley [1881 – 4 SCC 28], Cayley** C.J. states as follows,

> *"This is an action on a bond to recover 5,000 rupees as principal, and 5,000 rupees as interest in arrears. It appears that after the arrears of interest had equal the principal, the defendant has paid a sum of 2,000 rupees ; and the district Judge seems to hold that the arrears of interest having once come up to the principal, no further interest could ever be recoverable; and he has accordingly given judgment for the plaintiffs for 7,917 rupees and 46 cents only ; that is, for the 10,000 rupees, consisting of the principal and the interest due at the time when the arrears of interest first became equal to the principal, minus the 2,000 rupees paid after this time, and minus a small sum of 82 rupees and 54 cents subsequently paid.*
>
> *There is however nothing to prevent the oblige of a bond from recovering at any time arrears of interest equal to the principal, however much interest he may have previously received. He cannot indeed recover any interest in arrear exceeding the principal at the time of action brought; but if the interest is paid in time to*

time, there is no limit to the amount of interest which he may receive. In this case, when 2,000 rupees was paid for interest, there became due 5,000 rupees by way of principal, and 3,000 rupees by way of interest. Subsequent arrears of interest exceeded 2,000 rupees, so that when this action was brought, there were arrears of interest exceeding 5,000 rupees. The plaintiff cannot recover more than 5,000 rupees by way of interest in arrear; but he is entitled to recover all this."

In **Fernando and another Vs. Sillappen and others** [(1918) SC LW 301] **Bertram C.J**. stated as follows;

"How are we to interpret section 3 of Ordinance No.5 of 1852? That section perpetuates the important principle of the Roman Dutch Law, that the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal. The question is what is the meaning of "the amount recoverable on account of interest" in that section? It arises in view of the provisions of section 192 of the Civil Procedure Code. That section provides for three sums; firstly, the principal sum; secondly, the interest on that principal sum up to the date of action, and in the third place a supplementary sum in respect of interest from the date of action brought to the date of judgment. The section then goes on to refer to an "aggregate sum so adjudged. " It might be argued that in section 5 of Ordinance No 5 of 1852, the expression "amount recoverable on account of interest" means, with reference to section 192 of the Civil Procedure, "the aggregate amount made up of the two sums of "interest" i.e. firstly, the interest due up to the date of action brought, and secondly the interest due from date of action brought to date of judgment." I do not think however, that is the meaning of section 192. Section 192 intended to give to the creditor a certain additional statutory right to interest in addition to the limit of interest which he was allowed by the common law. The principle of this further privilege which the law conferred upon him is that the creditor's rights ought not to be prejudiced by the length of resistance offered to his claim by the defendant. Construing the section on this principle, it appears to me that the words "the amount recoverable on account of interest" in section 3 of ordinance No.5 of 1852, mean, "The amount adjudged in respect of interest in the action, apart from the special supplementary right to interest conferred upon the creditor by section 192 of the code. The matter is not one without difficulty. But the principle I have explained seems to be a fair one, and I may add that, assuming that the rules in respect of interest were what they are now in the year 1891, then the case of sinnathamby Cumaravaley v. Muttutamby Sittarapuvapulley is an illustration of the principle which I have laid down. In that case, although no argument was raised on the point, it was explicitly stated that the place at which the line shall be drawn in the calculation of the limit of interest allowed under Ordinance No 5 of 1852 is the time of action brought."

It is to be noted that Professor Weeramantree, in his celebrated work, 'The Law of Contracts' Vol. II at page 956, commented on the method of calculating interest as follows;

> *"The proper method of calculating interest is to work it out up to the date of commencement of action and from thence to the date of decree at the rate agreed. From the date of the decree the interest may be awarded on the aggregate amount at the legal rate.*

In **Lohini Indra Ramanayake vs. Bamunu Arachchige Swineetha [CA (Rev) App No. 1774/2002 – Decided on 3rd June 2004**] Hon Justice Amarathunga in his judgment reiterated the above legal principles and in conclusion his Lordship stated that;

> *"……on the legal principles set out above, the position relating to interest recoverable in this case is as follows;*
>
> 1. *The 5th plaintiff is entitled to interest for Rs.100,000/- according to the rate agreed by the parties (24%) from the date of the mortgage(14.6.1986) to the date of the institution of the action. If the total amount of interest exceeds Rs.100,000/-(the principal sum) in view of the operation of section 5 of Ordinance No. 5 of 1852 the 5th plaintiff in entitled to recover as interest, only Rs.100,000/-(emphasis is mine)*
>
> 2. *From the date of institution of the action, to the date of the decree the 5th plaintiff is entitled to interest at the agreed rate for the principal sum (Rs.100,000/-). This is interest the Court is entitled to award under section 192 of the Civil procedure Code. The limitation prescribed by section 5 of Ordinance 5 of 1852 is not applicable to interest awarded under section 192 of the Civil procedure Code. (emphasis is mine)*
>
> 3. *For the aggregate amount i.e. interest recoverable under item1 above, and interest awarded under section 192 of the code(as explained in No 2 above) interest at the rate of 15% from the date of Judgment till the date on which the entire amount is paid."*

In **Nimalarathne Perera vs. Peoples Bank [2005(2) SLR 67],** Court of Appeal has stated that, "**limitation placed by section 5 on the amount recoverable as interest has no application to interest recoverable relation to a banking transaction". (emphasis is mine)

In the above judgment the Court of Appeal clarifying the above context and states further as follows;

> *"The accounts maintained by the petitioner with the respondent were current accounts. Therefore, the law applicable to the transactions is the English law.*

> *According to English Law compound interest is recoverable.* ***In National Bank of India Vs. Stevenson the question arose whether in Sri Lanka a bank could charge compound interest. It was argued that although it is possible under the English Law, which is also applicable in Ceylon, the operation of that part of English Law stands removed by reason of section 3 (present section 5) of Ordinance No.5, 1852 Which limits the amount of interest recoverable. This argument was specifically rejected by Pereira j. This decision clearly shows that the limitation placed by section 5 of the introduction of Law of England Ordinance on the amount recoverable as interest has no application to interest recoverable relating to a baking transaction."*** *(emphasis is mine)*

However, In **National Bank of India vs. Stevenson (16 NLR 496)** Justice Pereira held *inter alia*;

> *that the rights and liabilities of the parties in connection with the account current were, in terms of Ordinance No, 22 of 1866, which introduced into this Island the English law of banks and banking, governed by that law, and not the Roman Dutch ; and that, therefore, the charge of compound interest was not, as such, un maintainable while under the Roman-Dutch law compound interest was not allowed, even though it had been expressly stipulated for, under the English law it was allowed where, inter alia, there was an agreement, express or implied to pay it, or where its allowance was in accordance with a custom of a particular trade or business.*

In the above case, Pereira J, has explained mainly in three matters,

(a) Rights and liabilities of the parties in connection with the account current referred to above are governed by the English Law and not by the Roman – Dutch.

(b) Banks can charge compound interest.

(c) Banks can charge higher rate of interest than the interest rate stipulated in the Mortgage Bond, when there is a Agreement between the parties.

In the above context, with utmost respect to Hon. justice who delivered the judgment in Nimalarathne Perera's case it is my humble view that the views expressed by Court is unacceptable regarding the applicability of Section 05 of the Civil Law Ordinance in respect of banking transactions.

In **Ramanathan Chettiar vs Wickramaarachchi and Others [1978-79 2 SLR 395]** the Court of Appeal had declined to follow the judgment of Supreme Court in the cases of

Kurunagala Estate Limited V. The District Land Officer BE/3528/ML 47 – SC 4 of 1976 – CAM 1-4-1977 and Pathiwille v. The Acquiring Officer – BR/3325/CL-835-SC 1/75-SCM 1-5-1977, on the basis of *per incuriam*.

Soza, J. with **Tambiah, J.** agreeing, sitting in Court of Appeal observed thus:

> *"The doctrine of stare decisis is no doubt an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as the basis for orderly development of legal rules. Certainty the law is no doubt very desirable because there is always the danger of disturbing retrospectively the basis on which contracts, settlements 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 the considerations, certainty must not be achieved by perpetuating error by insulating the law against the currents of social change …………… However ………. a decision given **per incuriam** by the former Supreme Court is may say so respectfully, not absolutely binding on the present Court of Appeal. "*

Upon a consideration of all the above legal aspects, my view is that, section 05 of the Civil Law Ordinance applies only for the period prior to the institution of the action even in banking transactions, *[except in an action filed under the Debt recovery (special provisions) Act No.02 of 1990 (as amended)]*.

Therefore, even in any money recovery and/or hypothecary action filed by Banks *[except an action filed under debt recovery (special provisions) Act as mentioned above]* the correct interest calculation would be,

(A) Time period prior to the action is filed;

Principal sum payable according to the plaint with the agreed rate of interest until the date of institution of the action (in accordance to the Civil Law Ordinance)

For an Example: -

Principal sum payable According to the plant	= 100,000/-
Agreed Interest rate	= 24%
Date of the Plaint	= 2016.01.10
Last voluntary payment by the borrower	= 2010.01.11
Interest	= 100,000 x 24% x 6 (years)
	= 144,000/-

Maximum interest recoverable Rs. 100,000/- for the relevant period.

(B) From the date of the plaint till the Judgment;

Principal sum payable according to the plaint, with the agreed rate of interest. (Limitation prescribed in section 05 not applicable)

(C) After the Judgment

The aggregated amount of above (A) and (B), with the legal interest from the date of Judgment till the date on which the entire amount is paid (Limitation prescribed in section 05 not applicable)

It has to be noted further that the amount of the principal sum payable is calculated as follows,

- Regarding Term Loan facilities – the principal sum payable for the last voluntarily payment by the borrower.
- Regarding Overdraft facilities – the accrued amount payable for the last voluntarily payment by the borrower.

EFFECTIVE PROTECTION MECHANISMS FOR THE VICTIMS OF CHILD ABUSE

NEED FOR EFFECTIVE LEGISLATIVE FRAMEWORK TO MEET WITH CONTEMPORARY CHALLENGES[1]

Navaratne Marasinghe*
High Court Judge, Kalmunai,

INTRODUCTION -

Child Sexual Abuse has been a very serious social issue and its horrendous impact on children has been tremendously addressed by the international community. Almost every jurisdiction has taken effective legislative and enforcement measures for the protection of child abuse victims. For the purpose of this paper the laws relating to child sexual abuse in the State of California and Sri Lanka will be comparatively discussed in order to identify salient features in the law and practice in both jurisdictions.

HISTORICAL BACKGROUND -

Child sexual abuse has been occurring throughout the history. John E. B. Myres classifies such periods as from colonial time to before 1875, from 1875 to 1962 and from 1962 to the present. According to his study on the history of child protection in America since 1856 onwards, he has observed that a majority of rape appeal cases involved child sexual abuse victims. He further observed that in the18th century, the world's first non-governmental organization known as the New York Society for the Prevention of Cruelty to Children (NYSPCC) came into existence.[2]

1 This paper is based on a research study carried out by me during my pre-academic study programme as a Hubert H. Humphrey Fellow attached to the Sacramento State University, California.

* LLB, LLM, Hubert H Humphrey Fellow, California State University & University of Minnesota Law School, USA, Diploma in Forensic Medicine & Science (Colombo) Post Attorney Diploma in Intellectual Property Law, Diploma in Tamil Translation & Interpretation (Kelaniya), Barrister & Solicitor of the Republic of Fiji. High Court Judge (Criminal& Civil Appeals), High Court of the Eastern Province, Kalmunai.

2 A Short History of Child Protection in America. John E.B.Myres Family Law Quarterly, Volume 42, Number 3, Fall 2008, p. 452

The society came forward to take measures for the protection of children from abuse. As time goes on, states and governments have come forward for the protection of children. In the history of international protection of rights of children, the United Nations Convention on the Right of the Child[3] is very significant. According to article 34 of said Convention, state parties have fundamental duty to take measures for the protection of children from all forms of sexual abuse and exploitation. Sri Lanka became a signatory to the CRC in 1991. Fulfilling the said international treaty obligation, Sri Lanka subsequently enacted penal laws in conformity with the CRC for the protection of children. It is significant to note that more than 192 states have ratified the CRC and only Somalia and the United States of America have not ratified it up to date. Thus, the State of California is also not a party to the CRC.

DEFINITION OF "CHILD" "CHILD SEXUAL ABUSE" "CHILD VICTIM" AND "CHILDWITNESS "IN THE INTERNATIONAL CONTEXT & DOMESTIC LEGAL FRAMEWORK -

According to the *Stroud's Judicial Dictionary of Words and Phrases* it is stated that the statutory definition of "Child" shows considerable variety, and although the idea that a child was one who had not reached the full age of twenty-one ran through the earlier statutes, different age groups for different purposes had been defined.[4] *The Black's Law Dictionary* defines the term child as a person under the age of majority, and also in Common law, a person who has not reached the age of 14 years.[5] In the Penal Code of Sri Lanka, which is a colonial piece of legislation older than 100 years, did not have a specific provision defining the term "Child," rather than provisions with regard to the criminal responsibility of children.

In Sri Lanka, the Penal Code underwent several significant amendments and according to Amendment Act No 22 of 1995 children are considered as all persons under the age of 18 years. Thus, it is clear that in both jurisdictions, persons less than 18 years are considered to be children. In the International context, the CRC defines "child" as a person less than 18 years old.[6] It is noteworthy to mention that according to the legal history of Sri Lanka, there was no specific offence as "Child Abuse" identified in the Penal Code of 1889.

Though offences falling within the ambit of child abuse were for the first time identified by the Penal Code Amendment Act No 22 of 1995, the term" Child Abuse" was not defined,

3 Convention on the Rights of the Child adopted by the UN General Assembly on 20 November 1989 Article 1
4 Stroud's Judicial Dictionary of Words and Phrases, Sixth Edition Volume 1 p 400
5 Bryan A Garner Black's Law Dictionary Eighth Edition, Editor in Chief, 2004 West Thomson Business, 610 Opperman Drive, St. Paul MN
6 See, Article 1 of the Convention on the Rights of the Child

therein. However the offence "child abuse" has been defined in the Code of Criminal Procedure Amendment Act No 28 of 1998 as Offences of Obscene Publications related to children, causing or procuring children to beg, hiring or employing children to act as procurer for sexual intercourse, hiring or employing children to trafficking in restricted articles, cruelty to children, procuration of children, sexual exploitation of children, trafficking of children, rape (statutory), incest, acts of gross indecency towards children, grave sexual abuse, and publication of sexual matters relating to children in news papers revealing their identity, and so on. Nearly two decades after the enactment of Penal Code Amendment Act No 22 of 1995, Sri Lanka took a bold step, enacting a long needed law for the protection of victims and witnesses of crime, which also include child victims and witnesses.[7]

According to section 46 of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015 "Child victim of Crime" and "Child Witness" respectively means, a person who is less than eighteen years of age and who is either a victim of crime or is a witness; Further "Victim of Crime" means a person including a "Child Victim" who has suffered any injury, harm, impairment or disability whether physical or mental, emotional, economic or other loss, as a result of an act or omission which constitutes an alleged(a) offence under any law ; or(b) infringement of a fundamental right guaranteed under Articles 13(1) or (2) of the Constitution, and includes a person who suffers harm as a result of intervening to assist such a person or to prevent the omission of an offence and the parent or guardian of a child victim of crime and any member of the family and next of kin of such person, dependents and any other person of significant importance to that person.

It is observed that according to California Penal Code §288(a) the offence of Child Abuse is defined as;

> *"an act of child sexual abuse occurs when any person ... willfully and lewdly commit(s) any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child"*[8]

However the age of 14 years has been increased to 18 years by year 2001 and, according to §11165 of the California Penal Code,[9] "Child" means a person under the age of 18 years and "Sexual Abuse" means Sexual Assault such as Rape (Statutory Rape), Sodomy, Lewd or lascivious acts upon a child, Oral Copulation, Sexual Penetration, or Child Molestation. According to §11165.1 "Sexual Abuse" means Sexual Assault or Sexual

7 Assistance to and protection of victims of crime and witnesses Act. No. 4 of 2015.
8 California Penal Code § 288(a) (West Supp. 1985)
9 California Penal Code, Amended by Stats.2000, Ch. 287, Sec. 21. Effective January 1, 2001

Exploitation. Further "Sexual Assault" means Rape, (Statutory Rape), Incest), Sodomy, Lewd or lascivious acts upon child), Oral Copulation), Sexual Penetration, or Child Molestation.

In addition to this, conduct described as "*Sexual Assault"* also includes, any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is emission of semen, any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person, any intrusion by one person into the genitals or anal opening of another person, including the use of any object. However acts performed for valid medical purposes excluded from such criminal liability. The intentional touching of the genitals or intimate parts including the breasts, genital area, groin, inner thighs, and buttocks or the clothing covering them, of a child, or of the perpetrator by a child, for the purposes of sexual arousal or gratification, other than such acts done during caretaker responsibilities, or demonstrations of affection for the child; or acts performed for a valid medical purpose. The law of California further goes on to say that, intentional masturbation of the perpetrator's genitals in the presence of a child also falls within this definition.

It is observed that the term "*Sexual Assault*" enumerated in the California Penal Code is mostly similar to the offence of "Grave Sexual Abuse" enumerated in the section 365(b) of the Penal Code of Sri Lanka (Amendment Act No 22 of 1995). This offence is also a directly indictable offence. In Sri Lanka this offence covers the acts of intra-crural sexual contact, Genital Fingering, Penile Substitute's Penetration with Artificial Objects, Digital and Penile Penetration of Anus, and Oral Sexual Contact. It is observed that conducts amounting to Child Abuse in state of California far broader than the situations covered in the Penal Code Amended Act No 22 of 1995.

JUDICIAL SAFEGUARDS ON CHILD SEXUAL ABUSE VICTIMS -

Courts are the upper guardian of children. Thus, every victim of sexual abuse coming before the court should get the justice he or she deserves; Under the judicial system of Sri Lanka all child sexual abuse cases are indictable offences, except the offence of Sexual Harassment, where charges are filed in the Magistrates 'Court.[10] However, if the Attorney General, who is the Chief Law Officer of the state is of the view that the circumstances of the case Sexual Harassment warrants an indictment, in such circumstances an indictment is filed in the High Court, in particular to mark the gravity of the offence and for the purpose of more severe penal sanctions.

10 S.345 of the Penal Code (Amendment Act No 22 of 1995)

The offence of statutory rape was introduced by the 1995 Amendment to the Penal Code of Sri Lanka and by the amendment brought to the Judicature Act of Sri Lanka, further significant step was taken by the legislature in order to safeguard child abuse victim from secondary victimization facing a Non-Summary Inquiry or a Preliminary Inquiry. It is significant to observe that by to date, there is no requirement of preliminary inquiry (Non-Summery Inquiry) in respect of statutory rape cases in Sri Lanka.

In contrast, all child sexual abuse cases in California are considered to be Felonies and heard before the jury. In California Evidence Code §514 states that witness under the age of 14 or a dependent person with substantial cognitive impairment must take special care to protect such children from undue harassment or embarrassment and to restrict unnecessary repetition of questions.[11]Abolition of the requirement of a Non Summery Inquiry in respect of Statutory Rape cases[12] where victims are less than 16 years old is a commendable move of the judicial system of Sri Lanka, safeguarding child victims. This situation minimizes the secondary victimization, and trauma of giving evidence before two courts.

Holding judicial proceedings in respect of child sexual abuse trials *in camera*, excluding the parties who are not directly related to the case also a common procedural practice[13] that is followed for the best interests of victims. This is a universally accepted norm. In the International Covenant on the Civil and Political Rights, (ICCPR) which came in to existence in 1966 also embodied with special provisions in respect of safeguarding children and the article 14(1) is very significant in this regard. In Article 14(1) it is stated that a case should be heard in public and even though as an exception to said rule if such case is in respect of a juvenile then such case should not be heard in public in the interest of the juvenile. Thus the proceedings *in camera* recommended by this article in respect of cases involving children, for the best interest of them. Similar provisions are embodied in the International Covenant on Economic Social and Cultural Rights as well.[14] However in USA the accused can demand a public trial even for child abuse cases and to have a public trial is recognized as a constitutional right.[15]

Referring to Sri Lankan judicial system Professor Savitri Goonesekere, articulates about child sexual abuse witnesses in judicial proceedings as follows;

---

11 Evidence Code of California, § 765(b), p.47, West's California Jurisprudence 3D Vol, 18 Criminal Law; Crimes against the person, § 503 to end, 21st Century edition-west

12 Judicature Amendment Act No 27 of 1998(2nd Schedule)

13 The Constitution of the Democratic Socialist Republic of Sri Lanka. Article 106

14 Article 10(3) of the International Covenant on Economic, Social and Cultural Rights, states that "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation"

15 The sixth amendment to the Constitution of USA recognizes the right of accused persons for speedy and public trial in all criminal prosecutions.

"The absence of a child centered approach is even more striking in the law relating to a child as a witness in a criminal trial. There is nothing to safeguard child witness from becoming incoherent and intimidated in a courtroom atmosphere. The Law of Evidence on child witnesses is derived from 19th century English Law and has not been reviewed. The general approach is that a child however young (even an infant) may be a witness if he/ she sufficiently understand the nature and moral obligation of an oath.[16]

However by to date significant changes have been made to the law relating to child witnesses and the requirement of taking oath by children before giving evidence in child sexual abuse cases has been taken away and such victim's evidence can be recorded without oath or affirmation.[17]This approach of the judiciary protects child sexual abuse victims from trauma of giving evidence and also from secondary victimization. The admissibility of video recorded interview with a victim child[18] as formal evidence before courts is considered a milestone in Sri Lankan law. However the implementation of such judicial procedure is minimal due to non-availability of resources and infrastructure facilities.

SIGNIFICANT DIFFERENCES IN THE DEVELOPMENT OF LAW

The analysis of the offence of sexual assault in California, which is similar to the offence of Grave Sexual Abuse under Sri Lankan law, covers a wider range of acts than Grave Sexual Abuse and it is specifically stated that the offence of Sexual Assault does not include acts which may reasonably be construed to be normal caretaker responsibilities, interactions with, or demonstrations of affection for the child; or acts performed for a valid medical purpose. There is no mention of such exclusions in the section on Grave Sexual Abuse in Sri Lankan law. In my view, it is appropriate to have such provisions embodied in the offence of Grave Sexual Abuse under Sri Lankan law too for the effective and fair administration of criminal justice in child sexual abuse incidents.

In California, according to §11166.5, reporting of incidents of child abuse is a mandatory requirement and it is also made a criminal offence for not reporting child abuse incidents to child protection agencies immediately, or as soon as practically possible, by telephone and to prepare and send a written report within 36 hours of receiving information about the concerned child abuse incident[19] to the authorities. It is further stated that the intention

16 Goonesekere Savitri, Children, Law and Justice-A South Asian Perspective, UNICEF, Sage Publication, New Delhi, 1998. at p.335-336

17 The Evidence (Special Provisions) Act was certified as a law on 7th October 1999. The Preamble of the Act itself says " An Act to make provision for court to receive evidence of a child without causing an oath or an affirmation to be administered to such child; "

18 Evidence (Amendment) Act No 32 of 1999, S. 163(A)

19 Wests' Annotated California Codes - Penal Code Section 4400 to 11999 official California Penal Code Classification, West group Publication, page 591

of the California legislature for having this section is for co-operative arrangements for investigation and written findings of child abuse. Under this provision teachers in public and private schools are also considered as custodians. Under Sri Lankan law, there is no such a legal provision, and it is timely to have such legal provision enclosed in our penal law too in order to deal with school authorities who suppress child sexual abuse incidents committed by teachers and school authorities. However, in terms of section 286(c) of Penal Code (Amendment) Act No. 16 of 2006, any person who, having the charge, care control or possession of any premises, has knowledge of such premises being used for the commission of an act constituting the abuse of a child, shall forthwith inform the officer in charge of the nearest police station of such fact.

In California, very often doctors and physicians come across suspected child sexual abuse victims, and it is observed that some are reluctant to report the incidents to law enforcement authorities. It is evident in the case of ***People v. Stritzinger,***[20] where the Supreme Court of California has held that these reporting obligations take precedence over any physician-patient or psychotherapist-patient privilege.

Pre-trial welfare and rehabilitation has been a paramount importance for child abuse victims in the State of California.

Robert Martens in his research paper on Child Sexual Abuse and judicial response discusses the significance of establishment of the Child Sexual Abuse Prevention Training Centers, which recognize the need to develop programs to provide the kinds of innovative strategies and services which will eliminate the trauma of child sexual abuse.[21]

In California, a strong vicarious liability is cast upon educational institutions for the protection of child abuse victims in the hands of school authorities. In ***C.A. v. William S. Hart Union High School,***[22] a minor of 14-15 years old, sued his female public high school guidance Counselor and the school district for damages arising out of sexual harassment and abuse by the Counselor, for the negligence of supervisory or administrative personnel who allegedly knew, or should have known, of the Counselor's propensities and nevertheless hired, retained and inadequately supervised the Counselor. The Supreme Court of California held that a public school district may be vicariously liable for the negligible conduct of the School Union.

20 People v. Stritzinger, 34 Cal. 3d 505, 512, 668

21 Child Sexual Abuse in California: Legislative and Judicial Responses, Golden Gate University Law Review Volume 15,Issue 3Women's Law Forum, 1985 , p. 445

22 C.A. v. William S. Hart Union High School, 53 Cal. 4th 861, 270 P.3d 699, 138 Cal. Rptr. 3d 1

LEGISLATIVE FRAMEWORK FOR VICTIM PROTECTION IN THE STATE OF CALIFORNIA -

Californian Government Code states that

> *"All victims of crimes should be ensured that they will be treated with dignity respect and sensitivity and the rights of victims of crimes should be honoured and protected by law enforcement agencies, prosecutors and judges in a vigorous manner"[23] and, child sexual abuse victim's also covered under this Act.*

It is interesting to observe that in Sri Lanka too, it is specifically enumerated in the recently enacted Assistance to and Protection of Victims of Crime and Witnesses Act, No 4 of 2015, under section 3 that a victim of crime shall have the right to be treated with equality, fairness and with respect to the dignity and privacy of such victim. Further, it is stated that where the victim is a child victim, he or she to be treated in a manner which ensures the best interests of such child.[24]

On November 5, 2008, in California, the Victim's Bill of Rights Act, also known as Marcy's Law, went into effect. This Marcy's Law expanded the rights of victims, and amended the California Constitution to provide victims with rights. Under this law, among other things, the victims can be heard and are entitled to take part in sentencing proceedings as well. The child sexual abuse victims are also adequately covered by this Act.

LEGISLATIVE FRAMEWORK FOR VICTIM PROTECTION IN SRI LANKA-

It has been a long standing struggle for effective legal provisions and legislations for the protection of child sexual abuse victims throughout the criminal justice process. Very often victims are forgotten in the criminal justice system. Under such process, the victims should be protected from influence and intimidation of perpetrators. In addition to penal sanction to the perpetrator, adequate monitory compensations should be awarded for the physiological and psychological trauma caused to victims. To address such social and legal issues related to victims and witnesses, Sri Lanka had serious and long standing considerations for having strong victim protection legislation. Consequentially, the draft Bill for the protections of victim's rights went through the legislative process in 1998. Finally after a period of one and half decade the legislature enacted the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015, certified on 07th March, 2015 respectively for the betterment of victims and witnesses. According to the preamble of this act the objectives of this Act are to provide for the setting out of rights

23 The California Government had passed Victim and Witness Protection Act of 1982 to protect the rights of the victims and witnesses

24 Assistance to and Protection of Victims of Crime and Witnesses Act, No 4 of 2015, S.3(a) & (b)

and entitlements of victims of crime and witnesses and the protection and promotion of such rights and entitlements; to give effect to appropriate international norms, standards and best practices relating to the protection of victims of crime and witnesses ; the establishment of the National Authority for the protection of victims of crime and witnesses; constitution of a Board of Management; the victims of crime and witnesses assistance and protection division of the Sri Lanka police department; payment of compensation to victims of crime and also for the establishment of witnesses assistance and protection fund.[25]

This Act has significant legal provisions in respect of crime victims and witnesses and, it is observed that the entitlements of victims of crimes which are stated in the section 4, which include entitlement to receive a sum of money from the National Authority, in consideration of the expenses incurred as a result of the offence committed and his participation in any judicial or quasi-judicial proceedings before a Court or Commission pertaining to the alleged commission of an offence or an alleged infringement of a fundamental right or a violation of a human right. Further according to this section a victim of crime shall be entitled to claim and obtain from the State any required medical treatment, including appropriate medical services, medicine and other medical facilities, in respect of physical or mental injury, harm, impairment or disability suffered as a result of being a victim of crime and for necessary rehabilitation and counseling services. If the state is unable to provide the services claimed by a victim of crime as stated above, such victim shall be entitled to apply to the Authority for financial assistance for the purpose of obtaining the required medical treatment for any physical or mental harm, injury or impairment suffered as a result of being a victim of crime and for any necessary rehabilitation and counseling services. It is specifically stated in the article 3(b) that when the victim is a child victim, he or she should be treated in a manner which ensures the best interests of such child. Thus, protection of child victims and witnesses are of paramount importance in the Criminal Justice System and administration of justice.

As stated above, there are adequate legal provisions in California for the victims to participate in judicial proceedings and bring forward the impact caused to him/her (Victim Impact Statement) for the consideration of the court at the time of sentencing. It is observed that a similar provision available in the Sri Lankan Victim protection Act under section 3(O), where it is stated that following the conviction of the offender and prior to the determination of the sentence, either personally or through legal Counsel, a victim is entitled to make submissions to court emphasizing the manner in which the offence concerned had impacted on his life, including his body, state of mind, employment, profession or occupation, income, quality of life, property and any other

25 See the Preamble of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015[Certified on 07th March, 2015]

aspects concerning his life. Thus, it can be concluded that the new legislation has very significant judicial safeguards in respect of witnesses and victims, which include child victims and witnesses as well. As far as the procedural law is concerned, the legislators have emphasized the need for speedy judicial process in respect of cases relating to child victims. It is evident that the Code of Criminal Procedure (Amendment Act No 28 of 1998) embodied with such a provision. According to the section 453(a) of the said Amendment *"the Courts should give priority to the trials and appeals of any person charged or indicted for child abuse"*[26] However it should be understood that similar provisions are included in the Prevention of Terrorism Act[27] as well and in such circumstances there is a conflict between these two Acts, when cases under both Acts are coming up in the same Court where the Court has to objectively determine as to which case should be given priority.

For the protection of child victims and witnesses the National Child Protection Act No 50 of 1998 is very significant. According to the preamble of the Act, the intention of the legislature is;

> *"for the purpose of formulating a national policy on the prevention of child abuse and the protection and treatment of children who are victims of such abuse; for the co-ordination and monitoring of action against all forms of child abuse; and for matters connected therewith or incidental thereto."*

According to section 14 of the Act Child Protection Authority is vested with wide powers in respect of protection of children. Among such powers, consulting the relevant ministries, Provincial Councils, local authorities, District and Divisional Secretaries, public and private sector organizations and recommending all such measures as are necessary, for the purpose of preventing child abuse and for protecting and safeguarding the interests of the victims of such abuse is significant. Further to this, creating an awareness, of the right of a child to be protected from abuse and the methods of preventing child abuse; monitoring the implementation of laws relating to all forms of child abuse; to take appropriate steps where necessary for securing the safety and protection of children involved in criminal investigations and criminal proceedings; monitoring the progress of all investigations and criminal proceedings relating to child abuse and taking appropriate steps where necessary for securing the safety and protection of children involved in criminal investigations and criminal proceedings are very significant.[28]

26 See Code of Criminal Procedure (Amendment) Act No 28 of 1998) S. 453 (a)
27 Prevention of Terrorism (Amendment) Act No 48 of 1979 S.21
28 See section 14 (e,f,g,h,j) of the National Child Protection Act No 50 of 1998

CONCLUDING REMARKS -

The comparative analysis of the laws relating to Child sexual abuse in Sri Lanka and the State of California clearly shows that some of the laws in California are far more prominent than that of Sri Lanka.

However as discussed above the new legislation for victim protection in Sri Lanka also have significant provisions for safeguarding victims' rights of Sri Lanka, enabling child sexual abuse victims to take part in pre-trial interviews with prosecuting authorities; participate in sentencing proceedings by providing victim impact statements, and to have more child friendly judicial process. Further, the new legislation has made the offence of intimidation of witnesses and victims as a non-bailable offence in order to safeguard victims.[29] To do better justice to child sexual abuse victims, effective implementation of these existing laws also of paramount importance. As stated in the section 7 of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015, it shall be the duty of every public officer including the members of the armed forces and police officers and judicial officers, to recognize, protect and promote rights and the entitlements stated in the Act. As discussed above, the wide powers given to the stake holders under the provisions of the National Child Protection Authority Act No 50 of 1998 in safeguarding children in the course of administration of justice in respect of children should be strictly adhered to and implemented. It is also of paramount importance that deterrent punishment impose on the perpetrators where it is appropriate, to create a better and safer tomorrow for the children, who are to take over tremendous responsibilities in the tomorrows' world.

29 Assistance to and Protection of Victims of Crime and Witnesses Act, No 4 of 2015, section 10(1)(a)

ECONOMIC RIGHTS OF JOURNALISTS UNDER THE INTELLECTUAL PROPERTY ACT;

-ANCL VS. CHANDRAGUPTHA AMARASINGHE-

Nuwan Tharaka Heenatigala[1]
Additional District Judge-Polonnaruwa

INTRODUCTION -

The Intellectual Property system in Sri Lanka including the Copyright protection had its origin during the British colonial period. There were several statutes dealing with different areas of Intellectual Property such as Trademarks, Patents and Industrial Designs. However, the English Copyright Law was applied per se in Sri Lanka.

The English Copyright Act of 1911 was therefore operative in Sri Lanka for several decades. A statute called "the Copyright Ordinance" was passed in 1912 to supplement the English Copyright Act of 1911.

The Ceylon Independence Act of 1947 expressly made the English Act of 1911 applicable to Sri Lanka after independence. Thus, this Act remained valid as the Copyright Law in Sri Lanka even after it was revised in the United Kingdom in 1956.

The Code of Intellectual Property Act No. 52 of 1979 marked a turning point in the intellectual property legal regime including the copyright law in Sri Lanka. Those provisions were found over the time to be insufficient to cater to the needs of the owners and the users of copyright and related rights as well as of the modern technologically developed environment.

A new intellectual property law, the Act No. 36 of 2003 was introduced to makes provisions for a comprehensive IP regime including copyright and related rights and their management and enforcement.

1 Post Attorney Diploma in Corporate Law [Sri Lanka], Post Graduate Diploma in Human Rights [Sri Lanka]

The copyright can be categorized into two kinds of rights - economic and moral rights.

The economic rights cover the rights relating to the areas such as reproduction, translation, adaptation or transformation, public distribution including sale, rental, export or otherwise, rental of the original or a copy of an audio visual work, a work embodied in a sound recording, a computer program, a database or a musical work in the form of notation, irrespective of the owner of the copy or the original or concerned, importation of the copies of the work, public display, public performance, broadcasting and other communication to the public.[2]

The moral rights cover mainly the right to claim authorship and the right to object to any distortion or mutilation etc.[3]

These rights are subject to the certain limitations such as "fair use" which includes the use of the protected works for educational, research and private purposes.[4]

In a recent landmark judgment a three judge bench of our Supreme Court recognized the "Economic Rights" of a newspaper journalist to nine exclusive photographs taken by him.[5] This judgment will specially interest proprietors and editors of newspapers, photographers and the media.

FACTS IN BRIEF-

Chandragupta Amerasinghe [the Respondent] filed an action alleging that his intellectual property rights had been violated by the Appellant's publication of the 9 photographs in issue, taken by the Respondent, in the "Daily News" and "*Dinamina*" newspapers on the 24th of July 1999. More specifically, the Respondent pleaded that the aforementioned publication violated his economic rights as guaranteed by Section 10 of the now repealed Code of Intellectual Property Act No. 52 of 1979 (as amended) and his moral rights as guaranteed by Section 11 of the Code, as the Photographs were published without his consent or knowledge

When the Photographs were taken in 1983, the Respondent was in the employment of "Aththa" newspapers. By July of 1997, the Respondent was working for "Ravaya" newspapers and had consented to Ravaya's publication of the Photographs in connection with the 14th anniversary of the 1983 riots. In July of 1999, the said photographs were again published by "Ravaya" newspaper but, at this time, the Appellant also published them in

2 Sec 9[1] of the IP Act No. 36 of 2003
3 Ibid Sec 10[1]
4 Sec 11of the IP Act No. 36 of 2003
5 Associated Newspapers of Ceylon Ltd Vs Pituwana Liyanage Shantha Chandraguptha Amarasinghe- SC. CHC (APPEAL) No.30/2003 decided on 05/10/2012

its "Dinamina" and the "Daily News" newspapers. The Respondent, at trial, asserted the fact that he did not at any time directly or indirectly authorize the Appellant to publish the Photographs in the Appellant's newspapers and took the opportunity to note that the Photographs were published by the Appellant as parts of news articles which even lacked a citation listing the Respondent as the source of the Photographs and otherwise failed to mention how the Photographs were obtained. It is important to note here that, during these proceedings, the Appellant conceded that (i) the Respondent, in fact, took the Photographs during the July 1983 riots and that (ii) the Appellant did, in fact, publish the Photographs in the manner and on the date as alleged by the Respondent.

At the appeal in the Supreme Court, examines the judgment of the Commercial High Court as to whether the Learned High Court judge erred in holding that damages occurred to the Respondent on the basis that the Respondent had economic rights in the photographs.

DEFENSES OF ANCL -

The defendant [ANCL] conceded that the photographs were taken by the plaintiff [Amerasinghe] and that two papers of ANCL published the photographs as alleged, the defendant took up two main defenses to avoid liability and payment of any damages to the Plaintiff. Firstly it said that the plaintiff had tendered consent to the defendant to allow its' publication of the aforesaid photographs. Secondly, that the plaintiff did not have the capacity to consent to the publication of the photographs by the defendant or put in another way Amerasinghe's "employment arrangement" with the Aththa newspaper at the time he took the photographs did not permit Amerasinghe to retain ownership of the photographs.

JUDGMENT OF THE SUPREME COURT -

Her Ladyship Justice Thilakawardane in her Judgment stated that the larger question of whether the Respondent is entitled to economic rights arising from the copyright of the Photographs in terms of the Code is a question of fact and not of law and, to be properly tried before this Court, would require the ascertainment of new facts – this is especially so with respect to the question of the Respondent's capacity to consent, as the contract of employment between the Respondent and "Aththa" newspapers was not an issue at the time of trial.[6]

6 Page 4 in SC. CHC (APPEAL) No.30/2003

Justice Tillakawardane further observed that these questions are not pure questions of law but are mixed questions of fact and law and it is well settled that an Appellate Court like the Supreme Court cannot hear argument on issues which are based both on fact and law. Citing precedents,[7] Justice Tillekawardane had stated, "A pure question of law can be raised in appeal for the first time but if it is a mixed question of fact and law it cannot be done". Accordingly, the failure of the defendant ANCL during the trial before the Commercial High Court to (i) challenge the originality and ownership of the work or to (ii) lead any evidence during the course of the trial or at the time of cross-examination, are errors in litigation strategy that cannot be rectified through an appeal. Having said that, the Supreme Court is not obliged in this appeal by ANCL to consider matters which ANCL had failed to lead evidence at the trial.[8]

However, Justice Tillakawardane due to the importance of this case for the journalism and interest of the media further analyzed the Economic Rights issues and the relevant copyright law as follows:-[9]

1. Section 7(h) of the Code sets out a definition of the scope of work to be protected by copyright. This section expressly includes photographic work.
2. Section 10(a) of the Code sets out the framework for the economic rights of the author and provides the author with exclusive rights to do or authorize reproduction.
3. Section 11(1) of the Code discusses the moral rights of an author and states that the author of a protected work shall have the right to claim authorship of his work in connection with acts referred in Section 10 and therefore reproduction of the said photographs under Section 10(a) is a violation of the author's moral rights.
4. Section 13(b) of the Code states that notwithstanding Section 10, protected work can be used without the author's consent:

> *"…in the case of any article published in newspapers or periodicals on current economic, political or religious topics….the reproduction of such article or such work in the press or the communication of it to the public, unless said article when first published….was accompanied by an express condition prohibiting such use, and that the source of the work when used in the said manner is clearly indicated"*

5. Section 17(1) of the Code indicates that the rights protected under Section 10 are those of the author who created the work.

7 Jayawickrama Vs. Silva 76 NLR 427 & Leechman Co Ltd., Vs. Rangalle Consolidated Ltd. (1981) (2) SLR. 373
8 Page 4 in SC. CHC (APPEAL) No.30/2003
9 Page 5 in SC. CHC (APPEAL) No.30/2003-Sections mentioned here are from The Code of Intellectual Property Act No. 52 of 1979

6. Section 17(3) of the Code discusses works created in the course of employment indicating that where in the course of the author's employment under a contract of service or work commissioned, the rights in Section 10 will be transferred to the employer or commissioner, where terms to the contrary are not stipulated.

From the above review of the rules governing copyright, it appears that the Appellant's case rests solely on the application of Section 13(b)'s "newsworthiness" exemption or, alternatively, the availability of the allocation of presumed employer ownership under 17(3).

The Supreme Court held that the exemption of "newsworthiness"[10] is unavailable to the Appellant for the simple reason that, at the time of the Appellant's publication of the Photographs in 1999, the communal riots of 1983 were no longer current "political" events. While it could be argued that the 14^{th} anniversary of the 1983 riots was itself the current event to which the Appellant's publication was connected, the legislative intent of 13(b), clearly was to allow for the dissemination of information surrounding actual transpired events, and not to serve as a loophole for use of material in subsequent "news cycles" of an initial event.[11]

The Supreme Court also rejected the appellants' defense that the photographs belonged to the *Aththa* newspaper and not to its employee, (Amerasinghe),[12] and held that the presumption established under Section 17(3) (of the Code) that an employer holds ownership in employee-created work is also unavailable to ANCL. The words crucial to the determination of the inapplicability of` Section 17(3) are; *"in the absence of contractual provisions to the contrary"*. While it may well be that the Respondent's contractual relationship with *"Aththa"* newspapers – his employer at the time the Photographs were taken – did not stipulate that the Respondent would retain ownership of them, the Appellant's failure to introduce or request the introduction of the contract between Respondent and "Aththa" newspapers into evidence for review, precluded the High Court from being able to determine whether Section 17(3)'s presumption was met.

It was held that if the said employment contract been presented for the High Court's review, an analysis of the terms of the contract of service or the specific nature of the work commissioned such as:

(i) whether the photographs were taken for personal interest or investigation,

(ii) whether the photographs were taken during or outside of working hours,

10 Sec 13[b] of The Code of Intellectual Property Act No. 52 of 1979
11 Page 6 in SC. CHC (APPEAL) No.30/2003
12 Sec 17[3] of The Code of Intellectual Property Act No. 52 of 1979

(iii) whether the photographs were taken in furtherance of Amerasinghe's work assignment and professional objectives, may well have led the High Court to have concluded that ownership remained with "Aththa" newspapers and not Amerasinghe, would have been undertaken.

As the High Court was not afforded the opportunity to undertake such a factual analysis and since such questions of fact cannot be reviewed at the appellate level, Supreme Court held that the Learned High Court judge did not err in holding that damages occurred to Amerasinghe on the basis that he had Economic rights in the photographs.

> *"The evidence before the Court therefore leads the Court to conclude that the photographs were taken for personal interest or investigation and not in furtherance of a work assignment that the Respondent had, at the risk of personal safety and with his camera and film. Therefore the photographic works are owned exclusively by the Respondent, who being the author is the first owner of the copyright in his photographs especially as the evidence is that he never transferred his ownership and he therefore continued to retain ownership."*[13]

Finally the Supreme Court held that Amerasinghe; the journalist/photographer had possession of the Economic Rights to the said photographs and affirmed the judgment of the High Court and dismissed the ANCLs appeal. Further the Supreme Court justified and confirmed the award of Rs. One million as damages against the ANCL by the High Court.

RIGHTS OF THE AUTHOR OF COPYRIGHTED WORKS ; INTERNATIONAL LEGISLATIVE INSTRUMENTS -

The Supreme Court referred the Berne Convention,[14] to which Sri Lanka is a signatory and stated that under the said convention, copyright for creative works do not have to be asserted or declared, as they are automatically in force at creation and are not subject to any "formalities" such as registration or application in countries adhering to the Convention.[15] As soon as the work is written or recorded on some physical medium, the author is automatically entitled to all copyrights in the work, as well as any derivative works. In addition, it also ensures that the rights are protected until the author explicitly disclaims them or the copyright expires.[16] Further held that consistent with Section 17(3) of the Code,[17] which refers to photographs taken in the course of employment under a contract of service, the Berne Convention also deems that the photographer is the sole

13 Page 6 in SC. CHC (APPEAL) No.30/2003
14 Berne Convention for the Protection of Literary and Artistic Works 1886
15 Article 5 of the Berne Convention
16 Ibid Article 2
17 Code of Intellectual Property Act No. 52 of 1979

owner of the copyright in a work upon its creation, in so far as the image was not made under an agreement to the contrary, in which case the ownership of the copyright would vest in the employer.

In deciding to uphold the judgment of the High Court in favour of the photographer, Justice Tillakawardane suggested some reform of the law to ensure that authors of creative work (such as the journalist/photographer) are fully protected. Her Ladyship drew attention to Continental European law and the United Kingdom law where the Economic Right of a creator are better protected and stated[18] *inter alia*;

> *"Under the current system of law in Sri Lanka, the author is not encouraged to create works outside the ambit of the employment contract or terms of work commissioned out of fear of losing rights to the work. This disincentive, in the future, could lead to lack of journalistic motivation and therefore deterioration in investigatory reporting and subsequent communication to the public. The public has a right to information both communicated via articles, photographs and other medium. As a result of narrowly interpreted laws this right to information may be restricted and ultimately confine the media, which would ultimately impact the fabric of social justice that holds a nation together".*

> *"In this regard, the Court wishes to draw attention to the approach taken in continental European States where employers must purchase the usage rights from the author by means of an individual or collective agreement. The authors retain any usage rights not licensed to the employer by that contract, for example the right to reuse photographs already published would require permission from the original creator unless the right to reproduce is explicitly stated in the contract, the rights have expired or such reproduction is restricted by law. They are usually entitled to receive further remuneration for uses that go beyond those covered in the contract of employment. The law must at all times balance the exercise of an author's copyright with public interest. This is seen clearly in the United Kingdom where Section 171(3) of the Copyrights Designs and Patents Act 1988 provides the courts with the jurisdiction to refrain from enforcing copyright claims on the grounds of public interest".*

According to the evidence of the Respondent, one of the Photographs was sold at the value of Rs 10,000/- in 1996. Despite this being the only indication of value, the Supreme Court is in agreement with Cornish as expressed in his work on Intellectual Property,[19] that the work of a humble photographer is in the same category as the work of a great artist and, hence the Supreme Court was not willing to disturb the Learned High Court Judge's assessment of the commercial value of the Photographs. The Supreme Court

18 Page 7 in SC. CHC (APPEAL) No.30/2003

19 Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights by William Cornish (Author), David Llewelyn (Author), Tanya Aplin (Author)

also agreed that the "exclusive, historical and invaluable" nature of the Photographs is independent of how often they were sold and how much they were sold for – the lack of an existing market does not alone suggest an absence of value.

CONCLUSION -

This Judgment can be considered as well reasoned and reinforced by a clear exposition of the relevant law. It also recognizes and strengthens the role of journalists and a responsible media. Even though the new law[20] makes provisions for a comprehensive IP regime including copyright and related rights and their management and enforcement this Judgment reminds us that there is indeed an urgent need for protection of journalists who are doing their duty with skill and commitment. In this regard as a final observation at the end of the judgment, Justice, Shiranee Tillakawardane stated as follows;[21]

> *"There is indeed an urgent need for protection of journalists like the Respondent who with skill and commitment respond to the journalistic duty to honor the citizenry of our nation by fulfilling their primary obligation to report on facts in an unbiased, independent, undistorted, and disciplined manner, providing the unvarnished truth whilst maintaining an objective perspective of the people and events they cover. Their journalistic lens needs to be strengthened and empowered by law and their skills be developed through education and investment, propelling them in turn to report with a higher degree of accountability, independence and fairness. A nation of people who make their life's choices on the information they receive from the media need to support and acknowledge their bravery and fearlessness especially when they become independent monitors of power and the checks and balances in exposing the truth, thereby being a cornerstone in creating a fair and just society. The extended lens of dedicated, fearless and responsible journalists has often been the tool in effecting social justice and they must be protected, nurtured and supported, as much as an irresponsible journalist who distorts and violates the truth for biased reasons must be soundly condemned and exposed as they shame a noble profession"*

20 Intellectual Property Act No. 36 of 2003
21 Page 9 in SC. CHC (APPEAL) No.30/2003

PRAGMATIC APPROACH IN WRITING CRIME JUDGMENTS IN THE TRIAL COURTS

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

INTRODUCTION -

Experts in law writing on 'Judgments' or 'Judgment writing' speak of modalities in the nature of a literary composition after making a study of innumerable volumes of the law reports in which were reported the judgments pronounced by the past masters of the art. These appellate court judgments take the form of an intellectual product produced after hearing the hotly argued issues and legal argument advocated by counsel appearing for their respective clients. No doubt the judges who authored the judgments had done their own homework and research. They exhibit the attributes of style, elegance and happy phrasing coupled with embellishments. The authors desired their judgments to be dignified and convincing.

TRIAL COURT JUDGMENT IS UNIQUE -

My experience in the judiciary enables me to make a proposition which deviates from such a model which was the result of a clinical study of an original court judgment which was the end result of a living picture portrayed after hearing the evidence of witnesses by the trial judge himself. Ensconced in a trial court judgment are the qualities of openness and transparency of the whole process by which the latter came to his conclusions. Lord Neuberges of Abbotsbury has underscored this quality recently when he said *'Openness is a fundamental principle of Justice.'* (Telegraph group 2013) A trial court judge needs not bother about the attributes of style, elegance and happy phrasing painted with embellishments associated with judgments in the Appellate Courts. It is best advised that the trial court judges ought to confine themselves strictly to dealing with the points at issue in the case before them. Strength of a trial court judgment lies in its own characteristics and own standard of merit. It is something unique.

The trial court judge has the patience and gravity of hearing the evidence of witnesses in his endeavor to discover the truth and do justice. In achieving this end he has to exclude irrelevancies and be conscious of not having repetitions when evaluating the evidence to make out his judgment. It is a kind of concentration and he must not allow his thoughts tumbled over around his head. Conscious and proper evaluation of evidence is his forte.

THE REAL DRAMA -

The real human drama unfolds before the trial Judge. He hears the witnesses, sees how they fare at cross examination and their demeanor and deportment. He gets the opportunity of looking at the relevant productions and sometimes even the opportunity of seeing the crime scene. All this material shapes up his judicial mind. The end result would be his well judge judgment. It is the trial judge and he alone had this privilege. That is why the Appeal Court judges were very slow to upset the findings of a trial court judge. This important guideline was highlighted for the attention of the Appellate Court Judges by one of Sri Lanka's highly respected and well reputed Chief Justices G.P.S. de Silva in ***AlwisVs. Piyasena Fernando (1993) SLR 119.*** It is to the following effect, *'It is well established that the findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal.'* Of course in judgments where the findings, were perverse they intervened. That is how justice works.

There are pronouncements made by the learned Superior Court Judges which underscored the value of evidence aspect in jury trials as well. In ***Ebert Silva 52 N.L.R. 505*** the Privy Council pointed out the right question which an Appellate Court has to ask itself namely. *'Was there any evidence upon which the jury could find their verdict'.*

It is unwise for a trial court judge to cumber his judgment with all apparatus of research done by him or the counsel appearing in a particular case. Some times that might cloud his vision. The litigant who lays claim to the judgment may find it difficult to get at what the trial judge had found. If it was so the whole process would be in vain. A judgment is not the appropriate vehicle for wit and pleasantry.

DEFINITION -

Keeping in mind that the definition to be made should focus on a trial court judgment, an Indian Court in **Mandul v Benergee** (1901) 1 L.R. 28 Calcutta 651 said that 'judgment' is a final determination of the case which would end it once and for all, such as an order of conviction or of acquittal. The finding of the verdict coupled with the sentence is the 'judgment'.

The Code of Criminal Procedure Act does not formally define the phrase 'crime judgment' in a trial court. Hence I venture to coin a definition. It is a coin with two facets. On the one side of the coin it is the mechanism which authorizes the trial judge who has taken the charge of the person who stands before him in the dock accused of committing an offence wrapped himself in a veil of innocence, to go scot free after considering the totality of evidence in the case. It entails a verdict of acquittal.

The other side of the coin is the mechanism which authorizes the trial judge the power to tear off the veil of innocence and expose the guilty person to the world at large. Such a pronouncement entails a verdict of 'guilty' and a 'sentence' specified in the Statute.

Crime judgment is the end result of the judicial process whose main aim is to achieve a balance between the public interest demand relating to the discovery and punishment of the offender on one hand and the demand for a fair trial by the accused which is his fundamental right the Constitution on the other.

The framers of the Code of Criminal Procedure Act have provided the wherewithal to make the mechanism. Section 283 sets out the essential characteristics or qualities that such judgment should posses. It lays emphasis on the firm restraint with which the judging has to be done.

In the case of an acquittal it is a paramount requirement that the judgment should specify the offence with which the accused was acquitted. In the case of a conviction it should specify the offence with which he was convicted. It should contain the point or points for determination. It follows that the trial judge must state his decision and the reasons for the decision. Thus the decision and reasons for his findings contain an integral part and parcel of the judgment. It is a fundamental right of the accused to know how and why the trial judge had come to any such conclusion. It enables the appellate court to decide whether there are any valid grounds to interfere. Vide; ***Thiyagaraja vs Annaikoddai Police*** *50 N.L.R.109*, ***Henricus v Wijesuriya*** *47 N.L.R. 378,* ***HaramanisAppuhamy v Inspector of Police, Bandaragama*** *66 N.L.R. 526.*

What is specified in the aforesaid section is the skeleton which the judge has to fill with flesh and blood. Nagalingam J. in *Thiyagarajah* did not mince his words when he said.

'The essence of a judgment to my mind, consists in the reasons a Magistrate is called upon to give for taking the view he takes for convicting or acquitting an accused person.'

It has been held that a mere outline of the case for the prosecution and for the defence, embellished by such phrases as *'I accept the evidence for the prosecution'* and *'I disbelieve the defence'* is not, per se, an adequate discharge of the duty placed on the judge to set out the reasons for his decision. Vide; ***Thuraiya v Pathanamany*** *(1993) 15 C.L.W. 119.*

OFFENCE - CONSTITUENT ELEMENTS AND THE BURDEN OF PROOF -

The judgment should specify the offence and the section of the Penal Code or any other statute under which the accused was charged. There must be certainty. There cannot be any doubt. Vide; ***Amsa v Weerawagu*** *(1993) 11 Times of Ceylon L.R. 50.*

When speaking of the points for determination what is ensconced therein are the constituent elements and the ingredients of the offence which the law requires to be established. The author of the judgment has to be conscious of the two elements, namely, *factum* and *animus*. In other words it means the physical or the corporeal component and the mental component of the crime. Physical component alone would not suffice. Chamelin and Evans, 1972 Handbook on Criminal Law refers to another principal namely, there is no criminal liability for simple thought. There must be a guilty act e.g. *if you plan to steal a car you not committed a crime, you must have actually attempted to steal it*. In the case of a drug offence, the *factum* is the possession, trafficking or sale of the drug. *Mensrea* is a question of knowledge, awareness and consciousness. The judgment should necessarily carry proof of knowledge or awareness or consciousness of the accused person.

The judge after setting out the constituent elements of the offence gets into the gist of it, namely, that it was the accused person who stands in the dock who had committed the offence. Here the judge has to be mindful of the Woolmington Principal of the persuasive burden that lies on the prosecution of proving the criminal liability of the accused beyond reasonable doubt. It is of paramount importance that the trial judges have to be mindful of certain emerging principals in criminal law. In ***R v Lord Cochraine and others*** *[1814] Gurney's Reports 469* [quoted by E.R.S.R. Coomataswami - Law of Evidence Vol.1 page 21] Lord Ellenborough observed thus;

> *No person accused of crime is bound to offer any explanation of his conduct of circumstances of suspicion which attach to him but, nevertheless, if he refuses to do so where a strong prima facie case has been made out, and which is in his own power to offer evidence, if such exists, in explanation of such suspicious circumstances which show them to be fallacious and explicable consistently with*

> *his innocence, it is reasonable and justifiable conclusion that the refrains from doing so only from conviction that the evidence so suppressed or not adduced would operate adversely to his interest'.*

Another important principle was found in the pronouncement of Lord Kane in **R.v Lucas** [1981] 2 A.E.R. 1008 at 1011. He lays down the principle that a lie told by an accused person in court or outside court about a material issue provides corroboration against him in the following circumstances.

[a] Lie must be deliberate,

[b] it must relate to a material issue and

[c] the motive must be a realization of guilt or fear of truth and he knew that if he told the truth he would be sealing his case.

Justice F.N.D. Jayasuriya dealt with the application of this principal in S**amarakoon v The Republi**c [2004] 2 S.L.R. 206.

Crime court judges are well aware of the implications of 'presumptive evidence' enshrined in section 114[c] of the Evidence Ordinance. Illustration [a] states 'the court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the stolen goods knowing them to be stolen' In **King v William Perera** 43 N.L.R. 433 it was held that very recent possession of property removed when a robbery was committed coupled with the evidence that on the night of the robbery the accused was seen in the vicinity of the crime scene with other men raised, in the absence of an explanation an overwhelming presumption that the accused participated in the robbery. Recently, the Supreme Court in **Ariyasinghe and others v Attorney General** [2004] 2 S.L.R. 357 endorsed the above view that the presumption under section 114 illustration [a] is not limited to the offence of theft and retention of stolen property.

In his judgment the trial court judge would sort out the evidence of matters required to prove the guilt of the accused. He is aware that 'judicial evidence' has been defined as 'matters of facts received by the courts of law in proof or disproof of facts, the existence of which comes in question before them.' The judge will be mindful when assessing evidence that no particular number of witnesses is required to prove a fact unless corroboration is required by law or by a rule of practice [vide sections 134, 133 and 114b of the Evidence Ordinance.] In this regard crime court judges are advised to read Justice F.N.D. Jayasuriya's educative judgment in **The Attorney General vs. Mohamed Saheeb**

Mohamad Ismath [Unreported] C.A. No.87/97, H.C. Colombo No. 7245/94, decided on 13.07.1999. The learned judge reiterated the principal which is to the following effect;

> *"There is no requirement in law that evidence of a Police Officer who has conducted an investigation into a charge of illegal possession of heroin, should be corroborated in regard to material particulars emanating from an independent source"*

In the absence of such a legal requirement, the court ought to apply the provisions of section 134 of the Evidence Ordinance which postulates that evidence should be evaluated and weighed, and no particular number of witnesses is required for the proof any fact. He had cited **Mulluwa vs. State of Madya Pradesh AIR** 1976 S.C. 198. He further cited Justice Vythyalingam's judgment in **Gunasekera vs. A.G.** 79 NLR 348. What is important is that the judge should be satisfied with the testimonial trustworthiness of the witness.

A judge is precluded from acting according to his own knowledge and views. The Law of Evidence gives him the guidelines. Dr. Amerasinghe [see below] reminds the judges of an important constraint that they have to be mindful of namely, 'One of the constraints in judicial law making is the paramount need for judges however clever they may suppose themselves to be, to faithfully follow the decisions of higher courts.' He is also aware that proof is the effect or result of evidence and that evidence is the principal medium or means of proof. Proof means the conviction generated in the mind by evidence. It is by his insight developed from his own experience over the years that the judge separates the wheat from the chaff among the mass of facts that are produced before him; decides upon their just and mutual bearing and draws correct inferences. [Vide; Coomaraswamy's Law of Evidence in Ceylon 1st edition at page 3.]

It is refreshing to keep in mind by the original court judges an important test referred to in Cross on Evidence 5th Edition at page 27 which is to the following effect. "*The evidence in support of a fact is said to be insufficient when it is so weak that no reasonable man could properly decide the issue in favour of the person who adduces such evidence.*"

Sorting out and arrangements of facts require insight and skill. Unessential details which are in the margin should be dropped and attention has to be focused on the material circumstances. The prime object is to formulate and apply the law in its correct perspective. In this exercise the precedent and judge made law found in the Superior Court judgment may give the guidance required to the trial court judges. It is of paramount importance for the judge to state the legal principal on which his findings were based. Lord Macmillan who had possessed long years of experience in judgment writing in one of his articles on the subject underscored a vital point to wit. 'The strength of a judgment lies in its reasoning and it should therefore be convincing.' In this regard Lord Hardwicke in **Walton v Tryon** [1753] Dick, 244 at 245 [vide A.R.B. Amerasinghe's Judicial Conduct Ethics and Responsibilities at page 297] said "Certainty is the mother of repose and therefore the law aims at certainty"

It is interesting to note that the Code of Criminal Procedure Act has laid down statutory provisions for the trial judge to acquit an accused person after the close of the prosecution case without calling the defence. Lord Sankey in his celebrated judgment in **Woolmington v The Director of Public Prosecution** articulated the doctrine of 'presumption of innocence'. It is based on that principle our own criminal legislations were formulated. The persuasive burden of establishing of all constituent elements of any offence must necessarily devolve upon the prosecution. What is the point putting an accused person in jeopardy when there is no case to answer?

In the Magistrate's Court trials section 186 proviso mandates the Magistrate to acquit an accused if he is satisfied that further proceedings in the case will not result in the conviction of the accused. He should record reasons for doing so.

In the High Court when the case for prosecution is closed, in terms of section 200 of the Act the High Court Judge should acquit the accused under the following circumstances namely, if the judge wholly discredits the prosecution evidence or he is of opinion that such evidence fails to establish the commission of the offence he was charged with.

There is no doubt that the craftsmen of the statute brought in these provisions to give solace to an accused person against whom there is no case to answer. It is a mandatory requirement of the law.

The requisites necessary for the decision making to record a verdict of acquittal under the aforesaid statutory provisions contains all the components of a judgment. Hence it is counted as a judgment for all purposes.

At this stage if the judge considers that there are grounds to proceed he shall call upon the accused for his defence. Once the cases for the prosecution and accused are closed the judge will scan all items of evidence. It is the duty of the judge to evaluate the totality of evidence in the case and come to his finding.

I reiterate Nagalingam J.'S pronouncement of this principle in Thiyagarajah which was as follows;

> *The essence of a judgment to my mind consists in the reasons a Magistrate is called upon to give for taking the view he takes for convicting or acquitting an accuses person.*

In terms of section 283 (2) of the Code of Criminal procedure Act, the sentence in fact forms part of the judgment; De Siva J in **Henricus v Wijesuriya** 47 N.L.R.378. Hence the trail judge may call for any mitigating circumstance from the defence. He may state the reasons what made him to decide on the punishment that the imposed.

A trial court judge will not be unnecessarily bothered about the attributes of style, elegance and happy phrasing and other embellishments which give glamour and attraction to Appellate Court judgments. They hardly find models to look for because the trial court judges write their judgment in Sinhala or Tamil. Nearly 90% of the trial court judgments are written in Sinhala and 10% in Tamil.

STAKE HOLDERS -

The parties to the litigation are the stake holders. It is paramount importance that the judge's decision should go to their heads uncluttered and unhindered. We can gather some important clues from Lord Denning's book titled "The Closing chapter" as to how judge should set about writing his judgment. Hearsay is the central principle is that he must be conscious of the fact that he is writing to the parties in litigation. He must make their easy. There are many pitfalls the judge must avoid. Denning's classic expression is to the following effect; "the moral of it all is that you should use plain, simple words and sentences the readers will understand. You should avoid the roundabout expression and use instead the direct thrust, you should choose your words well and present them well'. Do not use unparliamentary words. It would taint the entire judgment. I remember a judgment from a High Court case where the judge had used the words 'sudupapathraya' (white unholy man) referring to the accused who was indicted with committing the offence of grave child abuse. The accused was a foreigner. Justice Ninian Jayasuriya in the course of his judgment in the Court of Appeal while setting aside the trial court judgment reprimanded the trial court judge for using such phrases, I concurred with him.

Paragraphing is a quality equally important. It will be depressing, discouraging and confusing to the reader if the judgment is set out in a massive unbroken expanse of print over which half a dozen ideas straggling in disorder. It looks ugly to the eye and repulsive to the mind. Within each paragraph long sentences should be avoided. Each paragraph should be completed and self contained. The criterion of good syntax is that it should never be necessary to read a sentence twice over in order to get at the meaning. The conclusion arrived at must be expressed in a separate final paragraph.

A WORD OF CAUTION -

At the commencement of his carrier as a judge he would find the judgment writing as a boring and stressful exercise and feel as if his heart is being pounded. Albeit, as he gains experience and develops commitment to his cause it is going to be a wonderful exercise. It would calm his breathing and be blissful.

The judge who is conscious that he has done his duty gains a threefold satisfaction. Firstly an ecstatic satisfaction that he wrote a good judgment. Secondly, he gains confidence in his work. Finally, it reduces his judicial stress and attendant pressure and anxiety. It will have a salutary effect on his health.

STATUTORY PROTECTION FOR VICTIM RIGHTS

Purnima Parana Gamage*
Magistrate, Wattala.

INTRODUCTION -

The operation of the criminal justice system has sometimes tended to add to rather than to diminish the problems of the victims.

It must be a fundamental function of criminal justice system to meet the needs and to safeguard the interests of the victim whilst it is also important to enhance the confidence of the victim in criminal justice and to encourage his co-operation, especially in his capacity as a witness. Although people react differently to crime and do not all suffer serious or long-lasting effects, emotional reactions can affect everybody and a failure to respond or an inadequate response to such emotions on the part of the authorities may exacerbate feelings of anger and fear. A peaceful and orderly resolution of conflicts depends upon showing compassion and respect for the dignity of victims by meeting their expectations.

Nevertheless, measures to help the victims need not inevitably conflict with other principals and objectives of criminal law and procedure, but in fact, ought to assist in their achievement and in an eventual reconciliation between the victim and the offender.

TREATMENT OF VICTIMS IN THE ADMINISTRATION OF JUSTICE -

Attempts to date at the international level to improve the position of victims in the administration of justice are an admission of the fact that national justice systems have

* LLM (Colombo) Dip. In Forensic Medicine (Peradeniya) , Magistrate , Wattala

often focused on the offender, to the exclusion of the rights, needs and interests of victims.

While there is no universal convention dealing with the rights of victims of conventional crimes, the United Nations General Assembly adopted, in 1985,[1] the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter Declaration), the text of which had been approved by consensus by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

The Declaration defines the notion of victim of crime and abuse of power and specifies victims' rights of access to justice and fair treatment, restitution, compensation and assistance.

THE NOTION OF VICTIM -

Accordingly 'victims' means persons who, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws prescribing criminal abuse of power.[2] Quite importantly a person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.[3] The term 'victim' also includes, where appropriate, the immediate family or dependents of the direct victims and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Victims of crime should be enabled to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible while they should be informed of their rights in seeking redress through such mechanisms.[4]

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by, *inter alia*, informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information,[5] by allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system,[6] and by providing

1 UN General Assembly Resolution 40/34
2 Paragraph 1 of Declaration
3 Paragraph 2 of Declaration
4 Paragraph 5 of Declaration
5 Paragraph 6(a) of Declaration
6 Paragraph 6(b) of Declaration

proper assistance to victims throughout the legal process.[7] The responsiveness should further acknowledged by taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.[8]

In providing for Assistance for Victims, the Declaration identifies Restitution by Offenders in paragraph 8 and review of policies by State Governments in the desired end by paragraph 9. Irrespective of the source whether Offender or the Government, paragraph 6 stresses on the requirement of compensating the Victim.

Further in cases where the criminal activities have caused substantial harm to the environment, restitution should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.[9]

Interestingly where officers acting in an official capacity have violated national criminal laws, the victims should receive restitution from the State or Government successor in title.[10]

When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes and the family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.[11]

Paragraph 13 of the Declaration states that the establishment, strengthening and expansion of national fund for compensation to victims should be encouraged.

In addition to various financial needs, victim's requirements for medical care as well as other forms of assistance are recognized in[12] the Declaration. Paragraph 17 further emphasizes that in providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as discrimination on the grounds listed in paragraph 3 of the Declaration. Paragraph 15 provides that victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

7 Paragraph 6(c) of Declaration
8 Paragraph 6(d) of Declaration
9 Paragraph 10 of Declaration
10 Paragraph 11 of Declaration
11 Paragraph 12 of Declaration
12 Paragraph 14 of Declaration

Paragraphs 18 to 21 provides for victims of abuse of power. While interpreting the 'victim' to include persons who have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of inter-nationally recognized norms relating to human rights.[13] It further provides that States should consider incorporating into the national law norms proscribing abuses of power and providing remedies, in particular, restitution and/or compensation, and necessary material, medical, psychological and social assistance and support to victims of such abuses.[14]

States should consider negotiating multilateral international treaties relating to victims[15] while periodically review existing legislation and practices to ensure their responsiveness to changing circumstances[16].

PROTECTION OF VICTIM RIGHTS IN INDIA -

India does not have a prime legislation in victim protection so far. Instead, Apart from the Constitutional remedies for Fundamental Rights[17] violations, there are legislation which ensures compensation be awarded to the victims of crime. i.e. the Criminal Procedure Code of 1973, the Fatal Accidents Act No. 13 of 1855,[18] the Probation of Offenders Act of 1958[19] and the Motor Vehicles Act of 1988[20] and so forth.

Although in **Rattan Singh v. State of Punjab**[21] Krishna Iyer J observed ;

> *"the victimization of the family of the convict may well be a reality and is regrettable. It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependents of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law! This is a deficiency in the system which must be rectified by the Legislature. We can only draw attention to this matter. Hopefully, the Welfare State will bestow better thought and action to traffic justice in the light of the observations we have made".*

13 Paragraph 18 of Declaration
14 Paragraph 19 of Declaration
15 Paragraph 20 of Declaration
16 Paragraph 21 of Declaration
17 The six fundamental rights recognized by the Indian Constitution in Part III are, Right to equality, Right to freedom, Right against exploitation, Right to freedom of religion, Cultural and Educational rights and Right to constitutional remedies
18 An Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong.
19 Section 5 of the Act
20 Amendment Act No.110 of 1956, Section 93 to 109 with reference to third party insurance and Section 110(A) to 110(F) with reference to creation of Motor Accident Claims Tribunal and procedure for adjudication of claim
21 1980 AIR 84 1980 SCR (1) 846 1979 SCC (4) 719

In 2008 the Indian Code of Criminal Procedure (Amendment) Act expanded the scope of the term 'victim' to mean a "person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged", and the expression 'victim' includes his or her guardian or legal heir[22] while bringing in several provisions for victim protection. For instance section 24, 26, 157 and 161 were amended respectively by insertion of provisos that the Court may permit the victim to engage an advocate of his choice to assist the prosecution, that any offence under section 376 and sections 376A to 376D of the Indian Penal Code shall be tried as far as practicable by a Court presided over by a woman, that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality and that statement made may also be recorded by audio-video electronic means.

Provisions for a victim compensation scheme was brought in by section 357A and the scheme is for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority shall decide the quantum of compensation.[23] If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.[24]

Even where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.[25]

It further provides for, to alleviate the suffering of the victim, to obtain immediate first-aid facility or medical benefits free of cost.[26]

Interestingly amendment to section 372 provides that victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.

22 Section (wa)
23 Section 357A(2)
24 Section 357A(3)
25 Section 357A(4)
26 Section 357A(5)

PROTECTION OF VICTIM RIGHTS IN THE USA-

The United States of America by 18 U.S.C. § 3771 Crime Victims' Rights Act[27] provides statutory protection for series of rights[28] for Victims, including right to full and timely restitution, right to proceedings free from unreasonable delay, right to be informed in a timely manner of any plea bargain or deferred prosecution agreement and the right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990,[29] while interpreting the term 'crime victim' to mean a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the mentioned rights[30] while Sub section (c) provides the frame work for best efforts to accord rights.

The rights shall be asserted in the District Court[31] notwithstanding whether the prosecution is underway and in denial may petition the court of appeals for a writ of mandamus. The Court of Appeal[32] if denies the relief sought, the reasons shall be clearly stated on the record in a written opinion. Sub section (f) outlines the procedure to promote compliance of the above provisions.

PROTECTION OF VICTIM RIGHTS IN SRI LANKA -

Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015[33] of Sri Lanka is enacted in light of the above Declaration in view of facilitating operation of appropriate International norms, standards and best practices of same.

The Act which is certified on 07th March 2015 is an Act to provide explicitly for;[34]

a) for the setting out, protection and promotion of rights and entitlements of victims of crime and witnesses,

27 CVRA
28 Sub section(a)
29 VARA:The VRRA directs designated federal officials referred to as "responsible officials" to provide specified services to victims.
30 Subsection(b)
31 Sub section (d)3
32 the United States court of appeals for the judicial district in which a defendant is being prosecuted
33 Referred as the Act hereafter
34 Preamble to the Act

b) to give effect to appropriate international norms, standards and best practices thereto,

c) to establishment of The National Authority for the Protection of Victims and Witnesses of Crimes and The Victim of Crimes and Witnesses Assistance and Protection Division of The Sri Lanka Police Department,

d) to provide for payment of compensation to victims of crimes and to establishment of the victim of crimes and witnesses assistance and protection fund and for matters connected therewith and incidental thereto,

The provisions of the Act, as it specifies shall come into operation on such date or dates as the Minister may appoint by Order published in the Gazette whereas different dates may be appointed by the Minister for the coming into operation of different Parts of the Act.[35]

The Act consists of IX parts which deals with object of the act, rights and entitlements of victims of crime and witnesses, offences against victims of crime and witnesses, establishment of the national authority for the protection of victims and witnesses of crime and the victim of crimes and witnesses assistance and protection division of the Sri Lanka Police Department, entitlement of a victim of crime or witness to obtain protection, compensation, testimony through audio visual linkage and general provisions respectively.

In terms of the Section 46 of the Act child victim of crime and child witness means a person who is less than eighteen years of age and who is either a victim of crime or is a witness, and a victim of crime means a a person including a child victim who has suffered any injury, harm, impairment or disability whether physical or mental, emotional, economic or other loss, as a result of an act or omission which constitutes an alleged offence under any law or infringement of a fundamental right guaranteed under Articles 13(1) or (2) of the Constitution, and includes a person who suffers harm as a result of intervening to assist such a person or to prevent the commission of an offence, and the parent or guardian of a child victim of crime and any member of the family and next of kin of such person, dependents and any other person of significant importance to that person.

Interestingly the Act contains a lengthy definition for the term 'witness' unlike any other international instrument or state legislation, provides for witness protection.

Following is a brief introduction to provisions of the Act contained in Part I, II, III and VII with special reference to provisions directly relevant with judicial proceedings.

35 Section 1(2) As per the extra ordinary Gazette notification No. 1967/8, dated 16th May 2016 the provisions of parts I, II, III, IV, V, VI, VII, VIII and IX are in operation with effect from 18th May 2016

PART I; OBJECTIVES OF THE ACT -

Part I of the Act, deals with the object of the Act wherein it states among other things that the Act aims to set out, uphold and enforce the rights and entitlements of victims of crime and witnesses and to provide for a mechanism to promote, protect, enforce and exercise such rights and entitlements. The Act identifies Compensation, Restitution, Reparation and Rehabilitation as such rights whereas it sets out duties and responsibilities of the State, Judicial Officers and Public Officers towards the intended end. Furthermore the Act stipulate offences that may be committed against victims of crime and witnesses and the penal sanctions for such offences and provides for the adoption and implementation of best practices relating to the protection of victims of crime and witnesses.

At this point it is significant to state that even before the introduction of the Act and similar to legal provisions in India, up to date victim protection and /or assistance, compensation and /or restitution and/or reparation and rehabilitation has been severally provided for, in criminal justice system in the Sri Lanka.

For instance section 17(4) of the Code of Criminal Procedure Act No 15 of 1979 as amended by Act No 14 of 2015 provides for Awarding of compensation to a victim of a crime, whereas in section 447 provides for restoration of a female victim of an abduction. The Act was amended to further include section 451(a) to provide for safe custody of child victims of child abuse by Amendment Act No: 28 of 1998 and provisions contained in section 243 of the Act was amended to include entitlement to obtain expenses of a witness by Amendment Act No: 39 of 1982.

Children and Young Persons Ordinance No. 48 of 1939 specifically provides for rehabilitation of child victims.[36] Moreover Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985, provides for in section 64 that the Magistrate shall order the offender to refund the fee or money which is the subject of the offence, to the person from whom the offender received such fee or money, notwithstanding a limit.

PART II: RIGHTS AND ENTITLEMENTS OF A VICTIM -

Part II of the Act specifies under the heading of rights and entitlements of a victim and/ or a witness.[37] A Victim shall have the right to;

- be treated with equality, fairness, with respect to the dignity and privacy,
- be treated in a manner which ensures the best interests of a child victim,

36 Section 34, 35

37 Section 3(1)

- receive prompt, appropriate, fair redress,
- be protected from any possible harm,
- be medically treated for any mental or physical injury suffered as a victim,

However the victim, upon a request[38] shall have the right to be informed of the legal remedies available, progress of the investigation, dates fixed for hearing and the progress and the disposal of judicial proceedings, dates fixed for the release on bail, discharge of the suspect, institution of criminal proceedings against the accused, the conviction, sentence or acquittal of the suspect or the accused, and the release from prison of the convict, and the reasons therefore.

In addition to that victim has a right to be represented by an Attorney-at-Law during all stages of an investigation, and to make necessary representations along with the right to obtain certified copies of all the reports unless the investigator objects before the magistrate on grounds of negative effect for the ongoing investigation.[39]

In addition to the right to be presented at all times of the disposal of the justice against the offender, the victim has a right to present written communications or make representations to the Attorney-General or to the investigator.

VICTIM IMPACT STATEMENT (VIS) -

A significant provision brought by the act is the victim's right to make a Victim Impact Statement, following the conviction of the offender and prior to the determination of the sentence, either personally or through legal counsel, to submit to court the manner in which the offence concerned had impacted on his life, including his body, state of mind, employment, profession or occupation, income, quality of life, property and any other aspects concerning his life.[40] This right to make a VIS is extended even to the event of an appeal or application in revision being presented by the accused and in the event of any person in authority considering the grant of a pardon or remission of sentence imposed on an accused along with the right to have notice of such instance.

It is pertinent here to study the roots of VIS as it is a novel concept in the criminal justice arena in Sri Lanka.

Rationale behind VIS is to allow the person most directly affected to address the court during the decision making process and is seen to personalize the crime and elevate the status of the victim, aiding their emotional recovery from their torment and thus aid rehabilitation.

38 Section 3(1) f.
39 Section 3(1) I.
40 Section 3(1) o.

The first such statement in the United States was presented in 1976[41] and was passed as law in California in 1982. The Report of President's Task Force on Victims of Crime, in the same year recommended that "judges allow for, and give appropriate weight to, input at sentencing from victims of violent crime." [42]

In 1991, the US Supreme Court held[43] that a victim impact statement in the form of testimony was allowed during the sentencing phase of a trial and that the admission of such statements did not violate the Constitution and that the statements could be ruled as admissible in death penalty cases.

The State of South Australia enacted law in 1988 specifically providing for VIS in the sentencing process, and other States soon followed.[44] However in the State of Queensland, the Director of Public Prosecution guidelines require prosecutors to remove inappropriate or inflammatory material from VIS prior to submit to Court.

Along with current issues with VIS since their relative newness and lack of research into their actual effectiveness, there may be legal issues on the admissibility of facts in a victim impact statement that are materially adverse to an offender and of course with the wavering judicial perception of the same.

Conversely, some jurisdictions expressly forbid any proposal or suggestion on punishment or sentencing since the sentencing process is solely the domain of the judge who considers many more factors than harm to victims.

RIGHTS OF A WITNESS -

The Act provides that in addition to entitlement to receive from investigational, quasi-judicial and judicial authorities fair and respectful treatment,[45] a witness shall not be harassed due to or as a consequence of providing information, volunteering to make a statement or providing testimony relating to the offence or to the infringement of any fundamental right or the violation of any human right.[46]

Most interestingly a person who is neither a victim nor a witness, shall be entitled to claim protection against any of the above acts or suffering from loss or damage in mind, body or reputation or any adverse change to his condition of employment, connected with an offence in issue.[47]

41 Sharon Marie Tate Polanski Murder Case
42 Judiciary Recommendation 6 at Page 76
43 Payne v. Tennessee501U.S.808 (1991).
44 The Sentencing Act 1991 (Victoria)
45 Section 5(1)
46 Section 5(2)
47 Section 6

It is observed that this is a salutary provision contained in the Act specifically with regard to Fundamental Rights and Human Rights. Nevertheless it is also observed that application of the Act is specifically limited to Article 13 in case of Fundamental rights.

PART III: OFFENCES -

According to section 8 and section 9 any person who commits and/or along with another person who attempts to commit, instigates or intentionally aids any other person;

(a) by force compels or

(b) by any deceitful means, abuse of authority or by any other means of compulsion, induces or

(c) wrongfully restrains or (d) voluntarily causing hurt or grievous hurt or (e) threatens a victim or a witness with injury to his or to a person whom he has an interest, with the intention of causing alarm to such victim or witness to refrain from lodging a complaint or testifying at any judicial or quasi-judicial proceedings or to compel such victim of crime to withdraw a complaint lodged or legal action instituted against such person, commits an offence, and shall on conviction by a High Court, be sentenced to a term of imprisonment which may be extended up to Twelve Years and to a fine of up to rupees thirty thousand.[48]

Furthermore;

a person who causes any harassment, intimidation, coercion, violation, physical or mental suffering, loss or damage to the reputation of another person or an adverse change to the conditions of employment on grounds of having provided any information or lodged a complaint or made a statement or provided testimony pertaining to the commission of an offence or the infringement of a fundamental right or the violation of human rights of such person, commits an offence and shall on conviction by the High Court be sentenced to a term of imprisonment not exceeding seven years and to a fine of rupees fifteen thousand.49

Any person who having received information given for the purpose of commencing or conducting an investigation or having gathered or received information in the course of an investigation, or Any person who is in charge of or participating or assisting in providing protection to a victim of crime or to a witness provides,

48 Section 8(1) to 8(3)

49 Section 8(4)

illegally issues or gives to a third person or publishes or otherwise disseminates any such information regarding the identity of the relevant victim or a witness or informant and thereby places the life of such victim or witness or informant in danger, commits an offence, and shall on conviction by the High Court be sentenced to a term of imprisonment not exceeding seven years and to a fine of rupees fifteen thousand.50

Any person who is alleged, suspected or accused of having committed an offence, offers, provides or gives any gratification to any other person who is intending or preparing to institute legal proceedings against such person or likely to provide information or testimony against such person, with a view to preventing, discouraging or dissuading such other person from his legal duty, commits an offence, and shall on conviction by the High Court be sentenced to a term of imprisonment not exceeding seven years and to a fine of rupees fifteen thousand.51

Any person who with the intention of obtaining any protection or assistance from the Authority, the police including the Division, a Court or a Commission, provides any information knowingly or having reasonable grounds to believe that such information is false, commits and offence, and shall on conviction by the High Court be sentenced to a term of imprisonment not exceeding seven years and to a fine of rupees fifteen thousand.[52]

OF BAIL -

An offence under section 8 or section 9 shall be cognizable and non-bailable and no person suspected, accused of or convicted of such and offence shall be enlarged on bail, unless under exceptional circumstances by the Court of Appeal.[53]

The Act specifically provides that when enlarging a person on bail, the Court of Appeal shall have the power to impose a condition prohibiting communication with or coming into close proximity with the person in respect of whom the suspect is alleged to have committed the offence, and with any other persons who may be specified in the order granting such bail.[54]

50 Section 8(5)
51 Section 8(6)
52 Section 8(7)
53 Section 10
54 Section 10(1)b

A trial against a person accused of having committed any offence under section 8 or under section 9 shall be taken up before any other business of that court and shall be held on a day to day basis and not be postponed during the course of such trial, except due to unavoidable circumstance which shall be specifically recorded.[55]

If after an inquiry by a Court, it is found that there exists prima-facie material to conclude that a person who at the relevant point of time was on bail in respect of any offence alleged to have been committed by him, has committed an offence under section 8 or section 9, the bail granted to such person by the Court which conducted the inquiry shall be cancelled and such person shall be placed on remand till the end of the trial in respect of the offence which he had been enlarged on bail.[56]

PART VII: COMPENSATION -

Part VII of the Act provides for compensation to the victims and notwithstanding anything to contrary in the Judicature Act and the Code of Criminal Procedure Act, every High Court and every Magistrate's Court may upon conviction of a person by such Court, in addition to any penal sanction that may be imposed on such person in respect of the offence for which he is convicted, order the convicted person to pay to Court;

(i) an amount not exceeding one million rupees to be paid as compensation to the victim of crime or witness concerned; or

(ii) a sum of money not exceeding twenty per centum of the maximum fine payable for that offence; or both the compensation and the sum of money referred.[57]

Prior to arriving at a determination on the quantum of compensation to be imposed the Court shall consider all relevant information relating to the victim including the report of the Government Medical Officer who has examined the victim, that may enable the Court to determine the nature and the extent of the damage, loss or harm victim may have suffered, the offence the person convicted of or had been charged with, representations or submissions made by the victim of crime or his legal representative, relating to the impact of the crime on such victim and information pertaining to any compensation that may have already been paid to such victim by any court, by any authority or otherwise received from any other source.[58]

The presiding judge shall, remit the money paid as compensation to the victim of crime concerned or to his next of kin or dependents or to the Victims of Crime and Witnesses

55 Section 10(2)
56 Section 10(3)
57 Section 28(1)
58 Section 28(2)

Assistance and Protection Fund established under section 29 of the Act.[59]

In the event of an accused failing to make any payments the Court shall determine a default imprisonment. However where the court upon inquiry is satisfied that the accused does not have necessary financial resources to make the payment shall instead enter a community based correction order.[60]

PART IX: GENERAL -

Part IX of the Act among other matters provided in section 38 that the provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and accordingly, in the event of any conflict or inconsistency between the provisions of this Act and such other written law, the provisions of this Act shall prevail.

OBSERVATIONS AND CONCLUSION -

It is factual that current scenario warrants the protection and restitution of the victim. It is salutary that the legislature provides for the victim to obtain financial and social assistance through the Authority notwithstanding the progress of the criminal prosecution or the accused's capacity to compensate.

However it is seen that imposing a limit to the compensation which shall be awarded by the Criminal Court at Rs. One Million while providing that provisions of the Act prevails over any other law, is a bar to give effect to some penal sections of some statutes. For example application of the section 64 of the Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985 would be limited and/or shielded.

On the other hand although the Declaration emphasizes on the need to restore effects of offences committed against the environment, and specifically against the abuse of power, the Act is virtually silent in that regard.

Theoretically the Mines and Minerals Act 15 of 1958 as amended by Act No: 66 of 2009[61] provides for restoration of adverse effects to the environment within the purview of its subject matter. Nevertheless, since the Act provides for almost all the victim rights already exist in several other Acts, the legislative framework could have enacted with due consideration for all relevant areas instead being hassled.

A thorough legal discussion is indispensable with regard to admissibility of VIS. Indisputably the VIS would serve justice in case of compensation.[62] Nevertheless the

59 Section 28(3)
60 Section 28(4)
61 Inserted section 63(1)A by section 30 of the Amendment
62 Section 28(2) b

standing of VIS against the sentencing which has not been provided by the Act would certainly bring disparity in sentencing. It is noted here that the law is settled with regard to prior convictions as well as judicial perception of Dock Statements. Similarly the judicial perception of VIS is yet to resolve, particularly in case of minimum mandatory sentences, statutory offenses and where VIS would offer clemency of the culprit.

Interestingly the penal sections and the provisions regarding grant of bail under the Act are extremely stringent. Although it is conventional with the object of the Act, these provisions need immense discern within public as required by the Act[63] itself from the Authority. Nonetheless it is perceived that the provisions regarding bail of the Act should have accompanied a proviso or a restricted application.

The Act applies to all offence under any law or infringement of a fundamental right guaranteed under Articles 13(1) or (2) of the Constitution. Interestingly, although the legislature has been mindful to exclude Article 11 and 13 where executive/administrative abuse of power or more particularly 'torture' involves along with Article 14. Whereas the Declaration has identified that there should be a variation on the gravity of offence,[64] it has not been able to distinguish between compoundable offences and heinous crimes. It is perceived that either the application of section 10 could have restricted to some offences which may introduce as a schedule or should have accompanied a proviso which may enable less stern application of law relating to bail.

Section 10(3) of the Act provides for cancelation of bail under the circumstances provided therein. It is perceived that specific provision should have made in this regard, whether it is optional in full or a part there of, of the sentencing to preclude the accused being double jeopardized. However it is also noted once again that Bail Act No: 30 of 1997 specifically provides for cancellation of bail in the event of hampering with evidence or witnesses.[65]

Interestingly, although the Act provides for Courts to impose a community service order where appropriate for an incompetent convict, the Act is silent whether the Court can order the decided compensation to be paid by the fund to the victim. Even though the Act stipulates guidelines for Courts to decide the quantum of compensation, it does not guarantee such compensation been paid to the victim by the Authority.

However it is imperative that laws at all times should be fair and just to its subjects whom are living in its unique socio-cultural background. Trans-importing a norm-set of a different culture would only worsen the lacuna.

63 Section 13(1) g
64 Paragraph 6
65 Section 14(1)a.(ii)

LAW AND EUTHANASIA

'MERCY KILLING SHOULD NOT LEAD TO 'KILLING MERCY'

R.S.M Mahendrarajah[1]
Additional Magistrate, Rathnapura.

INTRODUCTION -

Euthanasia or mercy killing is a debatable topic worldwide; surfacing and unsurfacing time to time to the grimed edge of social reality. Euthanasia is all about enforcement of law for right to life while respecting ones autonomy and dignity in dying.

Euthanasia originated in ancient Greece and Rome. Socrates and Plato supported deliberate hastening of a person's death, while Hippocrates, father of medicine was against euthanasia as he quoted in his noble oath *"I will not prescribe a deadly drug to please someone nor give advice that may cause his death"*. As the history reveals in 1561 - 1629 Sir Francis Bacon used the word euthanasia for the first time in his work ***Euthanasia Medica.***

According to its name, euthanasia is making the end of life easier and painless in exceptional circumstances by shortening life, yet the criteria for such decision will always be arbitrary. In the process of empowering an authority deciding which lives are worth saving and who would better off dead. Will it always mean the strong and powerful deciding the fate of those who are weak and less influential in society?

On the other hand, patients with terminal illness and who are suffering from intractable pain; do they have a right to choose to end their lives seeking physician assisted dying? When the death is imminent and when the patients find their sufferings unbearable, and if the healing is no longer possible should the medical practitioner who has deviated from his role as a healer to a reliever of suffering prosecuted ?

1 LLB University of Colombo.

LEGITIMIZING EUTHANASIA;

In 1936 in Great Britain when king George V suffered from cardio respiratory failure, his physician gave him a fatal dose of morphine and cocaine in order to quicken his death.

The first state sponsored euthanasia was done in 1939; mercy killing of a severely disabled infant named Gerhard Kretschmar was done in Hitlers office in Germany, followed by mercy killing of 300,000 mentally and physically handicapped people. While Gerhard's killing was done with the consent of his parents, most of children killed afterwards were forcibly taken from their parents.

In 1991 Patients Self Determinant act passed by the United States Congress permitting elderly / all terminal patients to prepare an advance directive in which they elect or choose to refuse life extending treatments, which only can prolong suffering.

Netherlands legalized voluntary euthanasia in 2001, under current Dutch law euthanasia by doctors is only legal in cases of unbearable suffering with no hope of healing.

The criteria concerned includes, patients request, the condition of the patient, the presence of reasonable alternatives, advice from another physician and finally method of ending life.

In 2010 request made to legalize euthanasia for all Dutch people over 70 years of age; who feel tired of life, has never been legalized yet.

In Canada the supreme court of Canada ruled that "Denying the right to assisted suicide is unconstitutional" (06/02/2015). A competent adult who clearly consents to the termination of life and has a grievous and irremediable medical condition that is intolerable to the individual in the circumstances of his or her condition. Further, this process should be monitored carefully and the death certificate should be given by other medical examiner except his/her treating physician. On 17th June 2016 legislation was passed to allow euthanasia within Canada.

In 2015 a New Zealand lawyer Lacretia Seales challenged New Zealand law for her right to die with the assistance of her general practioner (GP) on behalf of her client who was diagnosed with brain tumor and asked for declaration that her GP would not be persecuted. In her claim she stated;

"I have lived my life as a fiercely independent and active person. I have always been very intellectually engaged with the world and my work: For me a slow and undignified death that does not reflect the life that I have led would be a terrible way for my good life to have end…" I really want to be able to say good bay well"

However, Justice Collins declined to grant any of her declarations.

In USA, Oregon (1997), Washington (2009), Vermont (2013) have allowed euthanasia for terminally ill patients. In 2009 Supreme Court of Montana ruled that nothing in the state law prohibits physician assisted suicide.

In 2014 New Mexico district Judge Nan Nash ruled that euthanasia is legal under the state Constitution. New Mexico's Attorney General appealed against this judgment and ultimate decision is still pending.

The Belgian Parliament legalized euthanasia on 28th May 2002. A survey published in 2010 reported that those who died from euthanasia (compared with other deaths) were more often younger, male, cancer patients and more often died in their homes. In almost all cases, unbearable physical sufferings were reported. Euthanasia for non terminal patients was rare. There have been about 1,400 cases a year since the law was introduced, and a record 1,807 cases were recorded in 2013. In December 2013, the Belgian Senate voted in favour of extending its euthanasia law to terminally ill children. Conditions imposed on children seeking euthanasia are that "the patient must be conscious of their decision and understand the meaning of euthanasia, the request must have been approved by the child's parents and medical team, their illness must be terminal and they must be in great pain, with no available treatment to alleviate their distress". A psychologist must also determine the patient's maturity to make the decision. The amendment emphasizes that the patient's request be voluntary. The first minor to be euthanized under these new regulations occurred in September 2016.

Euthanasia is illegal in the United Kingdom. Any person found to be assisting suicide is breaking the law and can be convicted of assisting suicide or attempting to do so. However, the Director of Public Prosecutions has issued guidelines setting out when a prosecution is, or is not, likely to happen. Between 2003 and 2006 Lord Joffe made four attempts to introduce bills that would have legalized voluntary euthanasia but all were rejected by the UK Parliament. Currently, Dr Nigel Cox is the only British doctor to have been convicted of attempted euthanasia. He was given a 12-month suspended sentence in 1992. In regard to the principle of double effect, in 1957 Judge Devlin in the trial of Dr John Bodkin Adams ruled that causing death through the administration of lethal drugs to a patient, if the intention is solely to alleviate pain, is not considered murder even if death is a potential or even likely outcome.

The United Nations has found that the euthanasia law in the Netherlands is in violation of its Universal Declaration of Human Rights because of the risk it poses to the rights of safety and integrity for every person's life. The UN has also expressed concern that the system may fail to detect and to prevent situations in which people could be subjected to undue pressure to access or to provide euthanasia and could circumvent the safeguards that are in place.

Autonomy and choice are important values in any society, but they are not without limits. Our democratic societies have many laws that limit individual autonomy and choice so as to protect the larger community. These include, among many others, limits on excessive driving speeds and the obligation to contribute by way of personal and corporate income taxes. Why then should different standards on autonomy and choice apply in the case of euthanasia?

SUMMARY -

Research has revealed that many terminally ill patients requesting euthanasia, have major depression, and that the desire for death in terminal patients is correlated with the depression. In Indian setting also, strong desire for death was reported by 3 of the 191 advanced cancer patients, and these had severe depression. They need palliative and rehabilitative care. They want to be looked after by enthusiastic, compassionate and humanistic team of health professionals and the complete expenses need to be borne by the State so that 'Right to life' becomes a reality and succeeds before 'Right to death with dignity'. Palliative care actually provides death with dignity and a death considered good by the patient and the care givers.

Many patients in a persistent vegetative state or else in chronic illness, do not want to be a burden on their family members. Euthanasia can be considered as a way to upheld the 'Right to life' by honouring 'Right to die' with dignity.

> *"Every human being, even the child in the womb, has the right to life directly from God and not from his parents, not from any society or human authority. Therefore, there is no man, no society, no human authority, no science, no "indication" at all whether it be medical, eugenic, social, economic, or moral that may offer or give a valid judicial title for a direct deliberate disposal of an innocent human life"*

Pope Pius XII, Address to Midwives on the Nature of Their Profession Papal Encyclical, October 29, 1951.

THE "PUBLIC TRUST" DOCTRINE

Rajitha Perera, LL.B, LL.M (Colombo).
Senior State Counsel[1]

Though the origins of the doctrine are widely attributed to the ancient laws of the Roman Emperor Justinian and the Justinian Code of 530 A.D.,[2] it is interesting to note the discussions on the development of the doctrine in Sri Lanka with references to the rich history of this country and not to Justinian.

"From time immemorial, land has thus being held in "trust" for the people in this island". **Shirani Bandaranayake, J. in** the Supreme Court Determination on 'Land Ownership Bill' [3] observed.

"Discussing the ancient history of land tenure, Hayley (Sinhalese law and Customs. F.A. Haley, chapter II) states that the Kings were the owners of the soil. Contributing to this view H.W. Codington, (Ancient Land Tenure and Revenue in Ceylon, 1938) stated that,

The king was bhupati or bhupala, "lord of the earth", "protector of the earth" or as the late Niti Nighanduwa (Chapter I, 2) terms Manu the Vaivasvata, the first king of the men," lord (adhipati) of the fields of all."

Amarasinghe, J. in **Bulankulama and Six others v. Ministry of Industrial Development and seven others** [4] in analyzing the historical development of the doctrine referred to the Mahawansa.

1 The views expressed in this paper are those of the author and do not represent that of the Attorney General's Department or of any other Authority.
2 Justinian recognized that "By the law of nature, these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea. No one therefore is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings which are not like the sea, subject only to the law of nations."
3 Supreme Court Determination No 26-36 of 2003 Decisions of the Supreme Court on Parliamentary Bills, 1991 – 2003, Vol. VII pg. 455,
4 ([2000] 3 Sri L.R. 243).

The organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. This accords not only with the scheme of government set out in the constitution but also with the high and enlightened conceptions of the duties of our rulers, in the efficient management of resources in the process of development, which the Mahavamsa, 68.8-13 sets forth in the following words.

> *"Having thus reflected, the king thus addressed his officers.*
>
> *In my Kingdom are many paddy fields cultivated by means of rain water, but few indeed are those which are cultivated by perennial streams and great tanks.*
>
> *By rocks, and by many thick forests, by grate marshes is the land covered.*
>
> *In such a country, let not even a small quantity of water obtained by rain, go to the sea, without benefiting man.*
>
> *Paddy fields should be formed in every place, excluding those only that produce gems, gold, and other precious things.*
>
> *It does not become persons in our situation to live enjoying our own ease, and unmindful of the people .....[5] ".*

Judge C.G. Weeramantry, Vice President International Court of Justice in Gabcikovo -Nagimoros Project ***(Hungary v. Slovakia[6]) – the Danube case)*** referred to another passage from the rich history of Sri Lanka in his opinion on the historical development of the doctrine.

> *"Just as development was the aim of this system, it was accompanied by a systematic philosophy of conservation dating back to at least the third century B.C. The ancient chronicles record that when the King (Devanampiya Tissa) 247-207 B.C. was on a hunting trip (around 223 B.C.) the Arahat Mahinda, son of the Emperor Asoka of India, preached to him a sermon which converted the King. Here are excerpts from that sermon:"*
>
> *"O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it..."*

A study of 68.8-13 of the Mahavamsa, the sermon by the Arahat Mahinda to King Devanampiya Tissa and the Justinian Code would indicate certain common principles. Yet, a careful analysis of the former would indicate that what is actually referred to therein is a concept that is much more deep and advanced than the latter.

5 Translation by Mudaliyar L. de Zoysa, Journal of the Royal Asiatic Society (C.B), vol. III No IX,
6 GabCikovo-Nagymaros Project (Hungary /-Slovakia), Judgment, I. C. J. Reports 1997, p. 7

Justinian recognized things such as the sea, the shores of the sea, the air and running water was common to everyone and that they can be enjoyed by all. The text from the Mahavamsa and the sermon by the Arahat Mahinda identifies the equal right to live and to move about in any part of the land. The Mahavamsa and the sermon by the Arahat Mahinda proceed to say that "The land belongs to the people and all living beings; thou art only the guardian of it…" The element of the ruler being placed only as the guardian is not so clear in Justinian's writings. What is significant in the Public Trust Doctrine in the Sri Lankan context is the concept where the king or the ruler is placed as the guardian of the land. The statement that the land belongs to the people and all living beings thus the ruler is only the guardian of the same gives rise to the trust which is known as the public trust doctrine.

Thus the references to Mahavamsa and the sermon by the Arahat Mahinda by Amerasinghe, J. and Judge C.G. Weeramantry is of great value.

THE DOCTRINE -

Though theoretically the doctrine may be founded upon matters with some nexus to the environment, the application of the doctrine in Sri Lanka has not necessarily being the same. In Sri Lanka, It has had a wide application from dismissal of public servants to airwaves and television broadcasting; from land acquisition to privatisation of state controlled entities and to calling and the awarding of public tenders.

De Silva v Atukorale [7] is an early instance where the Public Trust Doctrine was applied by the Supreme Court. Quoting Wade,[8] it was emphasized at pg. 296 that;

> *"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended".*

Bandara v Premachandra [9] is yet another application where the Supreme Court applied the Public Trust Doctrine. Fernando, J. (at page 312) reasoned that;

> *"The State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the Judiciary must endeavor to ensure that this expectation is realized."*

7 ([1993] 1 Sri L.R 283, 296-297).
8 Administrative Law, 5th ed., pp. 353-354).
9 ([1994] 1 Sri L.R 301).

In **Premachanda v. Major Montague Jayawickrema and another** [10] G. P. S. De Silva, C.J. held as follows:

> *"There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted."*

In **Fernando v SLBC** [11] at page, 172, Fernando, J. made a reference to Public Interest in the following manner;

> *"….. it is relevant to note that the Government's Media Policy was intended to encourage criticism, in the public interest, in order to expose shortcomings. If nothing else, the right to equality requires that the media itself is not immune from justifiable criticism, internally and externally."*

In **Bennett Rathnayake vs. the Sri Lanka Rupavahini Corporation and Others**,[12] Fernando, J. observed that;

> *"The statutory powers which the 1st respondent has are not absolute, unfettered, or unreviewable; they are held in trust for the benefit of the public, and they cannot be exercised arbitrarily or capriciously or unreasonably. The airwaves are public property and the State is under an obligation to ensure that they are used for the benefit of the public."*

In **Jayawardene v Wijayatilake**,[13] Court observed;

> *"Respect for the Rule of Law requires the observance of minimum standards of openness, fairness and accountability in administration and this means - in relation to appointments to and removal from, offices involving powers, functions and duties which are public in nature - that the process of making a decision should not be shrouded in secrecy . . . ."*

at page 159 it was further observed that;

> *"It is accepted today that powers of appointment and dismissal are conferred on various authorities in the public interest, and not for private benefit, that they are held in trust for the public and that the exercise of these powers must be governed by reason and not caprice…"*

10 ([1994] 2 Sri L.R 90).
11 ([1996] 1 Sri. L.R.,pg 157)
12 ([1999] 2 Sri L.R., pg 93)
13 ([2001] 1 Sri L.R., pg 132)

IN RE 19TH AMENDMENT TO THE CONSTITUTION[14] -

The determination of the Supreme Court In Re 19th Amendment to the Constitution is a mile stone in the development of the doctrine in Sri Lanka. The structure of the 1978 Constitution, the Sovereignty and the Power of the People, the Executive power of the People, the Legislative power of the People, the Judicial Power of the People and the exercise of those powers all were discussed in detail by Chief Justice S.N. Silva.

Having made extensive references to Article 3[15] and Article 4[16] of the 1978 Constitution, court proceeded to elaborate on the significance of the words "the power of the People" referred to in Article 4 at pg 96 and 97.

> *"The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that subparagraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power "of the People" shall be exercised by Parliament; the executive power "of the People" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People"*

Therefore, the statement in Article 3 that sovereignty is in the People and is "inalienable" being an essential element which pertains to the sovereignty of the People should necessarily be read into each of the sub paragraphs in Article 4. The relevant sub paragraphs would then read as follows:

(a) the legislative power of the People is inalienable and shall be exercised by Parliament;

14 ([2002] 3 Sri. L.R., pg 85)

15 Article (3) "In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise."

16 Article (4) "The sovereignty of the People shall be exercised and enjoyed in the following manner

(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum ; (cont:)

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law……;"

(b) the executive power of the People is inalienable and shall be exercised by the President; and

(c) The judicial power of the People is inalienable and shall be exercised by Parliament through Courts.

The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the "trust" that is implicit in the conferment of power has been stated as follows:

> *"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended"*[17]

Court thus concluded that;

> *"The powers attributed to the respective organs of government include powers that operate as checks in relation to other organs that have been put in place to maintain and sustain the balance of power that has been struck in the Constitution, which power should be exercised only in trust for the People".*

As said earlier, the determination in the Re 19th Amendment is significant in many ways. The Constitutional recognition of the doctrine via Articles 3 and 4 is remarkable. The Interpretation of the Supreme Court that the power remains and continues to be reposed in the People who are sovereign and its exercise by the particular organ of government being its custodian for the time being in trust for the people crystallizes the concept behind the doctrine in the Sri Lanka context.

In **Mundy v. Central Environmental Authority and 3 others**,[18] whilst referring to earlier judgments on the Concept of Public Trust, Court reiterated that;

> *"... this Court itself has long recognized and applied the "public trust" doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes"*

> *"... Administrative acts and decisions contrary to the "public trust" doctrine and/or violative of fundamental rights would be in excess or abuse of power, and therefore void or voidable."*

17 Administrative Law 8th ed. 2000 - H. W. R. Wade and C. F. Forsyth, p. 356
18 SC Appeal 58/2003, SCM 20th , January 2004,

In **Environmental Foundation Ltd vs. Urban Development Authority,**[19] the Supreme Court made a reference to the sovereignty of the people in the light of fundamental rights in the following manner;

Article 4 (d) of the Constitution states the manner in which the sovereignty of the People shall be exercised in relation to the fundamental rights, as follows;

> *" the fundamental rights which are by the Constitution declared and recognized shall be respected , secured and advanced by all the organs of government, and shall not be abridged , restricted or denied save in the manner and to the extent hereinafter provided"*

In **Senarath vs. Chandrika Bandaranayake**,[20] the Chief Justice Sarath N Silva, citing from the Determination of a Divisional Bench of seven judges in regard to the 19th Amendment observed;

> *"Sovereignty, which ordinarily means power or more specifically power of the State as proclaimed in Article 1 is given another dimension in Article 3 from the point of the People, to include –*
>
> *(1) the powers of Government*
>
> *(2) the fundamental rights and*
>
> *(3) the franchise*
>
> *Fundamental rights and the franchise are exercised and enjoyed directly by the People and the organs of government are required to recognize, respect, secure and advance these rights.*
>
> *This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign and its exercise by the particular organ of government being its custodian for the time being is for the people (at page 98):*
>
> *"Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People"*
>
> *"…. The 1st respondent and the Cabinet of Ministers were the custodian of public property and public funds. The property and funds will have to be dealt with according to law for the benefit of the people; therefore, in my view the law itself is the instrumentality through which custodians are guarded…. "*

19 SC FR Application No 47 - 2004, SCM 23rd November.2005
20 SC FR Application No 503-2005, SCM 03rd of May 2007

> *" The facts that have been clearly established in this case prove that the 1st respondent and the Cabinet of ministers of which she was the head secured for the 1st respondent benefits and advantages in the purported exercise of executive power in breach of the provisions of the Presidents" Entitlement Act No.4 of 1986. Since executive power is exercised in trust for the People, such wrongful action is an infringement of the fundamental right to equality before the law guaranteed by article 12 (1) of the Constitution."*

The important principle formulated in this application is that the custodian of public property and public funds in dealing with public property and public finance is necessarily required to deal with such property and funds according to law for the benefit of the people and the Rule of Law.

THE GOLDEN ERA -

The doctrine reached its peak during the period of 2007- 2009. The Supreme Court in three Fundamental Rights applications more commonly known and referred to as the LMS case, the Waters Edge case and the Sri Lanka Insurance case , delivered judgment after considering *inter alia* the Public Trust Doctrine.

In **Vasudeva Nanayakkara vs. K.N. Choksy and Others** [21] the Supreme Court at pg 64-65 of the judgment placed on record three well established principles of law that were considered in coming to its conclusion of which the second principle was the Public Trust Doctrine.

> *"... as firmly laid down in the Determination of the Divisional Bench of Seven Judge of this Court in regard to the constitutionality of the proposed 19th Amendment to the Constitution (2002 3 SLR page 85) the principle enunciated in Articles 3 and 4 of our Constitution is that the respective organs of Government, the Legislature, the Executive and the Judiciary are reposed power as custodians for the time being to be exercised for the people. In Bulankulame and others vs. Secretary, Ministry of Industrial Development (2000 3 SLR p 243) this Court has observed that the resources of the State are the "resources of the People" and the organs of State are "guardians to whom the people have committed the care and preservation of these resources (at p.253). That, there is a "confident expectation (trust) that the executive will act in accordance with the law and accountability in the best interests of the people of Sri Lanka (page 258);*

In S**ugathapala Mendis and another vs. Kankanige Mahinda Perera and 20 others**[22] Tillekewardane J. elaborated the Public Interest Doctrine in the following manner;

21 SC FR Application No 209-2007 SCM 21.08.2007 (LMS Case)
22 SC FR Application No 352-2007 SCM 08.10.2008 (Waters Edge Case)

"Public Trust Doctrine" is based on the concept that the powers held by the organs of the government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain, favor, but always to be used to optimize the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution the Sovereignty reposes.

The principle that those charged with the upholding the Constitution- be it a police officer of the lowest rank or the President- are to do so in a way that does not "violate the Doctrine of Public Trust" by state action/inaction is a basic tenet of the Constitution which upholds the legitimacy of Government and the Sovereignty of the People.23

Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law. This Court has long recognized and applied the Public Trust Doctrine, establishing that the exercise of such powers is subject to judicial review …….

The Supreme Court observed that;

"The Public Trust Doctrine, taken together with the Constitutional Directives of Article 27, reveal that all state actors are so principally obliged to act in furtherance of the trust of the People that they must follow this duty even when a furtherance of this trust necessarily renders inadequate an ant or omission that would otherwise legally suffice"

In **De Silva v. Atukorale** (supra) the Court, quoting Wade (Administrative Law, 5th ed., and pp.353-354) observed that;

"the powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same was a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon the lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good."

Tillekewardane J. at page 41 of the Judgment held that that:

23 at Page 13

> *"Public power must only be used strictly for the larger benefit of the People, the long term sustainable development of the country and in accordance with the Rule of law"*

The important principle laid down in this judgment is that the "Public Trust Doctrine" is based on the concept where the powers held by the organs of the government originate with the People and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective. These powers are to be exercised in good faith for the benefit of the People of Sri Lanka and public power is not for personal gain, favor, but always to be used to optimize the benefit of the People. Any exercise of Power contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law as Public power must only be used strictly for the larger benefit of the People.

In **Vasudeva Nanayakkara vs. K.N.Chocksy**[24] and others. (Sri Lanka Insurance Corporation case) Amaratunga, J. at pg 56 observed;

> *"Fundamental rights jurisdiction forms a part of the equitable jurisdiction of the Supreme Court which exercises, at the highest level, the judicial power of the people according to the Rule of Law and the fundamental rights provisions enshrined in the Constitution."*

Court further observed that;

> *"The petitioners have filed this application in public interest alleging that the executive power of the people, delegated to the Executive by the Constitution, to exercise to the prejudice of the people. The trust reposed on the executive to which the peoples' executive power has been delegated is ,in the words of Amarasinghe J in Bulankulala case, "the confident expectation(trust) that the executive will act in accordance with the law and accountability, in the best interest of the people"(2000 3 SLR 243 at 258.) The rule's trusteeship of the resources of the State which belong to the people is a part of the legal heritage of Sri Lanka dating back at least to the third century BC as pointed out by Justice Weeramantry in his separate opinion in the International Court of Justice in the Danube Case, by quoting the sermon of Arahath Mahinda to King Devanampiya Tissa as recorded in the Great Chronicle- Mahawansa".*
>
> *This concept of the public trust which curtailed the absolute power of the monarch is in perfect harmony with the doctrine of public trust developed by the Supreme Court on the basis of sovereignty of the people set out in Articles 3 and 4 of the Constitution, Article 12(1) and the principle of the Rule of Law, which is the basis of our Constitution. The Rule of Law is the principle which keeps all organs of the state within the limits of the law and the public trust doctrine operates as a*

24 SC FR Application No 158-2007, SCM 04.06.2009 (Sri Lanka Insurance Corporation Case)

> *check to ensure that the powers delegated to the organs of the government are held in trust and properly exercised to the benefit of the people and not to their detriment. When the Executive which is the custodian of the People's Executive Power "act resources of the State, it is in the public interest to implead such action before Court."*

The public interest to keep the executive within the power given to it by law is the "positive component" in the right to equality.

In **Azath Sally Vs Colombo Municipal Council** [25] Shirani Bandaranayke, J. Observed that;

> *" This Court in Bulankulama and others v Secretary, Ministry of Industrial Development and others (supra) had carefully considered the concept of public trust and had held that the 'organs of State are guardians to whom the people have committed the care and preservation of the resources of the people…."*

> *"The concept of public trust had been followed in several judgments of this Court and now it is an accepted doctrine that the resources of the country belong to the people; Sri Lanka's sovereignty is in the people in terms of Article 3 of the Constitution and is inalienable and includes the powers of government, fundamental rights and the franchise; and the people have committed the care and preservation of their resources to the organs of the State, which are their guardians or trustees."*

In **Adam Bawa Issadeen vs Sudharma Karunaratne, Director General of Customs and 20 others**,[26] Priyantha Jayawardena, J. made the following observation in relation to the powers of recruitment and promotion.

> *"The wide powers vested in those responsible for recruitment and promotions have to be exercised in the public interest and for the benefit of public. The powers granted to the appointing authority are public in nature, to be held in trust for the public, and to be exercised for the benefit of public. Failure in the exercise of these powers according to the stipulated rules warrants the intervention of courts."*

In T**iran P.P. Alles vs N.K. Illangakoon, Inspector General of Police**[27] Sripavan, C.J observed;

> *"It is now well settled that powers vested in the State, public officers and public authorities are not absolute or unfettered but are held in trust for the public to be used for the public benefit and not for improper purposes. Where a Police Officer has discretion, the exercise of that discretion would also be subject to Article 12 as well as the general principles governing the exercise of such discretion. "*

25 SC FR Application No 252-2007, SCM 04.03.2009
26 SC FR Application No 248-2011, SCM 17.12.2014
27 SC FR Application No 171-2015, SCM 02.09.2015

In **Sithambiralage Martin Sebastian Premalal Perera vs Tissa Karalliyadda, Minister of Indigenous Medicine and others,**[28] Eva Wanasundera, J. whilst referring to several previous decisions of the Supreme Court observed that;

> *"Aforesaid authorities have specifically rejected the notion of unfettered discretion given to those who are empowered to act in such capacity and held that discretions are conferred on public functionaries in trust for the public, to be used for the good of the public, and propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted. It is clear that the Supreme Court has held that the discretion should be exercised in conformity with the general tenor and policy of the statute and for proper purposes and that it should never be exercised unreasonably."*

In **Noble Resources International Pte limited, vs Hon. Ranjith Siyambalapitiya, Minister of Power and Renewable Energy**[29] K. SRIPAVAN, C.J., observed that the powers of the State conferred on the Members of the Standing Cabinet Appointed Procurement Committee (SCAPC) and the Procurement Appeals Board (PAB) is to be held in trust for the benefit of the public.

APPLICATION OF THE DOCTRINE UNDER THE SRI LANKAN LAW -

The Public Trust Doctrine finds itself a unique place in the Sri Lankan law. As observed before, the application of the Doctrine in Sri Lanka encapsulates a wide spectrum and is not confined to the environment. One can safely conclude that this unique position was heavily influenced by the historical teachings and the constitutional reference to the "power of the People" in Article 3 and Article 4 of the Constitution.

Articles 3 and 4 narrates that the legislative power "of the People" shall be exercised by Parliament; the executive power "of the People" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts.

The significance of the specific reference to the "power of the People" in each sub paragraph is that the power remains and continues to be with the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.

Our courts have repeatedly held that the exercise of powers must be governed by reason and the powers should at all times used to optimize the benefit of the People. Further, the powers vested to the three organs of the government are to be used for the public good and such powers cannot be exercised arbitrarily or capriciously or unreasonably.

28 SC FR Application No 891-2009, SCM 31.03.2016
29 SC FR Application No 394-2015, SCM 24.06.2016

> *"The organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. This accords not only with the scheme of government set out in the Constitution but also with the high and enlightened conceptions of the duties of our rulers, in the efficient management of resources in the process of development [30] ……"*

Thus is settled law in Sri Lanka that powers vested in public authorities are not absolute or unfettered but are held in trust for the public and the exercise of such power by the custodian for the time being is for the benefit of the People.

30 Supra note 4

"DISCRETION IS A DOUBLE EDGED KNIFE"

Seevali Amitirigala[1]
Attorney-At-Law, LL.M(king's College London)

Very often, we see that the law does not reflect the contemporary values of a society. Mostly law is archaic and relates to values of the past. Law should be a mirror of values of the contemporary society. It is then that a society is able to better understand and seek the development of it

Since the legislature[2] of a state is the main institution which makes law it plays a pivotal role of making the law contemporaneous with the values of that society. Although the legislature could and should bring the law with the times in practice it rarely does so. When a new government is elected their main aim is not to make the law contemporaneous but instead it will change laws in order to implement the promises they have made at the elections.[3] In the wake of this reality it is necessary to note that it is judges who are bestowed with the responsibility of bring the law with the times.

The main instrument by which the judges bring the law with the times is through the concept of discretion. Discretion has been described as "a public officer's power or right to act in certain circumstances according to personal judgment and conscience."[4]

This definition has two important elements that need investigation first and foremost the concept of personal judgment and secondly one's conscience. Both these factors are based on subjective and relative factors or conditions. Therefore would discretion be arbitrary? A proper academic investigation of the concept of discretion in relation to the various conceptions of law [5] would reveal the essential truth.

1 The author is the present lecture in Jurisprudence and International Law at the Sri Lanka Law College.
2 The legislature is the body which makes laws in a state i.e parliament.
3 The doctrine of mandate makes elected government implement promises according to their political programme.
4 Black's law dictionary 3rd edition. Page 213
5 "Understanding of how or what something is" according to the oxford wordpower dictionary.

JURISPRUDENTIAL PERSPECTIVES

According to the natural law,[6] law is based on the higher values that have been derived from the divinity or nature.[7] These higher principles apply in the context of morals in society. Therefore law should essentially be moral. The natural law ethics is therefore that of cultural anthropology by which the philosophies of individuals ,cultures are made explicit and by which the facts at the basis of traditional, cultural, philosophers may be accounted for by a single set of assumptions.[8] Under natural law it is by these morals or ethics by which judges can bring the law with the times. This moral or ethic is the very foundation of discretion in natural law. Judges would make use of their discretion in order bring moral considerations into law. Morality is something that changes from society to society, times to time and person to person. Thus exercise of discretion under natural law would essentially be a personal judgment based on the morality of the judge

In natural law the higher law consists of what is naturally good and what is naturally bad. Every man is believed to be having these sentiments in their minds. When a person is in an adjudicatory role he or she may use this higher law and use it at their discretion in order to make the society better. These higher laws can be morals, equity or even common sense. This is clearly enunciated as follows "a judge must resort to his reason and sense of justice. In dealing with precedent the judge's sense of justice plays a decisive part even when he is purporting to apply principles. Where there is no principle to apply, the resort to justice is openly avowed".[9] What is important to indentify is that in the natural law school discretion actually means the using of these higher law as a yardstick to make the society better.

Sometimes legal systems have see that judges use discretion to keep morals that are out dated in existence. This is a dangerous phenomenon. Greater causation must be practiced by judges in infusing morals into law by their discretion because morality could vary and this will give rise to varied and indiscriminate standards of justice. If judges are not careful in using their discretion in fusing law with discretion (in order to bring the law with the times) they will justify anarchy in the name of morals. Natural law was criticized as being vague[10] and elusive and as a concept that can be adopted to serve any purpose, a manipulator wanted it to be.[11] Alf Ross in his works "On law and justice" states that natural law is like a harlot and is at the disposal of every one.[12]

6 "Natural law is based on a higher law that aims at achieving justice."understanding conceptions of law by H.J.F.Silva page 170.
7 Natural law is based either on the theology theory or the secular theory. understanding conceptions of law by H.J.F.Silva page 171.
8 Jurisprudence by R.W.M.Dias and G.B.J.Huges page 366
9 Jurisprudence by R.W.M.Dias and G.B.J.Huges page 369.
10 Bentham's comment on natural law
11 Understanding conceptions of law by H.J.F.Silva page 188.
12 Alf Ross ON LAW AND JUSTICE page 260

Under the positivist doctrine the black letter law and its meaning must prevail. In this case the core area of the law will be very clear and that area will not entail any discretion on the part of the adjudicators. It is only in the areas of the penumbra that the judges will have discretion. Since positive law does not involve morality as an essential ingredient of the law the discretion will hardly be based on the basis of morality. Even if the label morality will not appear the discretion will include conscience of the judge and the personal judgments of the adjudicator. Under the Austinanian command theory[13] laws are commands of the sovereign and judicial decisions are tacit commands of the sovereign. In this analysis discretion that is used by the judges will be interpreted as the tacit commands of the sovereigns. Even though philosophers such as Bentham has discounted the importance of common law and described it as Dog's Law.[14] Behind the mask of legal fiction and pretence on immemorial custom lay an incomprehensible web of unjust laws perpetuated in the name of precedence which Bentham ridicule as Dog's Law.[15] Judicial discretion and the role of the judges in judicial activism cannot be discounted simply. The positivist school of thought is divided into the so-called "Hard" positivist and the so-called "Soft" positivists. The main determining factor between them is the involvement of morality in law. The so-called soft positivist believes that moral issues come into the determination of what is "Law". To put it in other words the soft positivist believes that judges employ moral reasoning. Whereas the hard positivist believes that there is no connection between morality and law. This later view accommodates the fact that judges would use moral reasoning in the exercise of their judicial discretion.

The pure theory of law of Hans Kelson is said to be pure as Kelson's pursuit of a science of law is premised on the claim that an account of law can be disinfected from the elements of psychology, sociology, ethics, and political theory.[16] Kelson's rejection of morality from law makes the existence of judicial discretion rather ambivalent. However when kelson talks of the change of the so-called "grundnorm" by a political revolution the validity of the change would depend on the courts verdict. Dias suggests, "That effectiveness is not the criteria of the Grundnorm, but what courts are prepared to accept as the basis of validity.[17] Thus it is at this juncture that judicial discretion will play a role in the pure theory of law. Thus in the exercise of such discretion the court will make inroads into politics. This facts itself seems to negate the pureness of this theory.

Upon the examination of the Realist school, Historical school and the Sociological jurisprudence the association of morals in the law is not dismissed. Thus it is this element of morality that allows the court to exercise discretion

13 Command theory as propounded by Austinin his works the province of jurisprudence determind.
14 Bentham comment on natural law.
15 Understanding jurisprudence an introduction to legal theory by Raymond Wacks 2nd edition page 75.
16 Pure theory of law trans; Max Knight(Berkeley and los Angeles: university of Colombia press 1967)
17 Jurisprudence 366

Ronald Dworkin spoke of discretion of judges. Dworkins vision of law as integrity is where a judge must think of himself not as giving voice to his own morals or political convictions instead he must do so as an author in the chain of common law.[18] For Dworkin propositions of law are true if they figure in or follow the principles of justice, fairness and procedural due process that provides the best constructive interpretation of the communities legal practice.[19] Citing the case of **Riggs vs. Palmer**[20] Dworkin states that in addition to rules the legal system has Principles. In his analysis Dworkin asserts the fact that when judges attempt to be faithful to the text of the law; their subjective conceptions of justice are fundamental to their decision.[21] According to Dworkin it is the responsibility of judges to determine the moral principles which would under pin the law and employ them loyally as they would the law itself.[22] Dworkin argues that the law is like literature, and interpretive concept. Judges are like interpreters of an unfolding novel. They normally recognize a duty to continue rather than discard the practice they have joined. Therefore, they develop in response to their own convictions and instincts, working theories about the best interpretation of their responsibility under the practice.[23] Dworkin asserts the fact that judges have a weak discretion, like a doughnut because they are constrained by the chain novel principles or that law is a seamless web or a gapless legal universe. Thus judges only finds the law and do not make laws.[24]

PRACTICAL REALITIES -

Thus all in all we see almost all schools of jurisprudence have accommodated the fact that morality has a connection with the law. Thus tacitly it is through this avenue that judges exercise their discretion to bring the law with the values of the times.

If one goes back in time one can see that the court has given effect to the values and morality of that time. When one looks at some of these case decisions it cannot be justified in term of present day values. That is because morality and values of a society changes with the times and the harmonization of the law of that nation with the values of that society is done by the judges in the exercise of judicial discretion. During the time when the slave trade was justified as a trade and owning slaves was part and parcel of that society the courts too emitted these values in their judgments. In the case **Gregson vs Gilbert**[25] it was held that in some circumstances the deliberate killing of slaves was

18 Law's Empire 225.
19 Law's Empire 238-9
20 115NY506,22NE188(1889)
21 Justice in robes (Cambridge mass and london ;Harvard university press 2006)
22 Understanding jurisprudence an introduction to legal theory by Raymond Wacks 2nd edition page 150.
23 Law's Empire 87.
24 Natural law is based either on the theology theory or the secular theory. understanding conceptions of law by H.J.F.Silva page 247.
25 (1783 3 Doug KB232)

legal and that insurers could be required to pay for the slaves. In the first trial of the Zong Massacre Lord Mansfield summing up the verdict reached in the first trial stated that the jury had no doubt that the case of slaves was that as if a horse had been thrown overboard. The question was whether there was not an absolute necessity for throwing them over board to save the rest and the jury was of the opinion it was so.[26]

In the present times the judges of many nations have detested slavery and banned it as illegal and has thrived to protect human rights of individuals. The concept of human rights has been one of the most important inventions of our modern civilization. The legal recognition of human rights in the twentieth Century occurred when the United Nations in the grim shadow of the Holocaust adopted the Universal Declaration of Human Rights in 1948.[27] The protection of fundamental human rights became the foremost responsibility of the courts.[28]

In the case of **R Vs Home Secretary Ex Parte Venables and Thompson**[29]it was held that at common law the courts control the exercise of a statutory powers in ways that promote the rule of law and the separation of powers but the court cannot take the power away even if it conflicts with those principles.[30]

In the case **of R vs Ministry of Defence ex p Smith** it was held that common law, fundamental rights are relevant to the legal control of statutory or prerogative power only if the fact that such rights were violated is a reason to hold that an action was unlawful under the concept of unreasonableness.

The courts of the modern times have not stop there and they have not only taken human rights into account but also Animal right. In the case of **Nair Vs Union Of India**[31] it was held;

> *"we hold that circus animals are housed in cramped cages, subject to fear, hunger, pain not to mention the undignified way of life they have to live with no respite and the impugned notifications has been issued in conformity with the values of human life, philosophy of the constitution. Though not Homosapiens animals are also beings entitled to dignity, existence and human treatment sans cruelty and torture. Therefore it is our fundamental duty to show compassion to our animal friends but also to recognize and protect their rights. If humans are entitled to fundamental rights, why not animals."*

26 Walvin 2011 page 153
27 Understanding jurisprudence an introduction to legal theory by Raymond Wacks 2nd edition page287.
28 Administrative law by Timothy Endicott third edition page 76.
29 1998 AC 407
30 Administrative law by Timothy Endicott third edition page 77.
31 2000 Kerala High Court no 155/1999.

From the above examples it is clear that judicial discretion has been the mode by which judges have been able to bring the social values of the times be reflective in the legal system. This assertion is observed not in domestic law but also in regional law[32] and also international law.[33]

If upon a brief examination of the European Union law it is abundantly clear that the basis of the European Union law is the integration of Europe economically, socially and politically. This is the ethos of European societies that are bound together by this law. This ethos is demonstrated in the European Union jurisprudence due to the judicial activism of the European Court Of Justice.[34]

In the **Van Gend En Loss case**[35] the European court of justice devised the principle of direct effect. According to this principle the European Union treaties create rights and these rights have direct effect in the sense that individuals can enforce these rights directly before their national courts. The court held "the conclusion to be drawn from this is that the community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals . Independently of the legislation of member states, community law therefore not only impose obligations on individuals but is also intended to confer them rights which become part of their legal heritage.[36]

The European court of justice in a further remarkable exercise of their discretion created the concept of Supremacy of the European Union law in the case **Costa vs ENEL**.[37] According to this principle the law of the European Union would prevail over any conflicting national law of the member states.

Both these case cited enunciates how judges in the European court of justice have used their discretion to bring the law of their regional body with the values of their society.

Why is discretion viewed as a double-edged knife because it gives the decision maker the right either to do or not to do something. This power if not properly used or excised can lead to abuse and deterioration of the decision-making processes. If the decision-making process seeks justice as an end result the abuse of discretion could give the opposite result which is injustice. Discretion to be judicious must be exercised legally, rationally,

32 European union law.
33 Law of nations.
34 Judicial arm of the European union.
35 In case 20/62 NV Algemene Transport-En Expeditie Onderneming Van Gend En Loos Vs Nederlandse Belastingad- Ministratie.
36 European Union Law Margot Horspool, Mathews Humpreys, And Micheal Wells –Grecon 9th Edition 157
37 6/64 COSTA VS ENEL (1964). European Union Law Margot Horspool, Mathews Humpreys, And Micheal Wells –Grecon 9th Edition 169

procedurally proper, proportionately and without the violation of fundamental human rights of a society.

Most often judges use their discretion to be guided by common sense this is not incorrect so long as such common sense reflects the sense of a judicious mind.

Judges must be mindful that they are part of the social thinking and not isolated from social values completely. It is their just duty to make the law of a nation reflects the values of that society.

JUSTICE TO VICTIMS WHO ARE SUFFERING FROM MENTAL RETARDATION

Sehan Soyza, LLB, LLM
State Counsel[1]

INTRODUCTION -

The most difficult of cases to prosecute and to end with a conviction are cases involving victims who are suffering from mental retardation[2] (some time herein after referred to as "such persons/ or such victims"). In most of the cases if not all such cases, where I had to lead evidence of such persons as a Prosecutor, it was next to impossible to lead their evidence and it was rare indeed to obtain a conviction. This was difficult to justify since these victims were the most vulnerable segment in society and therefore it is the duty of the state to protect them. Yet both prosecutors and judges are helpless in such cases as the victim on whom the entire case depends is not in a position to elaborate what happened to them. Court Rooms are not conducive to such persons as their special needs are not addressed, which led me to research on ways that allows their needs to be met while not infringing on the rights of the Accused for a fair trial.

While I concede that each case has to be considered individually, it does appear that certain trial and/ or pre-trial steps could sustainably assist in the final outcome of the trial involving such victims. The aim of this paper is to increase awareness of the Legal Practitioners, Judges and Judicial Medical Officers (JMO) of such practices that could elicit vital information, which could be pivotal for such cases.

1 Sehan Soyza. LL.M, LL.B, Diploma in Forensic Medicine, Certificate in Criminal and Forensic Psychology. State Counsel, Attorney General's Department of Sri Lanka. The views expressed in the article are personal to the author and in no manner reflect those of the institution he represents.

2 Although I do not have a personal preference for the rather demeaning term "mental retardation" it is the term employed by the World Health Organization in their Organization International Classification of Diseases (ICD-10) on Mental retardation.

This paper exclusively deals with criminal cases where such person becomes the victim and not where such person is the offender. Although the paper is based primarily on criminal law even civil practitioners may find the contents useful.

DEFINITION OF THE TERM MENTALLY RETARDED -

The 10th edition of the World Health Organization International Classification of Diseases (ICD-10) on Mental retardation sets out several such diseases of the mind according to the Severity of retardation including its clinical features and diagnostic guidelines (F70 to F79). However, of these the 4 most important are the following. (only the most important clinical observations will be set out. Readers are advised to refer to the guidelines for a more in depth discussion);

1. Mild Mental Retardation[3]

Mildly retarded people acquire language with some delay but most achieve the ability to use speech for everyday purposes, to hold conversations, and to engage in the clinical interview. Most of them also achieve full independence in self-care (eating, washing, dressing, bowel and bladder control) and in practical and domestic skills, even if the rate of development is considerably slower than normal. The main difficulties are usually seen in academic school work, and many have particular problems in reading and writing.

2. Moderate Mental Retardation[4]

The patients in this category are slow in developing comprehension and use of language, and their eventual achievement in this area is limited. Achievement of self-care and motor skills is also retarded, and some need supervision throughout life. Progress in school work is limited, but a proportion of these individuals learn the basic skills needed for reading, writing, and counting.

3. Severe Mental Retardation[5]

The patients in this category are broadly similar to that of moderate mental retardation. Most people in this category suffer from a marked degree of motor impairment or other associated deficits, indicating the presence of clinically significant damage to or mal development of the central nervous system.

4. Profound Mental Retardation[6]

3 World Health Organization Geneva, ICD-10 Guide For Mental Retardation, 1996 page 2.
4 Ibid at page 3
5 Ibid at page 4
6 World Health Organization Geneva, ICD-10 Guide For Mental Retardation, 1996 page 4.

These patients are severely limited in their ability to understand or comply with requests or instructions. Most such individuals are immobile or severely restricted in mobility, incontinent, and capable at most of only very rudimentary forms of nonverbal communication. They possess little or no ability to care for their own basic needs, and require constant help and supervision

WHY DO MENTALLY RETARDED PEOPLE BECOME VICTIMS OF CRIME -

As the readers can guess they are most likely victim of a crime for the following reasons;

a) Have very little social interaction due to their disability and therefore vulnerable outside their support network.

b) Likely to be more trusting of people and thus more easily influenced and eager to please people.

c) Less likely to understand that they are subject to an offense or the repercussions of what happened to them.

d) Very unlikely to report an offense especially when the offender is a caregiver or family member.

e) The police are less likely to consider them as credible especially when they cannot describe what happened.

f) They have little or no access to authorities who could help them.

A study done by the L'Institut Roeher Institute[7] sets out the extent of the problem according to all available surveys done up to 1994 in Western Countries.

i. Mentally retarded Girl victims of Sexual abuse before reaching 18 years 39-68%

ii. Mentally retarded Boy Victims Sexual abuse before reaching 18 years 16-30%

iii. Psychiatric outpatients as victims of Physical or Sexual abuse 68%

iv. Psychiatric inpatients as victims of Physical or Sexual abuse 81%

v. Pre puberty girls in a Psychiatric inpatients setting as victims of Sexual abuse 48%

Although the above study was focused on Western Countries the research has global application as East or West mentally retarded people are subjected to the same offenses. These people are commonly subjected to the following types of offenses in Sri Lanka (readers may note the similarities with the study of Roeher Institute) ;

7 L' Institut Roeher Institute for the National Clearing House on Family Violence, Violence and People with disabilities: A review of literature, 1994

1) Physical Abuse

Due to their disability such persons are subject to hurt and grievous bodily injury[8] as they are perceived to be vulnerable and easy prey.

2) Sexual Abuse

Majority of the cases involving sexual abuse involves women and girl children. They are subjected to rape[9], grave sexual abuse[10] and sexual assault[11]. However, there are cases involving grave sexual abuse of boys who are mentally retarded as well.

3) Cruelty[12]

In most such cases the offenders are parents who lack empathy with their mentally retarded child.

4) Fraud, Cheating[13] and Criminal Breach of Trust[14]

Unfortunately due to their disability such persons are subject to these offenses on a daily basis even at such places as schools, workplace, markets etc.

OBSTACLES IN ACCESSING LEGAL REMEDIES FOR MENTALLY RETARDED PERSONS -

The following observations are important by Justice Ranjith Silva in the case of **Thikiribanda** regarding the traumatic process a child victim has to go through is pertinent.[15]

> *"A victim of sexual harassment is more often than not compelled to make statements and give evidence in court. We must realize that she's not doing so for the pleasure of it but because she is compelled to do so. Even though such complaints may appear to be voluntary yet they may not be voluntary in the true sense. This is what is called secondary victimization. This is somewhat like adding insult to injury. Any victim of rape or sexual harassment would like to avoid the embarrassment of talking about, let alone repeating the narration of such a shameful incident, if she could. Naturally it is reasonable and realistic to believe that a victim of sexual harassment would be in a trauma before, soon after the*

8 Section 314 onwards of the Penal Code of Sri Lanka
9 Section 364
10 Section at 365 (b)
11 Section at 345
12 Section 308
13 Section 398
14 Section 388
15 Tikiribanda v. Hon. Attorney-General 2010 BLR 92

> *incident and sometimes even thereafter. In most of the Child abuse and Child rape cases the complaints are belated due to a sense of shame, fear, embarrassment or ignorance. These incidents are brought to light invariably after much questioning and persuasion. Mostly the victims of sexual harassment prefer not to talk about the harrowing experience and would like to forget about the incident as soon as possible (withdrawal symptom)."*

For mentally retarded persons who live in a limited and even more secluded environment this process must be a harrowing experience. And thus the term secondary victimization would take a whole new meaning for them.

Our system of administration of justice requires a proper complaint to be made first, this is a daunting task as the police will find it extremely difficult to communicate with such victims. The complaint itself is most likely to be incomprehensible. Thereafter investigation proceeds on the complaint and the police will have an uphill task as the victim may be of little assistance. Even identifying the correct suspect would be a challenge where the suspect is not a known person. After this challenging investigation the complaint it is forwarded to the Magistrate and thereafter to the Attorney General to consider filling a charge sheet or an Indictment.

Provided that by some miracle if a suspect is ascertained, the next and greatest challenge will be leading the evidence of this victim in a hostile environment where the defense counsel is ever ready to breath fire and brimstone on behalf of his client. In most instances these witnesses will be terrified and confused in court, especially in the cross examination. This will lead to them not giving evidence or the evidence having no sense or value.

Therefore, it is obvious that the police stations and court houses are not conducive for mentally retarded persons. Neither institution has any specially trained personal or special procedure in place to interviewing and leading evidence of such person in Sri Lanka. However, this is not the cases in other countries.

INTERNATIONAL RESPONSE -

There is international recognition that mentally retarded people need special attention for them to have more accessible justice. By legislation the governments in these countries have put in special steps and procedures.

Such legislative action has ensured that both the prosecutor and the judge has the most relevant information in deciding whether the case should go to trial and, if so how the trial proceedings should reflect the special needs of the victim so that justice is done to these victims.

1. The Israel Approach[16]

In the year 2005 Israel government enacted a groundbreaking and novel legislation[17] that empowered Special Investigators at the Ministry of Social Affairs and Social Services to investigate persons with mental or developmental disabilities. Facilitating access to investigation through inputs from professionals in such disciplines as psychiatrists, psychologists, criminologists and social workers helps to achieve targets.

Within this program, the special investigator is joined by a speech language pathologist (SLP) who helps make the investigation more accessible for such mentally retarded persons. The SLP gathers information about the person and the ways in which she/he communicates, and then the investigation is planned and carried out together with the investigator.

These experts assist the justice administration to gather and produce vital evidence and the relevant facts of the case, in both the investigation and during the court trials. In addition, the law allows for greater exceptions/modifications of the normal procedural and evidentiary rules and practices, in order to facilitate the leading of evidence by persons with such disabilities during investigations and court trials.

The Act's far-reaching procedural and evidentiary provisions regarding leading of evidence of such persons with disabilities are commendable. In that the court allows the experts a greater degree of intervening on behalf of the mentally retarded persons. Such evidence by a person with a mental or cognitive disability can be supported, directed, and interpreted by experts, who are vested with extensive authority. These experts can point to the way a witness should be addressed, what questions she may or may not be asked, how to frame the questions, what her responses mean (or do not mean), what her body language insinuates, etc. In general, these experts provide a type of interpretation to the evidence, by comparing it against distinctive behavioral patterns of persons with similar disabilities.

2. The English Approach: The use of the intermediaries[18]

Section 32 Youth Justice and Criminal Evidence Act 1999,

(1) provides that;

A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section (an intermediary),

16 For a more detailed account see NetaZiv, Witnesses with Mental Disabilities: Accommodations and the Search for Truth — The Israeli Case, The Buchmann Faculty of Law Tel Aviv University, Tel Aviv, Israel 2007

17 The Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Cognitive Disabilities) of 2005

18 Youth Justice and Criminal Evidence Act 1999

(2) The function of an intermediary is to communicate:-

a) to the witness, questions put to the witness, and

b) to any person asking such questions, the answers given by the witness in reply to them, and explain such questions or answers so far as necessary to enable them to be understood to the witness or person in question

However, prior to the trial the Intermediary meets the witness, makes a written assessment and writes a report for the court. As a result of the assessment, the intermediary reaches a conclusion on the following matters:-

i. whether the witness can give evidence at all,

ii. whether the witness can give evidence with the assistance of an intermediary,

iii. whether the witness needs the assistance of an intermediary to give his/her best evidence,

iv. whether the intermediary possesses the particular skills required to help this witness,

v. whether the witness wishes the intermediary to assist him/her.

Intermediaries are only available for a certain categories of witnesses, defined by section 16 of the Youth Justice and Criminal Evidence Act 1999:-

(1) witnesses under the age of 17 at the time of the hearing,

(2) any witness the quality of whose evidence is likely, the court considers, to be diminished by reason of:-

a) any mental disorder within the meaning of the Mental Health Act 1983, or

b) a significant impairment of intelligence and social functioning, or

c) a physical disability or a physical disorder.

3. The South African Approach

South African law however affords intermediaries a more limited interpretive function. By translating or adapting questions, intermediaries reduce mistakes due to miscommunication. Usually, intermediaries sit in another room with the witness, and listen to questions from the prosecution and the defense (who are in the courtroom), through an earpiece before explaining them to witnesses. The court can observe the witness, but the witness cannot see or hear what is happening in the court.

The following people qualify as being competent to be appointed as intermediaries:

a. Registered medical practitioners also registered as psychiatrist;

b. Family counselors who have four years' experience as educators, or who are or were registered as clinical, educational, or counseling psychologists;

c. Childcare workers who have successfully completed a two-year course in child and youth care work and who have two years' experience;

d. Registered Social Worker who has two years' experience in social work;

e. Person with four years experience as educator and have not been dismissed or suspended from teaching, and

f. Clinical, educational, or counseling psychologists

It is unlikely that our legislators will pass any new laws to assist such persons, who have a very limited influence in society. However, we can use the existing legal frame in our country to help such victims. Some of these measures could be termed as best practices, which are out as follows:

Guidelines/ best practices in examining, analyzing the evidence of such victims and in the appropriate use of experts -

1. Obtaining the assistance of a Psychiatrist/ Mental Health Expert

When such a person is produced before a JMO, the JMO should necessarily refer him/her to a psychiatrist/ mental health expert. Where the JMO has failed to do the necessary referral, the Judicial Officer must exercise his discretion to refer the victim to a psychiatrist. The psychiatrist should be ordered to examine the witness to assess his/ her thinking ability, social capabilities, language abilities, memory and reasoning powers.

The psychiatrist should also be asked to submit a report setting out the test carried out by him/her to ascertain the nature of the victim's disability/disease and its effect on the victim's intellectual functioning, communication skills, rationalization and giving consent for sexual activity etc.

This would assist court to determine whether she/he can be a competent witness as required under section 118 of the Evidence Ordinance. This section therefore, empowers the judge to seek such a report from a medical health expert. The section states;

> *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.*

Explanation .—

> *A person of unsound mind is not incompetent to testify unless he is prevented by his unsoundness of mind from understanding the questions put to him and giving rational answers to them.*

I believe the readers would agree with me that there is little use in even attempting to lead the evidence of witnesses who has profound mental retardation, unless there is strong independent corroboration. This may also apply to a person suffering from severe mental retardation. In that event the prosecutor may have to consider not indicting the suspect at the stage of indictment or if the matter is at trial stage to consider a plea. Therefore, a report should be called from an mental health expert before a witnesses is called to the stand. Otherwise it would be a waste of court time and unnecessary trauma to the victim.

2. Use of a Support Person -

It is foreseeable that such victims require daily assistance from their family and/or support network. It most instances this would be the mother or father, but it could extend even to the grandparents, brother/ sister, uncles and aunties. Some may have teachers, nurses, attendants, social workers as their support persons.

These victims will rely a great deal on their family members or support network. Thus the support persons would have a good understanding of the social capabilities, language abilities, memory and reasoning of the victim. In such instances their help could be utilized in the investigations and may be considered as corroborative witnesses at the trial. In my view their evidence should be led first before the victim. This will allow the prosecutor and the court to comprehend the general capabilities of the victim such as their social capabilities, language abilities, memory and reasoning. It may thus set the background for the victim to take the stand and to be better understood. The second advantage of having a support person may be to have him/her in the court so that the victim will have the confidence to give evidence, knowing she/he has moral support inside the court.

3. A new judicial approach to evaluating evidence-

It is my view that evidence of mentally retarded persons should be evaluated and weighed differently from normal persons. Their evidence will not have a general flow and may be mixed up with other thoughts that take place in their heads. Their powers of observation, comprehension and memory are limited.

But this would also mean that they would find it is near impossible to make up complex stories as this would be beyond their capabilities. Through the jumble mass of facts their evidence will have “ring of truth” to it. To comprehend this ring of truth the judges will have to be very patient and persistent when hearing their evidence.

In the circumstances judicial officers should bear in mind these aspects in deciding the veracity of such evidence. The following recent judgment is a classic example of the issues faced by judges when confronted by such witnesses. The judgment can be considered a landmark as it has for the first time laid out certain principles in evaluating and relying on such evidence.

Palliyaguruge Dinesh Indikav, Hon. Attorney General [19] is a case involved in grave sexual abuse of a 27 year old mentally retarded person. The main ground of appeal on the conviction by the High Court rested on the competency and credibility of the prosecutrix as her evidence was not corroborated. Although there were several contradictions and omissions in her evidence the court held that:

> *"When a reasonable man goes through the evidence given by the victim at the Court it is evident that the victim was not questioned in great detail in regard to the procedure of the acts taken up on the day of the incident. Actually it is obvious that this kind of a mentally retarded person cannot be questioned in that way. The victim had just narrated the incident here and there without a proper flow. Also it is evident that her memory was mixed up with the similar incidents that she had to face because of this appellant. Furthermore, according to the evidence of the victim she was having a chest pain at the time of the incident and she was also nearly fainted.*

In **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat** 1983 AIRHC 753 Justice Thakkar has stated that;"

> *(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen....*
>
> *(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person....*
>
> *(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment."*

19 KeerawellPalliyaguruge Dinesh Indika v, Hon. Attorney General CA 88/2013 decided on 15.12.2016

There, Justice Thakkar has stated all above with regard to a normal human being. Accordingly, "there can be much greater deficiencies with regard to a mentally retarded person. Considering all these facts we cannot expect a clear cut description of the incidents occurred at the time of the incident and the exact procedure of those incidents from the victim in this case".

I hope readers will make a note of the above judgment and be more reasonable and sensitive to the inherent characteristics of such persons in evaluating their evidence in future cases as per the guidelines set out.

CONCLUSION -

Mental retardation is a disease without a cure and people who are subjected to this disease are at the mercy of society. We must not forget that we were fortunate not be subjected to such a disease and therefore be more empathetic to these people. It could always have been us instead of them. Therefore, when unscrupulous elements of our society take mean advantage of these people we must do our utmost to ensure justice to them.

For this purpose we as lawyers should be more sensitive to their plight when leading their evidence. In cross examination, while we have to present our case to the witness we must be a more circumspect, unless the circumstances requires otherwise. As officers of court we should not take advantage of their inherent vulnerabilities by attempting to intimidate them into silence.

Although judges are required to act as impartial "umpires", they must understand that right to equality means "equals must be treated equally". Therefore, one cannot equate a normal witness with a mentally retarded one and expect the same from both. Judicial discretion has to be flexible enough to tailor to the individual and to the circumstances. Judges are obliged to have regard both to the need to ensure a fair trial for the accused and to the reasonable interests of the witnesses including to the plight of these victims.

THE OFFICE OF PRESIDENT OF LABOUR TRIBUNAL

-A PROFILE OF GENERIC FUNCTIONS IN THE SRI LANKAN LEGAL CONTEXT-

Sudantha Ranasinghe, LL.B, LL.M. (Colombo)
President/Additional Magistrate,
Labour Tribunal, Maharagama.

Modern developments in the field of Industrial Law have revealed that the adjudication of industrial disputes by separate machinery is an essential pre requisite for commercial stability of a country. Industrial Disputes Act[1] is a piece of legislation introduced as a necessary step to provide opportunity for employees and employers who were fairly organized with trade unionism by that time, to come together of their own volition or with the assistance of a mediator to settle their disputes.[2] However the entire set up of machinery of settlement was at a referencing discretion of the Commissioner of Labour or the Minister of Labour, to a forum established for settlement of disputes. The employee concerned was not free to select the forum to which his/her grievance could be presented. In order to redress this infirmity of the Act, an amendment was designed, to enable individual workers to obtain relief for their grievances by making application to a forum called Labour Tribunal or Labour Court, directly without having concurrence or consent of any official or person.[3] Therefore it is critical to examine the authority of a Labour Tribunal as distinct from other authorizes introduced by the Industrial Disputes Act for adjudicating of industrial disputes. It is on this basis, that this paper will examine "The office of President of Labour Tribunal – A profile of generic functions in the Sri Lankan legal context".

1 No 43 of 1950
2 Hansard dated 20th June 1950 – made by Hon.M.D Banda –Minister of Labour and Social Services
3 Hansard dated 5th November 1957 – made by Hon.T.B Illangarathna Minister of Labour, Housing and Social Services,

A BRIEF HISTORY OF EVOLUTION OF THE OFFICE -

Industrial adjudication as new process of equity, the content of which is uncertain and variable, came into forefront by the introduction of the Industrial Disputes Act as the rigour of the common law could not suit the growing problems of industrial discontent.[4] Special Labour Courts are created by the provisions of the Industrial Disputes Act with an equitable jurisdiction. The exercise of which involves a modification of the common law where it no longer accords with changing social, economic and even political objectives.[5]

The Industrial Disputes (amendment) Act No. 62 of 1957 introduced a new part IV(A) into the principal enactment of Act No.43 of 1950 (hereinafter Act). It is apparent from the amendment itself, section 31(B) is the gateway to invoke the jurisdiction of a Labour Tribunal and it is the patent want of jurisdiction of the Labour Tribunal on the face of the enactment. The importance of the amending Act, seen through the judicial eye is as follows:

> *"The Amending Act No.62 of 1957 made many changes in the principal Act. The most important of these was the addition of a new part IV (A) providing for the establishment of Labour Tribunals and for the special and primary purpose of their establishment".*[6]

Part IV (A) of the Act, though nominally an amendment, in fact brought in, for the first time a new scheme of tribunals empowered to grant relief of a kind not envisaged before.[7] The person constituting a Labour Tribunal is designated as President of the Tribunal.[8]

Apart from the above patent jurisdiction on the face of the enactment, it can be seen that the true intention of the Legislature in establishing Labour Tribunals is to confer concurrent jurisdiction vested in the district courts which had exercised jurisdiction over breach of contract of employment up to the year 1957. Section 31 B (1) of the Act for the first time empowered an individual workman to approach a tribunal other than the normal courts of law for relief or redress.[9]

> *"Thus when one considers the manner of making the application to a Labour Tribunal, the subject matters which may be covered by such an application, the order which may be made by the Tribunal, and the final effect of such an order, it is plain that disputes which had always fallen within the jurisdiction of ordinary courts of law have been assigned to Labour Tribunals for hearing and determination. The Tribunal is required to determine facts in dispute, to interpret*

4 W.E.M.Abeysekara- Industrial Law And AdjudicationVol.iii& iv p.856
5 S.R.de Silva, Some Conceptsof Labour Law p.7
6 Walker Sons & Co. Ltd V. Fry 68 NLR 73 at p.92
7 Ranbanda V. The River Valleys Development Board 71NLR 25 at p.43
8 Regulation 10(2) of Industrial Disputes Regulation 1958 Published by Gazette No 11688 dated 2.3.1959
9 (supra) fn(n7) at p. 43

> *contracts, to apply the relevant rules of law, to adjudicate on the respective rights of the parties, and to make a just and equitable order which finally binds them. This is what any ordinary court does when hearing a dispute that goes before it.*
>
> *After all these years, during which contracts of service were justifiable by the ordinary courts, the Legislature chose in 1957 to take them out of the jurisdiction of those courts, or at any rate to establish courts of concurrent jurisdiction, calling them Labour Tribunals.[10] True it is that the Act in terms enables a Labour Tribunal to grant relief, notwithstanding the express terms of the contract, and requires it to make a just and equitable order, it could well have imposed the same terms on the ordinary courts which dealt with such disputes. The imposition of such terms would not have changed the character of such courts in any way; they would still have been exercising judicial power. And I do not see how the conferment of the power to grant equitable relief and to make a just and equitable order on a Labour Tribunal makes the power it exercises anything other than judicial……"[11]*

It has been accepted that Labour Tribunals have jurisdiction to inquire into and determine only disputes of a particular class, viz. those arising between a workman and his employer. But the fact remains that a Labour Tribunal is given jurisdiction to apply the law, to interpret the agreement, to decide the facts, and by its adjudication to create an instant right or liability, on the basis of some previously existing legal standard.

It is not merely under a duty to act judicially and observe the principles of natural justice that is a feature common to all tribunals, whether they exercise judicial or arbitral power. Thus a Labour Tribunal under part IV(A) of the Act corresponds in every respect to a court as described by Blackstone in his Commentaries.[12]

It was further held and concluded that a Labour Tribunal by part IV (A) of the Act was established for the purpose of exercising a jurisdiction concurrently vested in the District Courts and Courts of Requests. The fact that a Labour Tribunal has power to grant re-instatement, and other ancillary or alternative remedies, makes no difference of substance.[13]

On this basis it was held that an employee, who complains of an unlawful termination, can seek relief from a forum other than the Labour Tribunal as well, and if such person has sought relief from more than one forum, only one application can be pursued. [14] But it should be borne in mind that the variety and scope of the equitable relief far

10 (a) Walker sons & Co Ltd v. Fry 68 NLR 73 at pp. 79,80,81,& 82 per Sansoni CJ.;
(b) Vasantha Kumara v. Skyspan Asia Ltd. (2008) xiv BLR Part ll at p. 88

11 ibid (a)

12 Walker Sons & Co. Ltd v. Fry 68 NLR 73 at p. 80

13 opcit at p.100 per H.N.G.Fernando J.

14 Fernando v. Standard Chartered Bank(2011) BLR Vol. XVII p. 242 per J.A.N.de Silva CJ.

surpasses the relief that would be obtainable from the District Court.[15]

By the amending Act No 62 of 1957, three special features had been introduced based on equitable considerations viz section 31(B)(4), the jurisdiction to grant relief notwithstanding anything to the contrary in any contract of service, section 31(C)(1), jurisdiction to make a just and equitable order and section 33(1)(b), jurisdiction to grant relief of reinstatement.(specific performance)[16] by making the jurisdiction of Labour Tribunals more wider in comparison with the jurisdiction of District Courts in granting relief.

Apart from this wide jurisdiction to grant relief, it is to be noted that many features are similar and common to both for a of District Courts and Labour Tribunals acting under part IV (A)of the Act.

Firstly it will be seen that the application is made directly to the Tribunal, and in this respect is similar to the procedure prescribed for filing a plaint in a Civil Court. In the case of Industrial Courts or Arbitrators there is no such provision enabling a workman to make such a direct application for relief, an order of reference to an Arbitrator or an Industrial Court can only be made by the Commissioner of Labour or the Minister.[17]

Secondly an application to a Labour Tribunal is described as one "for relief or redress". In this respect it also resembles an action in a Civil Court which, according to section 5 of the Civil Procedure Code, is "a proceeding for the prevention of or redress of a wrong"; and according to section 6 of the Code, is an "application to a court for relief or remedy obtainable through the exercise of the court's power or authority."[18]

Thirdly section 31B (5) provides that when a Labour Tribunal conclude the proceedings the workman shall not be entitled to any other legal remedy in respect of that particular matter. Thus Labour Tribunals have been given concurrent jurisdiction with the ordinary courts over matters which form the subject of dispute between a workman and his employer.[19]

Fourthly part IV(A) introduced into the Act the term "order", which was not previously used in the Act in connection with the machinery for the settlement of disputes, and which indeed is inconsistent with the concept of "settlement".[20] "Order" is perfectly appropriate as an alternative for "decree", having regard to the fact that there is no mechanism available in Labour Tribunal for execution."[21]

15 (a) Tri-Star Apparels Exports (Pvt) Ltd. v. WijesuriyaMudiyanselageUpaliGajanayakaSC.Appeal 85/2003 decided on 19.10.2004
(b) International Science & Technological Institute v. Rosa (1994) 3 SLLR 233 at p.241

16 Walker Sons &Co . Ltd. V. Fry 68 NLR 73

17 op citat p. 77

18 op cit at p.93

19 Walker Sons & Co Ltd v. Fry 68 NLR 73 at p.94

20 ibid

21 ibid

Fifthly the amending Act inter-alia provided provision[22] for interpretation of award or order made by a Labour Tribunal. But this section was recently amended[23] and presently there is no such necessity to interpret orders, made by Labour Tribunals, under part IV (A) of the Act. This modification also can be seen as a healthy sign which strengthens the view that Labour Tribunal as a judicial forum exercises judicial powers under part IV (A) of the Act, since the Court of Law does not interpret its own orders but corrects the clerical and arithmetical mistakes in any judgment or an order or any error arising from any accidental slip or omission.[24] Any clerical error or mistake due to any oversight in a Labour Tribunal order also can be corrected as provided by the Industrial Disputes Regulations.[25]

Finally it is to be noted that the right of appeal lies only against an order made by a Labour Tribunal and the awards made by other forums can be questioned by way of writs. The amending Act[26] introduced a new appellate procedure against an order of a Labour Tribunal. It can be seen that, this piece of legislation not only introduced appellate jurisdiction but also extended the extraordinary revisionary and writ jurisdiction against orders made by Labour Tribunal.[27] Therefore at present the appellate, revisionary and writs jurisdictions are available against orders made by Labour Tribunal which is almost in resemblance with remedies available against orders or judgments made by Civil Courts.[28]

At this stage it is to be highlighted the fact that before 1990 the revisionary jurisdiction was not available against orders made by Labour Tribunals[29] and there had been a distinction between remedies available against orders of Labour Tribunals and against orders or judgments of District Courts. But the amending Act introduced in the year 1990 has paved the way for removing this difference by making the situation similar even on the point of remedies sought from higher courts.

PRESENT STATUS OF THE OFFICE -

After the above meticulous analysis it is clear that the jurisdiction of a Labour Tribunal under Part IV (A) of the Act is in resemblance to the functions of a District Court, which exercises the jurisdiction in the area of breach of contract, as precisely concluded by the Supreme Court in **Walker Sons &Co. Ltd. V. Fry.**

22 Section 16 of Act No 62 of 1957 which amended the section 34 of the principal Act No 43 of 1950
23 Section 7 of Act No 11 of 2003
24 Section 189 of the Civil Procedure Code
25 Regulation 29 of Industrial Disputes Regulations 1958
26 No 32 of 1990
27 Section 31(D)4
28 Section 753-777 of the Civil Procedure Code
29 Thameena V. Koch 72 NLR 192
Sri Lankan Broadcasting Corporation V. De Silva (1981) 2SLLR 228

However it is to be noted that the ratio of the above Supreme Court Judgment of **Walker Sons & Co. Ltd v. Fry**, which held that the President of a Labour Tribunal holds a "judicial office" was overruled by the Privy Council and held that the President of a Labour Tribunal does not hold a judicial office.[30] But it can be seen that this Privy Council judgment does not bear any persuasive value under today's legal context, as a result of the present Constitutional recognition of Labour Tribunal as a forum which administers the judicial power of the people of the country.[31] And also the President of a Labour Tribunal has been constitutionally interpreted as a judicial officer to be appointed by the Judicial Service Commission.[32]

Accordingly the Judicial Service Commission acting under article 111H(2)of the Constitution has taken steps to gazette the President of Labour Tribunal as a judicial officer and considered the office of President of Labour Tribunal as one of a class and grade which forms part of the Judicial Service of Sri Lanka.[33]

Having given this recognition to the office of President of Labour Tribunal, the Judicial Service Commission has taken further step to appoint President of Labour Tribunal as Magistrate for the implementation of orders delivered under the Act.[34] However it is to be noted that the appointments as Magistrate to implement orders may have been a result of a longstanding recommendation introduced by the Commission on Industrial Disputes Ceylon in 1969.[35]

And also it should be borne in mind that the minimum qualifications of the office of President of Labour Tribunal are similar and equal with qualifications of the office of Magistrate and thereby there is no any difference.[36]

In addition to the above main articles of the Constitution, it can be seen that there are provisions in the Constitution which impliedly support the conclusion, that the Labour Tribunal forms a part of the judiciary and the President of a Labour Tribunal holds an office in the judiciary.[37]

Further to the constitutional recognition, it is to be borne in mind that the judiciary too by way of judicial interpretation concluded that the status of the President of a Labour Tribunal forms a part of the judiciary of the country.[38]

30 United Engineering Workers Union v. W.Devanayagam69 NLR 289
31 Articles 4(c) and 105(2) of the 1978 Constitution
32 Article 170 of the 1978 Constitution and Article III (m) of the 17th amendment to the Constitution.
33 (a) Rule 30, published by the Judicial Service Commission in Gazette dated 08.12.1978
(b) Rule 6, published by the Judicial Service Commission in Gazette No.699 dated 24.01.1992
34 Gazette No 1052 dated 30th October 1998
35 H.W.Jayawardena Q-C- Commission On Industrial Disputes Ceylon – at p.168(paragraph - 555)
36 Gazette No 842 dated 21.10.1994
37 Article 24(5) of the 1978 Constitution
38 Upali Newspaper Ltd v. EksathKamkaruSamithiya(1999) 3 SLLR 205 at PP.210,211 per Justice Kulathilake

It is to be stressed that even before the adoption of the 1978 Constitution the Judiciary had judicially and judiciously drawn its attention to limit the ratio of the above Privy Council judgment to a certain point in order to avoid any unexpected and unforeseen repercussion which were not intended by their Lordships.[39]

Finally the most interesting point to be highlighted is the use of **Walker Sons &Co. Ltd v. Fry** (supra) as one of main authority in concluding the "Court Martial" as a forum which exercises the judicial power of the sovereignty of the people of the country.[40]

Therefore it is to be noted that even though the decision of **Walker Sons & Co. Ltd V. Fry** was overruled by the Privy Council decision of **U.E.W.U. Vs. Dewanayagam**, subsequent constitutional and judicial recognitions affirmed the judicial status of the office of Presidents of Labour Tribunals, which led to negate the authority of the Privy Council judgment. Hence the legal value of the ratio of Walker Sons & Co. Ltd V. Fry has to be considered still as a persuasive authority in Sri Lankan industrial jurisprudence.

As stated above[41] in accordance with the Judicial Service Commission sub-rule No. 6(6)(a), a Judge in the Judicial Service of class II – Grade I or II is deemed eligible for appointment as a President of Labour Tribunal Grade II, whereas in accordance with the Judicial Commission sub-rule 6(7)(a), a Judge in the Judicial Service of Class I Grade II is deemed eligible to be appointed as a President of Labour Tribunal Grade -I.[42]

Therefore presently the President of Labour Tribunal in his capacity as a Judicial Officer in Judicial Service of Sri Lanka and subject to his length of service in accordance with rule 6(3)[43] may in addition to and apart from his substantive duties, take on the onus of a subordinate Judiciary whilst according to sub rule 6(6)(a) and 6(7)(a) on his service, a Judicial Officer of a subordinate Judiciary may serve as a President of Labour Tribunal Grade II or I. Accordingly the fact of interchangeable nature of eligibility of President of Labour Tribunal as a judicial officer and the other Judicial Officers, to serve in the same Judicial service in which the office of the President of Labour Tribunal is included is to be highlighted.

JUDICIAL POWER AS OPPOSED TO ARBITRAL POWER -

The issue of Tribunal's jurisdiction to make a just and equitable order is not analogous to a court of justice exercising judicial function but only exercising arbitrary function

39 Ceylon Transport Board v. Gunasinghe 72 NLR 76 at p .81
40 GardihewaSarathFonseka v. DhammikaKithulgoda and Others SC REF No. 1/2010 decided on 10.01.2011
41 supra – fn(n33)
42 Judicial Commission rules published in the Gazette No 699 dated 24.01.1992
43 Rule 6(3) of Judicial Commission Rules published in the Gazette No. 699 dated 24.01.1992

of an entirely different order from judicial functions, was answered by Justice H.N.G. Fernando and concluded that Labour Tribunal should be treated as a Judicial Tribunal.[44]

Therefore the jurisdiction under section 31(C) (1) of the Act has no bearing on judicial power of the Tribunal (under part IV (A)) and to change its character of a Judicial Tribunal to an Administrative or Arbitral Tribunal. It is noteworthy to bear in mind that the prime aim of the Act, is the protection of labourer and claims to be based on equitable principles.[45]

Therefore it is clear that the concept of justice and equity involves in making an order for relief only. "Just and equitable jurisdiction enables the court to be guided by equitable considerations rather than by pure legal norms in the matter of relief;"[46] and makes no difference whether the jurisdiction is exercised by a Labour Tribunal under section 31 C (1) of the Act or the Supreme Court under article 126(4) of the Constitution.[47]

Therefore at this junction, it is proposed to discuss the distinction between judicial and arbitral powers, which will be a crucial criterion to establish the fact of judicial status of the office of President of Labour Tribunal.

In perusing the structure of the Act relating to the machinery of settlement of industrial disputes, by Collective Agreement, Conciliation, Arbitration and Industrial Courts, the terms of awards will become implied terms in the contract of employment between the employees and workmen bound by the award.[48] But it is to be highlighted that there is no such corresponding provision in the part IVA of the Act which established Labour Tribunal as an additional forum for settlement of industrial disputes.[49]

As a result it has been an established law that the industrial arbitrator[50] creates new contracts for the future, by contrast the President of Labour Tribunal like a Judge of Court of Law enforces the rights and liabilities arising out of an existing contract.[51] It is to be noted that the arbitral function is ancillary to the legislative function, and provides the fact upon which the law operates to create the rights or duty. The Judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and if it binds it, then proceeds if necessary to enforce the law.[52]

44 Walker Sons & Co. Ltd. v. Fry 68 NLR 73 at p. 95
45 S.R.de Silva , Some Concepts of Labour Law p. 7
46 Justice S. Sharvananda, Fundamental Rights in Sri Lanka p. 416
47 Lanka BankuSewakaSangamaya v. Peoples Bank SC Appeal No. 204/12 decided on 16.11.2015
48 Sections – 8,14,19 and 26 of the Industrial Disputes Act
49 Section 31 A to 31D of the Industrial Disputes Act as amended (Industrial Disputes Amendments Act Numbers 62 of 1957 to 39 of 2011)
50 Commissioner of Labour , Authorized Officer, Conciliator, Mediator , Arbitrator, and Industrial Court
51 Walker Sons & Co. Ltd. V. Fry 68 NLR 73 at p. 84
52 ibid

Hence an Industrial Arbitrator settles disputes by dictating new conditions of employment to come into force in future where he cannot get the parties to agree on them; a President of Labour Tribunal as a Judge determines the existing rights and liabilities of the parties. "This is no new theory"[53] It can be seen that this distinction has been viewed further in the context of Commercial and Industrial Arbitration as well, and concluded that Commercial Arbitration as opposed to the Industrial Arbitration attracts the flavor of judicial power which only concerns existing rights and duties relating to existing agreements.[54]

On this basis it has been decided that the power of an industrial arbitrator is wider than the powers of civil or commercial arbitrator.[55]

To have a clear understanding it will be useful to distinguish the Indian situation with regard to the status of Labour Tribunal which considered as one of an arbitral tribunal never exercises judicial power.[56] On this basis it has been held that

> *"in setting the disputes between the employers and the workmen, the function of the tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and the obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping peace,"* [57]

Therefore it is suggested to be cautious in comparing the status of the office of Labour Tribunal in Sri Lanka with India on the above incompatible nature of powers exercised by them in adjudicating industrial disputes.

In this discussion regarding the status of the office of President of Labour Tribunal, it will be a sort of infirmity, if the extraordinary jurisdiction of a Labour Tribunal under Section 31B (4) of the Act is not dealt with. As pointed out by our Supreme Court, section 31B(4) of the Act is a new feature introduced by the amending Act No 62 of 1957. The original Act did not contain any provision which is in resemblance to the above provision. Therefore it can be seen that the Legislature had intended to confer Labour Tribunals acting under part IV A of the Act, a special jurisdiction to make inquiries into

53 Federated Saw Mill & Co. Employees Of Australia V. James Moore & Son proprietary Ltd. (1907) 8 C.L.R. at 521

54 (a) Ludwig Teller – Labour Disputes and Collective Bargaining – volI p. 536
(b) H.W.Jayawardana- Commission on Industrial Disputes Ceylon – p. 122
(c) SuranjanChakrawarthi And ShyamaCharan – Law of Employees' Victimization pp. 111, 136
(d) S.R.Roy – Bagri on Law of Industrial Disputes Third Edition 2001 volI p. 17

55 Thirunavakarasa V. Siriwardena (1981) 2SLLR 185

56 Section 7A of the Indian Industrial Disputes Act No. 14 of 1947 the presiding officer of a tribunal should be a High Court Judge or a District Judge or an Additional District Judge with three Years' experience. But appointments are made not by the Judicial Service Commission but by the Appropriate Government which resulted in treating a presiding officer not as a judicial officer but as a public officer. (Vide – Section 11(6))

57 Bharat Bank Ltd. V. Employees of the Bharat Bank Ltd 1950 LLJ 921

the terms and conditions of a contract of employment, and to determine whether there is such a manifested meeting of minds or "consensus ad idem" between parties regarding a particular term of the contract of employment.[58]

But the fact to be borne in mind is that the power granted by section 31B (4) of the Act to Labour Tribunals does not make any effect to its exercise of judicial power or judicial functions.[59] It is also to be noted that this special jurisdiction to ignore the provisions of a contract of employment and to grant relief in a manner it considers to be just and equitable under section 31(C) of the Act is not an uncommon feature even in ordinary Civil Courts.[60]

Hence the final conclusion on section 31B(4), on which the special jurisdiction conferred on Labour Tribunal, is to be understood as a part of the same jurisdiction vested in the Civil Courts on law of contracts basically based on the rule of "Contra preferentum", a rule of contractual interpretation.[61]

At this point, attention should be drawn to the jurisdiction of Labour Tribunal under section 31C(1) of the Act "to make all such inquiries into (that) application and hear all such evidence as the tribunal may consider necessary". It is to be noted that although the power conferred by this section literally seems to be very wide, there are limitations imposed on this power and it is not unrestricted or untrammeled, as it appears to be in the text.

Under section 31C(1) of the Act, there is no duty cast on Labour Tribunal or its President to lead evidence when parties failed to lead evidence to prove their case. To expect the learned president to call for evidence would lead to his entering of conflict and thereby losing his detached position of impartiality.[62] Further there is no duty cast on Labour Tribunal to introduce amendments to the pleadings.[63]

In this context, it is expedient to understand the scope of the jurisdiction of the term "to make all such inquiries as the Tribunal may consider necessary" and to see whether this jurisdiction is exclusively conferred on Labour Tribunal with the intention of introducing the concept of "tribunalism" as opposed to the jurisdiction of other system of courts.

When the Labour Tribunal was introduced in 1957, the intention of Legislature was to form a new forum with concurrent jurisdiction with Civil Courts (District Courts) with

58 Walker Sons & Co. Ltd. V. Fry 68 NLR at p.86
59 op cit at pp.77,78
60 H.W. Jayawardena QC – Commission On Industrial Disputes Ceylon at. pp.163,164
61 (a) DCSL V. Rupasinghe (1994) 2 SLLR 395 – (per Mark Fernando J.)
(b) Suva City Council V. Koroi (2013) FJCA 97 (per Sureshchandra J in Court of Appeal of Fiji)
62 Ceylon Workers' Congress V. Sri Lanka State Plantations Corporation CA No. 224/86 decided on 13th November 1991
63 NimalasenaTennekoon V. Co-operative Wholesale Establishment SC 67/67 Application incorrectly constituted.

some extended powers to inquire in to disputes relating to termination of employment.[64]

It is to be noted that by conferring these powers, the Legislature had intended to create another forum named as a "Labour Court" or "Labour Tribunal" and appeared thereby no intention by making a special reference to the concept of "tribunalism". The Legislature merely and simply wanted to introduce a separate forum which is distinct from the "Industrial Court". The intention of the Legislature in this regard has to be understood with the words used by the Minister in introducing the bill to the House of Representatives as recorded in the Hansard.[65]

Therefore it is clear that the forum contemplated to be introduced was a "Labour Court" or a "Labour Tribunal" though later on it was simply labeled as Labour Tribunal. Hence it is to be highlighted the fact that any emphasis on the word of "Tribunal" in this regard will be apt to mislead. It is to be noted that by using the mere word of "Court", a separate forum was introduced by the Industrial Disputes Act which is clearly an administrative body with arbitral powers.[66]

On the other hand, the present legal context of the country has given a judicial status to the forum of "Court Martial" which is exclusively introduced for the very purpose of dealing with matters of armed forces,[67] irrespective of its express exclusion, even from the extent of application of the Evidence Ordinance.[68]

Therefore it is hereby stressed the point that mere use of label as "tribunal" to name "Labour Tribunal" is really a confusion with the word of "Court" which is used even to name a forum which undoubtedly do not exercise judicial power or which do not have any judicial character, in accordance with the concept of separation of powers based on sovereignty of the people as recognized by the Constitution.[69]

Therefore in this context it is not expedient and / or it is not reasonable to compare "Labour Tribunal" with other types of tribunals whether administrative or otherwise on the same basis of the concept of tribunalism[70] as the "Labour Tribunal" is constitutionally recognized judicial forum which exercises the judicial power of the peoples' sovereignty with jurisdiction concurrently vested with the District Court recognized by the Judicature

64 (Supra) f n (n16) at p. 73

65 Vide Hansard dated 5.11.1957 Speech Made by Hon. T.B Illangarathne – Minister of Labour , Housing and Social Services.

66 Walker Sons & Co. Ltd. V. Fry 68 NLR at p.86

67 GardihewaSarathFonseka V. DhammikaKithulgoda and others SC REF No.1/2010 decided on 10.01.2011

68 Section 2 of the Evidence Ordinance

69 (a) Articles 3, 4, 24(5), 105.111(M) and 170 of the 1978 Constitution as amended.
(b) Sir William Wade & Christopher Forsyth – Administrative Law Ninth Edition at pp.909 934

70 (a) Ariyadasa V. Weerasinghe and (Western) Provincial Housing Commissioner 2005(2) Appellate Law Recorder 19
(b) Sir William Wade & Christopher Forsyth – Administrative Law Ninth Edition at p.928
(c) The Tribunal and Inquiries Act 1958, The Tribunal and Inquiries Act 1992, The Tribunal Courts and Enforcement Act 2007 (all in England)

Act[71] as a forum which constitutes the "Courts of First Instance" for the administration of justice in accordance with articles 4(C) and 105 of the Constitution. And also as noted above, the name of "Labour Tribunal" is a mere label of one of the two names (Labour Courts or Labour Tribunal) indented by the Legislature in introducing a separate system of courts with equitable jurisdiction as an alternative to, but with concurrent jurisdiction with District Courts which exercise the common jurisdiction on breach of contracts on illegality and public policy considerations, without considering the contract of employment as contracts sui-generis, up to the point of statutory modifications.

On this basis it should further to be understood the real application of section 31C (1) which empowers the Labour Tribunal "to make all such inquiries as the tribunal may consider necessary."

It can be seen that Labour Tribunal has to exercise its jurisdiction under section 31C(1) at an inquiry when parties are not duly represented.[72]

Another instance of Labour Tribunal has to exercise this power is where the tribunal is called upon to decide preliminary objections mixed with facts and law.[73]

After the above analysis on section 31C(1) of the Act, the final issue to be discussed is whether Labour Tribunal should adopt an inquisitorial approach in conducting an inquiry and if so, is it distinct from the conduct of any court of law (a civil court) in the course of proceedings of trials.

As discussed above the Labour Tribunal has to exercise its powers under section 31C(1) of the Act in the course of making all such inquiries as the tribunal may consider necessary. However it is to be noted that even a Civil Court (District Court) is also vested with powers which are almost similar to or consistent with the powers conferred on Labour Tribunals by section 31C(1) of the Act.

A District Court as a Court of First Instance vested with power to question witnesses at any time,[74] to recall witnesses in its discretion [75] and even to depart from procedure prescribed by the civil procedure Code.[76] It can be seen that the inherent power of a District Court is more dominant than that of a Labour Tribunal when it is necessary to administer justice and to prevent injustice.[77]

71 No 2 of 1978

72 W.E.M. Abeysekara – Industrial Law and Adjudication – vol III & IV at p 1612

73 (a) Niranga Hettiarachchi and others V.Board of Directors, Selacine Television Institute& others SC (Appeal) No 182/2012 decided on 30th July 2015.
(b) Lal WasanthaAbeywickrama V. W.A.A.M Dharmasena SC (Appeal) No 142/2010 decided on 13.08.2015

74 Section 164 of the Civil Procedure Code.

75 Section 165 of the Civil Procedure Code.

76 Section 166 of the Civil Procedure Code.

77 Section 839 of the Civil Procedure Code.

Further to the above powers conferred on District Courts by the procedural Law, the Evidence Ordinance confers power to all courts[78] to put any question it pleases, in any form, at any time, of any witness or of the parties about any fact relevant or irrelevant.[79] The very reason for this section is based on the ascertainment of truth which needs to administer justice.[80]

Therefore, it is clear that the power of a judge of a civil court to inquire from parties or witnesses or to deviate from a prescribed procedure as he pleases in order to administer justice are not uncommon features of inquisitorial approach, even in an adversarial system.

Therefore all forums whether they are courts of law or labeled as tribunals vested with power of making inquiries based on inquisitorial approach in an adversarial system so as to make sure that justice is done by uncovering the truth.

On this basis, Labour Tribunals and District Courts are authorized to adopt an inquisitorial approach by way of questioning or calling witnesses for the purpose of administering justice though they are basically adhered to an adversarial system. Therefore this cannot be said to be an exclusive power vested in the Labour Tribunal under section 31C (1) of the Act as distinct from any other court of law, merely on the basis of its name, "tribunal", which also appears to be a haphazard selection out of two names of "Labour Court" or "Labour Tribunal" without giving any heed to the concept of tribunalism.

It is to be noted that even in UK where the concept of tribunalism borne and developed does have only the adversary procedure before any kind of tribunal, like that in a court of law.[81] On this basis, all attempts to distinguish the nature of work done by a Court of Law and a Labour Tribunal seem to be based on lack of sound legal knowledge and understanding of fundamental, legal concepts embedded in any system of administration of justice in the developed world. It is to be borne in mind that Labour Law differs from Common Law only in granting relief.[82]

Therefore the Judicial power of the office of President of Labour Tribunal under part IVA of the Act was in no way affected by its newly introduced features of power to grant equitable relief after making all such inquiries as the tribunal may consider necessary or power to ignore contractual terms (section 31B(4)) which are not uncommon in ordinary Civil Courts in cases of breach of contracts based on basic contractual principles.[83] By

78 Section 2 of the Evidence Ordinance.
79 Section 165 of the Evidence Ordinance.
80 (a) Sir James Stephen in his Introduction to Indian Evidence Act. P. 162
(b) Vepa. P. Sarathi – Law of Evidence at p. 362
81 Sir William Wade & Christopher Forsyth – Administrative Law Ninth Edition at p.928
82 (a) S.R.De Silva – Contract of Employment – Monograph 4. Revised Edition 1998 at p.208
(b) South Ceylon Democratic Workers' Union v. Selvadurai 71 NLR 244 at p. 247
83 The Law of Contracts by Professor C.G.Weeramanthry vol. I at pp 74,75 & 76

contrast, when a Labour Tribunal acting as an Arbitrator under section 3(1)(d) or 4(1) of the Act when a dispute is referred to it by the Commissioner of Labour or Minister of Labour, is contemplated to exercise arbitral powers under sections 15 to 21 of the Act.

There the Labour Tribunal holds no office and is not a judicial officer, as the forum of arbitration established in the main Act[84] does not attract any judicial status.[85]

Therefore it was held and concluded that Arbitrators under Act exercise only arbitral and not judicial power.[86]

CONCLUDING REMARKS -

As discussed above, Labour Tribunal was created by the amending legislation in 1957 to ensure job security against involuntary termination of employment except for good or valid reason. The amendment empowered workmen and trade unions by giving locus standi directly against unscrupulous employers without being hamstrung by any bureaucratic referencing discretion exercised by the Commissioner or the Minister of Labour, jurisdiction so far exercised by the ordinary civil court on breach of contract. Even today, the ordinary civil court is vested with the same jurisdiction over employment contracts on the same level. But the new forum; the Labour Tribunal, surpasses the civil jurisdiction with new equitable considerations based on norms of justice and equity introduced by the Courts of Justice or Chancery Courts in England and the jusgentium introduced by the Roman Praetor. On this premise as stated above, the Labour Tribunal is vested with the concurrent jurisdiction of ordinary civil courts in the area of breach of employment contracts and exercises judicial power of the peoples' sovereignty as opposed to arbitral or administrative power, as a constitutionally established judicial tribunal.

Accordingly, the office of the President of Labour Tribunal has also been elevated as a constitutionally recognized office and a class of officers who compose of the Judicial Service of the Sri Lankan Judiciary.

Therefore the present status of the forum of Labour Tribunal is in resemblance with fully-fledged judicial body and part and parcel of the Judiciary of the country. Equally the office of the President of Labour Tribunal as a part of the Judicial Service of the country holds the office of Judicial Officer without being in anyway unequally flavored or circumstanced, who exercises judicial power in the way of administration of justice.

84 43 of 1950
85 Walker sons & co. Ltd. V. Fry 68 NLR 73
86 Sukumaran V. The Maharaja OrganizationLtd (2008) xiv BLR part ll at p. 398 (per SaleemMarsoof J)

AN INFORMED APPROACH TO COMBAT SEXUAL OFFENCES;

A CRIMINOLOGICAL ANALYSIS

Dr. Thusitha B. Abeysekara[1]
Senior Lecturer in Law, Faculty of Law,
General Sir John Kotelawala Defence University

Samindika D. Elkaduwe[2]
Lecturer in Law, Faculty of Law,
General Sir John Kotelawala Defence University

INTRODUCTION -

Despite the existence of various safeguards i.e. legislative, executive and judicial and preventive measures sexual offences are increasing in an alarming rate.[3] The criminal justice system is experimenting on various models to be used in the process which repeatedly prove to be unsuccessful. The authors identify this necessarily as a result of an informed prevention approach towards sexual offences.

The positivist school of criminology seeks to explain criminal behavior by resorting to a scientific analysis of the criminal mind.4 This school of thought provides guidance on the importance of focusing on the criminal rather than the crime. That provides for an approach which advocates the removal of causes rather than combating the effects. The paper is premised on the argument that understanding the unique nature of sexual

1 Head of the Department of Civil Law, Senior Lecturer, General Sir John Kotelawala Defence University PhD in Computer Law/University of Exeter-UK, LLM in Computer and Communications Law/Queen Mary- Uni of London-UK, LLB (Hons/2nd Upper) – Colombo, Attorney-at-Law (1st Class) – Sri Lanka Law College, Dip in IR (BCIS/Sri Lanka), Dip in HR (AMU/Poland), Dip in Digital Archives (CEU/Hungary).

2 Lecturer in Law, Faculty of Law, General Sir John Kotelawala Defence University, LLB (Hons/2nd Upper) Colombo, Attorney-at-Law (2nd Class) – Sri Lanka Law College, LLM Colombo, LLM George Washington University Law School-USA.

3 A (False allegations of sexual abuse) (Rev 2) [2016] EWFC B27 (28 April 2016); Rodgerson v Procurator Fiscal, Alloa [2016] ScotHC HCJAC_12 (04 February 2016); Uithaler v S (A490/2013) [2014] ZAWCHC 13; 2015 (1) SACR 174 (WCC) (10 February 2014); R v Bree [2007] EWCA Crim 256; R v Kennedy (No 2) [2007] UKHL 38; R v Evans [2009] EWCA Crim 650.

4 Clarence R. Jeffery , The Structure of American Criminological Thinking (1955-1956) 46 J. Crim. L. Criminology & Police Sci. 658 at p658.

offences and its causes in light of the positivist school of criminology would assist in drafting a well-informed comprehensive policy towards combating its rapid increase. To that end the paper at the outset engages in a brief discussion of the positivist school of criminology. In the section that follows the paper engages in an analysis of the unique nature of sexual offences and various causes for sexual offences as identified by several scholars to highlight at the policy making should take notice of the nature and the cause in developing a preventive approach In the last part the authors seek to make several recommendations as to how the criminal justice system should organizes itself in drafting specific crime prevention strategies taking cognizance of the said characteristics.

POSITIVIST SCHOOL OF CRIMINOLOGY AND SEXUAL OFFENCES -

Looking at the alarming rate at which sexual offences are increasing it appears clear that severity of punishments or the number of convictions may not be the solution to successfully combat the situation. It demands a more informed approach. That is to say it requires an analysis of the causes of the sexual offences and an approach based on that understanding to combat its increase. In this regard recognizing criminal behavior necessarily as a result of different factors which influence the criminal is an essential starting point.

The positivist school of criminology which looks at criminality as an under-socialized and under-evolved behavior, rests on the idea that crimes are caused by factors other than rational decisions.[5] The focus is on the problem of the motivation of criminal behavior.[6] Rather than emphasizing on punishment it relies on identifying positive causes that determined the propensity for criminal behavior in order to rectify them.[7] Instead of focusing on punishments as a necessary tool in combating crimes it warrants an inquiry into the nature of the offences, their causes and suggests an approach which combats the causes rather than the effects of crimes.

NATURE OF SEXUAL OFFENCES -

In analyzing sexual offences in the light of the positivist theory of criminology firstly, it is important to identify the sui generis nature of sexual offences. Sexual offences are offences against the person. It involves violation of the physical integrity of the person. Be it rape, sexual assault, or sexual harassment they all carry this nature. The physical and

5 Denis Szab, Comparative Criminology (1975) 66 J. Crim. L. & Criminology 366 at p367; Sawyer F. Sylvester, Criminology Past and Future (1975-1976) 13 Criminology 223 at p224.

6 Clarence R. Jeffery , The Structure of American Criminological Thinking (1955-1956) 46 J. Crim. L. Criminology & Police Sci. 658 at p659.

7 Ibid.

psychological effects of sexual offences on the victim are severe and at times outweigh the effects of any other crime. It is a violent crime driven by a desire for dominance. [8]

When it comes to sexual offences decisions are taken with reference to the public interest which in turn is based on a number of considerations including but not limited to: "the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or a victim"; the attitude of the victim and or witness; the accused person's background and antecedents and whether they are likely to cooperate; whether the proceedings or the conviction would be "unduly harsh or oppressive."[9]

Majority of the victims of sexual offences are females. While females are disproportionately the victims of sexual offences, males are disproportionately the accused.[10] This has resulted in identifying the offences necessarily with dignity and chastity thereby inviting numerous social cultural factors into the context.[11]

Due to the relatively private nature of sexual offences the numbers of cases reported are considerably lower than the actual number. Criminal justice data sources are likely to provide particularly poor information about the characteristics of sexual offences due to low reporting levels and the filtering out of cases across the system.[12] 'Sexual assaults'[13] are more likely to be reported where there are injuries and where the person responsible is a stranger.[14] However, the characteristics of sexual offences not only shape women's reporting of the event they also shape decisions about whether the matter will be investigated by police and prosecuted.

Accordingly not every case of sexual offences is treated alike by the criminal justice system. The treatment of the victim and the offender differs depending on their characteristics, gender, age and more importantly their social background. Unfortunately the relationship of the parties are considered unnecessarily significant in selecting the mechanism to deal with the offence, in that in cases in which a prior intimate relationship between the victim and the accused can be established chances of the cases going through the justice process are very low. The issue is aggravated by the inherent difficulty of proof based on evidence in cases involving sexual offences.

8 Simon Power, Law Reform and Sexual Offences (2011) 17 Canterbury L. Rev. 120 at p121; Christine Forster, Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms With International Good Practice Standards (2009) 33 Melb. U. L. Rev. 833 at p834.

9 Julie Stubbs , Sexual Assault, Criminal Justice and Law and Order (July 2003)14 Women Against Violence 14 at p26.

10 Catrien Bijleveld, Sex Offenders and Sex Offending (2007) 35 Crime & Just. 319 at p321.

11 Ibid.

12 Ibid at p320.

13 Joseph J. Peters, 'Children who are victims of sexual assault and the psychology of offenders' [1976] American Journal of Psychotherapy 8 at p9.

14 Simon Power, Law Reform and Sexual Offences (2011) 17 Canterbury L. Rev. 120 at p121.

In addition to the aforementioned unique nature of sexual offences, at times the factors which motivate the commissions of sexual offences are identifiably different from causes which contribute towards other types of crimes. Consequently successful strategies to prevent them require, as the positivist theory suggest a treatment at an individual level and an intervention at social level.

CAUSES OF SEXUAL OFFENCES-A SURVEY OF SCHOLARLY OPINIONS -

As explained above whilst the classical theory of criminology advocates deterrence as the solution for criminal behavior positivist thought leans towards expert study and intervention.[15] In light of that understanding, this part of the paper discusses the various causes for sexual offences.

In many occasions sexual offences happen because a perpetrator believes that they are entitled to have sex or sexual contact with another person without that person's consent.[16] Several scholars have examined modern theories relating to all aspects of sexual offending, such as: comprehensive explanations of sexual abuse; single factors associated with sexual abuse, such as intimacy deficits, empathy problems, cognitive distortions and the offense process itself.[17] Results of this extensive analysis suggest that there are a number of types of causes plausibly associated with sexual crimes.[18] These causes include: genetic predispositions; adverse developmental experiences, e.g., abuse, rejection, attachment difficulties; psychological dispositions/trait factors, e.g., empathy deficits, attitudes supportive of sexual assault, deviant sexual preferences, emotional skill deficits, and interpersonal problems; social and cultural structures and processes; and contextual factors, such as intoxication and severe stress.[19] These theories can on a very basic level be categorized as theories relating to psychological factors and theories relating to social causes.

Offender related theories suggest that there are factors at the individual level that contribute to the likelihood of a person committing sexually violent acts. The variables that have been explored in the research range from biological factors to personality characteristics to attitudes and beliefs. One of the most controversial theories among

15 Clarence R. Jeffery , The Structure of American Criminological Thinking (1955-1956) 46 J. Crim. L. Criminology & Police Sci. 658 at p660.

16 R v EB [2006] EWCA Crim 2945; Catrien Bijleveld, Sex Offenders and Sex Offending (2007) 35 Crime & Just. 319 at p320.

17 Melanie D. Price, 'The Privacy Paradox: The Divergent Paths of the United States Supreme Court and State Courts on Issues of Sexuality' (1999) 33 Ind. L. Rev. 863 at p863.

18 West, Donald James. Sexual Crimes and Confrontations: A study of Victims and Offenders (Aldershot, UK: Gower, 1987) at p33; Generally read Anil Aggrawal, Forensic and medico-legal aspects of sexual crimes and unusual sexual practices (CRC Press, 2008).

19 R. C. Gaillard, and E. Spinedi, Sex-and stress-steroids interactions and the immune system: evidence for a neuroendocrine-immunological sexual dimorphism (1998) 15/5 Domestic animal endocrinology 345 at p351.

them which seeks to explain sexual assault is the theory which suggests that it is a natural byproduct of human evolution.[20] This theory suggests that rape is best understood as a means of enhancing male reproductive success, a mating strategy used by some men as a viable alternative to the usual pattern of courtship.[21]

Some theorists identify a set of psychological characteristics that is labeled as hostile masculinity.[22] Hostile masculinity is defined as "hostility toward women, dominance in sexual relations, and attitudes accepting of violence against women," and is a significant characteristic of men who commit acts of sexual and/or non-sexual aggression against women.[23] They have found that, for example, sexually aggressive men were domineering in conversations with females but not with other males.[24] These theories are based on the premise that "Rape is not a sexual act, it is an act of power, using sex as a weapon." Research on this area has confirmed that motives of power and anger are more prominent in rapists' rationalizations for sexual aggression than sexual desires are.[25] This line of thinking reveals that the aim of most of the rapists is to humiliate and hurt the victim to express their contempt for the victim. For them rape is a process through which they compensate their sexual insecurities.

Some writers have commented on relationship context as a cause for sexual offences.[26] The stage of relationship between a man and a woman may affect the probability of violence, although the research is still unclear on this point. Once a couple has been sexually intimate, a man may be more likely to believe that he has a right to such intimacy any time he desires it. He may also make the false assumption that a forced sexual encounter with a sexually experienced woman is harmless.[27]

A slightly different biological approach to the issue is taken by those who suggest that the cause of sexual assault may be found in hormones and other chemicals in the body, as well as head traumas or brain abnormalities.[28] Researchers in this area have found a correlation between testosterone levels in humans and aggression, but it is not clear

20 Martin D. Schwartz, et al., Male peer support and a feminist routing activities theory: Understanding sexual assault on the college campus (2001) 18/3 Justice Quarterly 623 at p625.

21 Anil Aggrawal, Forensic and medico-legal aspects of sexual crimes and unusual sexual practices (CRC Press, 2008) at ff23.

22 Baruch Fischhoff, Giving advice: Decision theory perspectives on sexual assault (1992) 47/4 American Psychologist 577 at ff577.

23 Mary P. Koss, and Cheryl J. Oros, Sexual Experiences Survey: a research instrument investigating sexual aggression and victimization (1982) 50/3 Journal of consulting and clinical psychology 455 at pp455, 457.

24 Ibid.

25 K.R Rapaport,. and B.R. Burkhart, Personality and attitudinal characteristics of sexually coercive college males (1984) 93 Journal of Abnormal Psychology 216 at p220.

26 Knut, et al. Sturidsson, Using multidimensional scaling for the analysis of sexual offence behavior: A replication and some cautionary notes (2006) 12/3 Psychology, Crime & Law 221 at p222.

27 Johnson, J.D., and L.A. Jackson, Assessing the effects of factors that might underlie the differential perception of acquaintance and stranger rape (1988) 19 Sex Roles 37 at p44.

28 Knut, et al. Sturidsson, Using multidimensional scaling for the analysis of sexual offence behavior: A replication and some cautionary notes (2006) 12/3 Psychology, Crime & Law 221 at p223.

whether testosterone levels lead to aggressive behavior or rise as a result of aggressive behavior.[29]

Influence of alcohol is also pointed out as a cause for sexual offences. Nearly every category of aggressive acts is more common in people who have been drinking. Alcohol use is involved in up to 75% of acquaintance rapes.[30] Research has shown that alcohol affects men's perception of women's sexual intent. Alcohol increases the likelihood that friendliness will be misperceived as sexual intent and that a man will feel comfortable forcing sex after misreading a woman's signals.[31]

Another body of theories suggests that socio-cultural factors contribute to the occurrence of sexual violence.[32] These theories suggest that our society tacitly accepts and encourages sexual violence through expectations and cultural mores, which are transmitted through our history, families, media and institutions. For instance Studies suggest that children who are exposed to violence between their parents are more likely to be involved in violent intimate relationships as adults.[33]

The role played by media in creating sexual personalities for both men and women has been identified as another vital cause. This has resulted in spreading sexual insecurity among both genders and aggravating the aforementioned psychological factors.

STRATEGIES AND POLICIES TO PREVENT SEXUAL OFFENCES-CONCLUDING RECOMMENDATIONS -

Despite varies attempts taken the criminal justice system has failed to respond to the issue of sexual offences successfully .Among others one of the fundamental flaws of the system is that it unfortunately still tend to homogenize sexual offences and by doing so the needs of these victims and the broader public interest are often not adequately met. Responses available within that system are limited and are unlikely to address the problem.

These flaws which are inherent in the criminal justice system are being aggravated by the unique nature and the causes of the sexual offences discussed above. This draws us towards the conclusion that traditional crime combat methods are less likely to be constructive in sexual offences. For instance severity of punishment cannot combat the large number of cases which go unreported and creation of new offences may not be successful in preventing incest within family circles which is still at a very high level.

29 Ibid.

30 Todd Hogue, Sexual offence information questionnaire: assessment of sexual offenders' perceptions of responsibility, empathy and control [1994] British Psychological Society 68 at p69.

31 Antonia Abbey , Lisa Thomson Ross, Donna McDuffie, and Pam McAuslan, Alcohol and Dating Risk Factors for Sexual Assault Among College Women (1996) 20 Psychology of Women Quarterly 147 at p167.

32 C.S Widom, Does viole Denis Szab nce beget violence? A critical examination of the literature (1989) 106 Psychological Bulletin 3 at pp27, 28.

33 Ibid.

Hence based on the above discussion the authors conclude that sexual offences need to be given a sui generis treatment. Thus requires a legal approach which emphasizes not only on the substantive aspects of the prohibited sexual conduct that constitute offences, but more importantly on the broader policy under which the legal system is organized to battle sexual offences. To that end the authors present the following recommendations.

ENSURING COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS NORMS -

In reforming the system to combat sexual offences, recognizing international human rights standards in relation to the same is vital. After the celebrated decision in ICTY and ICTR there is an increasing tendency in international law towards recognizing sexual offences specifically rape as a violation of a human right.[34] This recognition replaces the traditional notion of sexual offences i.e. that it is an offence against dignity and chastity with the more refined idea of considering it as a violation of a person's bodily integrity. Any policy or strategy formulated towards combating sexual offences need to be based on the recognition of the aforesaid notion.

CLASSIFICATION OF OFFENDERS -

The positivist theory of criminology suggests an informed approach to combat crimes based on identifying its specific causes. As the above discussion suggests sexual offences are caused by varying reasons. It is suggested that the system be updated to develop a mechanism to classify sex offenders based on the possible reasons which may have driven them to commit the crime and to prescribe punishments accordingly. Wide differences exist in offenders' motives and the kinds of offenses they commit[35] At the sentencing stage emphasis must be given to measures that could be taken to prevent recurrence based on the identified causes. Hence almost all the reasons are psychologically based it is suggested that rehabilitation with specific treatments should be an essential aim in the sentencing policy. This may effectively prevent sex offenders from re-engaging in the same or an aggravated offence. Such a classification based on relative causes may be utilized in creating sex offender profiles and would be of assistance in identifying persons with potential risks of becoming sex offenders. That identification may result in early prevention.

TREATMENT OF CHILDREN WHO ARE CONVICTED OF SEXUAL OFFENCES IN THE CRIMINAL JUSTICE SYSTEM -

There appears to be a systematic failure to deal with these children in a constructive way. This is a major contributing factor towards the increase of sexual offences as such children if released without proper identification of contributing causes have a greater

34 Catrien Bijleveld, Sex Offenders and Sex Offending (2007) 35 Crime & Just. 319 at p320.
35 Ibid at p323.

tendency to re-engage in sex crimes.[36]It is suggested that the system be refined to improve the chances of effective rehabilitation for children who are convicted of sexual offences.

REFORMS IN EDUCATION SYSTEM -

It is strongly suggested that the masses be provided with a well refined proper sex education from their childhood itself.[37] Education system should promote free access to information about sexual matters and open discussion of such matters. This may contribute towards lessening of the number of offences committed due to sexual curiosity. Such education should be refined enough to assist the child in identifying his/her sexual orientation. Sex education should not only include safe sex but also good sex which would contribute towards eradicating one of the fundamental causes of sexual offences namely, sexual frustration. As studies reveal sexual frustration is the main cause for marital rape. Such complete sex education may assist in the early identification of psychological factors which lead to sex crimes.

MEASURES PREVENTING SEXUAL FRUSTRATION -

Sexual pleasure is a basic human requirement. Unlike the earlier ages in which it was considered mainly upon reproductive purposes, in recent periods engaging in sexual activity has been considered a main factor for human pleasure.[38] Due to cultural and social barriers methods through which such pleasure may be gained are being limited. This is a major contributing factor for several sexual offences such as sexual harassment. Facilitating controlled access to sex materials to adults would allow masses access to sexual pleasure under legalized circumstances.[39] This in turn would prevent sexual frustration leading to sexual offences. In this regard governments should consider shifting its policies from all out banning of sexual material to permitting controlled access by adults. However it must caution itself to thoroughly define the lines of such controlled access not act as an encouraging element for 'child pornography'[40] and abusive content.

CHILD SEXUAL ABUSE -

'Awareness' is the keyword when it comes to handling issues relating to sexuality of

36 Janes, Laura, Children Who Commit Sexual Offences: Some Legal Anomalies and Practical Approaches to the Law (December 2007) 46/5 Howard Journal of Criminal Justice 493 at p495.

37 Craven, Samantha, Brown, Sarah and Gilchrist, Elizabeth, Current Responses to Sexual Grooming: Implication for Prevention (February 2007) 46/1 Howard Journal of Criminal Justice 60 at p69.

38 Catrien Bijleveld, Sex Offenders and Sex Offending (2007) 35 Crime & Just. 319 at p325; Sawyer F. Sylvester, Criminology Past and Future (1975-1976) 13 Criminology 223.

39 Ibid.

40 Thusitha B. Abeysekara, Computer Crimes; Endless Race of Road Runners (2015) 3 JSA Law Journal 127 at p133; Thusitha B. Abeysekara, and Samindika Elkaduwe, 'A Game of Thrones': Law V Technology: A Critical Study on the Computer Crimes Legislation in Sri Lanka (2015) Second International Conference on Interdisciplinary Legal Studies available at https://drive.google.com/file/d/0Bkvy4vyDMn_ d1M 4dnloRXozZ2M/view?pli=1 visited on 4th November 2016.

children.[41] It is found that mistreated minor boys suffers more damaging effects than anyone else as the probability of them engaging in other crimes increases with the personal experience of multiple forms of maltreatment.[42] Promoting sex awareness at home, child sex education and a developing a continued support system for victims of child abuse should be added to the system. These may bring about more effective outcomes rather than an increase in punishments.

Victim Protection as an incentive promoting reporting of sexual offences -

As the discussion above reveals there is a significant issue when it comes to reporting sex crimes. The nature and the social cultural discourse involved prevent most of the cases from entering the criminal justice system. One factor which discourages reporting of sex crimes is the lack of confidence in victim protection and support.[43] Fear of publicity and re-victimization through court processes are the major causes which prevent reporting of sex crimes. Hence it is suggested that the criminal justice system adopt alternate protection systems for victims of sex crimes.[44]

This should mandatorily include a classification of victims based on the type and the nature of the crimes. Such classification may have a bearing on the nature of the offender as well. The nature and the scope of the support systems should be different according to the victim profile. Such support systems should be continuous and should subject the victim to constant medical examination both physically and psychologically till the victim is stable. Even after that they should be allowed free access to the support system depending on the need.

The lack of confidence in criminal justice system which in turn results in low reporting of sex crimes also has contributed to their increase. Hence it is vital that the system adopts a more balanced approach which should have a victim oriented protection system in place. It is also suggested that abortion be made available as a legal option for rape victims. The psychological trauma which may result after a rape may be aggravated by pregnancy. This may lead to the rejection of the enforced child by the mother. Access to safe abortions would assist in remedying this situation.

---

41 Shackel, Rita, The Dynamics of Disclosure of Child Sexual Victimisation: Implications for Investigation and Prosecution (August 30, 2012). Right Now (Online Journal of Human Rights in Australia), July 2012; Sydney Law School Research Paper No. 12/60 available at <SSRN: http://ssrn.com/abstract=2138644> visited on 4th November 2016.

42 J. H. Fitch, Men convicted of sexual offences against children: A descriptive follow-up study (1962) 3/1 The British Journal of Criminology 18 at p19.

43 Ibid at p18.

44 Ibid.

CONCLUSION -

According to recent trends in International Human Rights jurisprudence sexual offences are identified as violations of human rights. Various psychological and social factors have contributed to their increase. Promoting sex education among the masses, victim and offender classification towards rehabilitation, and several radical steps need to be taken by the criminal justice system to combat the increase. Moreover the authorities should take a more liberal approach in formulating policies to prevent sex crimes. This requires an approach which focuses on the causes rather than deterrence through increased punishments.

MARKING A DOCUMENT IN A CIVIL TRIAL

Trinity Rajapakshe, (LLB, Colombo)[1]
Additional District Judge, Maho

INTRODUCTION -

Documentary evidence plays a vital role in proving Civil Litigation. Consequently documents produce in civil trials are frequently objected by other parties. As a result of that District Judges have to deliver interim orders relating to the objections raised by parties regarding the documents provided in civil trial. This article reviews statutory provisions related to the documents marked in civil trials with extracts of relevant Judgments.

DOCUMENTARY EVIDENCE; DEFINITION -

The evidence includes both documentary and oral evidence. Section 3 of Evidence Ordinance defines "documentary evidence" as follows;

> *"All documents produced for the inspection of the court; such documents are called documentary evidence."*

All facts, except the contents of document, may be proved by oral evidence.[2] Subject to the exceptions described in the chapter VII of the Evidence Ordinance, the general rule is the contents of document may be proved either by primary evidence or by secondary evidence.[3]

1 LLB, Colombo, Diploma in Forensic Medicine, Additional District Judge, Maho.
2 Section 59 of Evidence Ordinance
3 Section 61 of Evidence Ordinance

Primary Evidence and Secondary Evidence have been defined in Section 62 and 63 of Evidence Ordinance. Rule is that content of a document must be proved by Primary Evidence and Secondary Evidence may be given of the existence, condition or contents of documents as stated by the Section 65 of the Evidence Ordinance.

Evidence Ordinance does not permit proof of the contents of a document without the production of the document itself.[4]

DOCUMENT; STATUTORY INTERPRETATION -

Evidence Ordinance defines 'Document' as;

> *"any matter expressed or described upon any substance by means of letters, figures, or marks or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter".*

Moreover illustrations related to documents explain that;

> *"writings, words printed, lithographed, or photographed, a map or plan, an inscription on a metal plate or stone, a caricature are considered as documents".* [5]

Civil Procedure Code states that "written" and "writing" include "printed" and "print" and "lithographed" and "lithograph" respectively. [6]

According to Electronic Transactions Act, No. 19 of 2006 "electronic document" includes documents, records, information, communications or transactions in electronic form.[7]

DOCUMENT; JUDICIAL INTERPRETATION -

In **Seccombe v Attorney General** (2002 (2) All SA 185(CK)), it was held that the word 'document' is a very wide term and includes everything that contain written or pictorial proof of something. It does not matter of what material it is made.

In **R v Daye** (1908 2 KB 333 at 340) Darling J. defined document in the following manner;

> *"Any written thing capable of being evidence is properly described as a document and…it is immaterial on what the writing may be inscribed. It might be inscribed on paper as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before on stone, marble, on clay and it might be and often was on metal".*

4 The Quean Vs Aladdin 61 NLR 07
5 Section 03 of Evidence Ordinance
6 Section 05 of the Civil Procedure Code
7 Section 26 Electronic Transactions Act, No. 19 of 2006

PRODUCTION OF A DOCUMENT;

- By the Party who relies upon the document;

Every document which a party intends to use as evidence against his opponent must be formally tendered in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness in examination in chief or in cross examination.

In **Alwis vs Rafenstein** (2004 (3) SLR 102) Nanayakkara J. decided that;

> *"introduction of documents for the first time in the course of re-examination of witnesses, should not be permitted, as grave prejudice could be caused to a party who had not had an opportunity of testing the authenticity of the document."*

- By the Opposite Party;

There are three situations available to tender a document through the opposite party.

I. When a notice is given to the opposite party under section 66 of the Evidence Ordinance

II. When an order has given to produce a document under section 103 of Civil Procedure Code

III. A document can produce in the cross-examination of the witness of opposite party.[8]

In **Casie Chetty Vs Senanayake** (1999(3) SLR11) Jayasinghe J. was of the view that a document which is required to be included in the list of documents filed in Court by a party as provided by section 121 and which is not included, shall not without leave of Court, be received in evidence at the trial: provided, that nothing in this subsection shall apply to documents produced in cross-examination of the witness of the opposite party or handed over to a witness merely to refresh his memory.

However in **Gabo Singho V Karunawathi** (2012 BLR 72) Imam J. observed that, although the Proviso to Section 175(2) of the Civil Procedure Code allows parties to tender unlisted documents to witnesses of the opposite party during cross examination, those documents cannot be marked in evidence unless the witness in question admit the document.

- By Third Party;

Section 127 of civil procedure code states that a third party can be summoned merely to produce the document. Moreover, in terms of Section 139 of the Evidence Ordinance

8 Proviso of the section 175(2) of the Civil Procedure Code

a person summoned to produce a document does not become a witness, and cannot be cross examined unless and until he is called as a witness.

DOCUMENTS IN A CIVIL TRIAL -

List of Documents and Witness -

Although there is no express provision in Code of Criminal Procedure to submit a list of witnesses and documents to the Magistrates Court, according to section 121(2) of Civil Procedure Code every party in a civil case has to file a list of witnesses and documents not less than fifteen days before the date fixed for the trial with notices to other parties.

Rationale to submit List of witnesses and documents is clearly explained in **Arpico Finance CO. LTD. Vs Perera and others** (2007(1) SLR 208) by Wimalachandra, J as follows;

> *"The purpose of listing of witnesses and documents is to prevent an element of surprise and thereby not cause any prejudice to the opposite party. It also prevents false documents from being introduced after the institution of the action"*

Words 'the date fixed for the trial" in 121(2) of Civil Procedure Code had been defined as the date on which the trial is first taken up by number of judgments of apex court.

I**n Salih Vs Hemawathie** (2004(3) SLR 91) Amarathunga J. held that;

> *"According to my view this section requires the parties to file their list of witnesses and documents before the first date fixed for trial and if we are to interpret the words date fixed for trial to mean the date on which the trial is first take up, we have to read into the section words which are not there and this is something we are not prepared to do"*

Roger Agencies (PVT) Ltd Vs Peoples Merchant Bank Ltd (2005(3) SLR 210)

UNLISTED DOCUMENT -

It is essential to consider a document which is not in the list of witnesses and documents can be marked as evidence in the trial. Section 175(2) of the Civil Procedure Code states that document which is not properly listed under section 121 of the Civil Procedure Code cannot be produced in evidence without the leave of the court.

Furthermore, in **Gabo Singho Vs. Karunawathi,** it was held that it is a mandatory requirement to first obtain the leave of the court to mark an unlisted document under section 175(2) of the Civil Procedure Code.

In **Salih Vs Hemawathie** it was further observed that section 175(2) of the Civil Procedure Code does not specify in what circumstances a court should grant leave to produce an unlisted document.

Moreover, Chitrasiri, J in **Rlzan and Others Vs Ratnasiri** (2009(2) SLR 115), observed that court has a wider discretion in this regard as follows;

> *"it is pertinent to note that Section 175(1) and Section 175(2) of the Civil Procedure Code which refer to listing of witnesses and documents respectively envisages two different criteria. Under Section 175(1), a witness who is not listed could be allowed to be called if and when special circumstances appear to Court in order to meet the interests of justice, whilst Section 175(2) allows a document to be marked with leave of Court considering the circumstances of each case. Therefore, it could be argued that a wider discretion is given to Courts when a document that has not been listed is to be marked in evidence than when an unlisted witness is to be called to give evidence."*

In **Kandiah Vs Vishwanathan and another** (1991(1) SLR 269) court held that when an unlisted document is sought to be produced by a party in a District Court trial, the question as to whether leave of court should be granted under section 175(2) of the Civil Procedure Code is a matter entirely within the discretion of the trial Judge. The precedents indicate that leave may be granted;

1 Where it is in the Interest of Justice to Do So,

It is not the duty of a Judge to throw technical difficulties in the way of the administration of justice, but where he sees that he is prevented from receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way, upon a proper terms as to costs and otherwise. [9]

11- Where it is Necessary for the Ascertainment of the Truth,[10]

111- Where there is No Doubt about the Authenticity of the Documents, (as for instance certified copies of public documents or records of judicial proceedings);

1V- Where Sufficient Reasons are Adduced for the Failure to List the Document (as for instance where the party was ignorant of its existence at the trial).

It was future held in the above case where the court admits such a document, an appropriate order for costs will generally alleviate any hardship caused to the other party.

9 Jones v. Chennell 8 Ch, D. 506, Read Vs Sansudim 01 NLR 292, Fernando Vs Fernando 7 NLR147
10 Girantha Vs Maria 50 NLR 519, Casie Chetthi Vs Senanayaka 1999 3 SLR 11

In addition to above precedents in **Silva Vs Silva** (2006(2) SLR 80) Wimalachandra, J. held that Court is entitled to look into whether the conduct of the party is grossly negligent and whether there are serious laches on the party.

ADDITIONAL LIST OF WITNESSES AND DOCUMENTS -

According to section 121(2) of Civil Procedure Code every party in a civil case should file a list of witnesses and documents not less than fifteen days before the date fixed for the trial. Nevertheless, there are no provisions in Civil Procedure Code to file an additional list of witnesses and documents after the first trial date. Usually filing additional list is a very common practice during the civil trial.

As discussed above it is a mandatory requirement to obtain the leave of the court to mark an unlisted document. Therefore there is a legal barrier to produce a document mentioned in an additional list of witness and documents if the above additional list filed without the leave of the court.

In other words, in a civil case there can be a list or lists of witnesses and documents which filed fifteen days prior to first trial date. However, prior approval of the court is mandatory to file an additional list during the trial.

MARKING A DOCUMENT IN EVIDENCE -

Section 154(1) of Civil Procedure Code states that every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness.

In **Kaswatta Gamage Jayantha Kulasiriwardena Vs. Jayasinghe Arachige Ranjani Jayasuriya and Others** [2016 BLR 152] Aliwihare J observed;

> *"Section 154 (1) clearly requires that if a party intends to use any document as evidence, it must be formally tendered when its contents or purport is first immediately spoken to by a witness."*

Procedure to be followed before witness is asked to identify the document is described in Section 155 of Civil Procedure Code.

In **Rajapakse Vs. Cooray** (2006(3) SLR 393), it was held that before a witness is allowed to identify a document, he should generally be made by proper questioning to state the grounds of his knowledge with regard to it.

Moreover, Section 156 of Civil Procedure Code permits opposing party to cross examination regarding his knowledge about the document and according to Section 157 of Civil Procedure Code the court has a duty to consider the capacity of the witness unless the opposite party admits it.

In a civil case when the document is tendered the opposing party should immediately object to the document, if he intents. Where opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received. That is the point of difference between criminal proceedings and civil proceedings.

In **Rogers Agencies (Pvt) Ltd. Vs People's merchant Bank Ltd** (2005(3) SLR 210) it was stated that when an objection is taken to the admissibility of a document it is desirable that such objection should be recorded immediately before any further evidence being recorded. Reasons for this principal is explained by Jayasuriya J in **Cinemas Limited Vs Sounnerarajan** (1998(2) SLR 16) as follows;

> *"Thus, in civil proceedings it is of paramount importance for the opponent to object to a document if it is inadmissible having regard to the provisions of the Evidence Ordinance. Where he fails to do so, the objections to admissibility cannot be raised for the first time in appeal. The principle and rationale behind this rule is easily understood. Had objection been taken, the party proposing to adduce the document would have tendered to the Court evidence aliened and by the failure to take the objection the opposing party has waived the objection."*

The explanation to section 154 of Civil Procedure Code states that, if opposing party objects to the document being admitted in evidence, two questions arose for the Court.

1. Whether the Document is Authentic;

   authentic means authoritative, reliable, trustworthy, real, pure, true, or genuine[11] .(Genuine means free of forgery or counterfeiting)[12]

Authentication is a special aspect of relevancy concerned with establishing the genuineness of evidence and a document can be authenticated by a witness who wrote it, sign it, used it or saw someone does so.[13]

2. Legal Admissibility of the Document;

In the light of the Ratio decidendi of **Cinemas Limited vs Sounnerarajan** and **Jamaldeen Abdul Latheef vs Abdul Majeed Mohomed Mansoor** (2010 SLR 333) legal admissibility means 'whether the document is admissible under the provisions of the evidence ordinance'.

11 Woods Vs Jastreminski (11So.2d4,8,201 La.1092)
12 Black's Law Dictionary s.v. " Genuine" (source: U.C.C. §1-201(b)(19)
13 Robin Orr Vs Bank of America, NT and SA (No-00-16509- decided-05.03.2002)

Moreover, as per the explanation to section 154 of Civil Procedure Code court should refuse to admit the document if either of above questions answered in negative. (**Kaswatta Gamage Jayantha Kulasiriwardena Vs. Jayasinghe Arachige Ranjani Jayasuriya and Others, Rajapakse Vs. Cooray)**

PROOF OF THE DOCUMENT MARKED SUBJECT TO PROOF -

The explanation to the section 154 of the Civil Procedure Code states that to authenticate a document it must be supported by such testimony as the party can adduce. If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a prima facie case of authenticity and is further of opinion that the authentic document is admissible against the opposing party, then it should admit the document as before.

In **Jamaldeen Abdul Latheef Vs Abdul Majeed Mohamed Mansoor and Another,** Marsoof, J expounded that when a document is marked subject to proof, it is essential for the said document to be proved through witness testimony and in Sri Lanka, the rules for the proof of documents are contained in Chapter 5 of the Evidence Ordinance No. 14 of 1895, as subsequently amended.

In **Samarakoon Vs. Gunasekara and Another** (2011 1 SLR 149 at 154) Amarathunga J stated that;

> *"In the course of giving evidence, if a witness refers to a document which he proposes to use as evidence, it shall be marked in evidence. If the party against whom such document is sought to be used as evidence, does not object to it being received in evidence, and if the document is not one forbidden by law to be received in evidence, the document and its contents become evidence in the case, On the other hand if the opposing party objects to the document being used as evidence. It is to be admitted subject to proof. When a document is admitted subject to proof, the party tendering it in evidence is obliged to formally prove it by calling the evidence necessary to prove the document according to law. If such evidence is not called and if no objection is taken to the document when it is read in evidence at the time of closing the case of the party who tendered the document it becomes evidence in the case. On the other hand if the document is objected to at the time when it is read in evidence before closing the case of the party who tendered the document in evidence, the document cannot be used as evidence for the party tendering it."*

READING THE DOCUMENT IN EVIDENCE; CONCLUSION OF THE TRIAL-

Provisions in the Civil Procedure Code do not state that reading the marked documents at the close of the case of a particular party is a must. This was elaborated by Marsoof J. in the case of **Jamaldeen Abdul Latheef Vs Abdul Majeed Mohamed Mansoor and Another** (2010 SLR 333) as follows;

> *"There is no provision in the Civil Procedure Code that mandates the reading in of the marked documents at the close of the case of a particular party. However, learned and experienced Counsel who have appeared in the original courts in civil cases from time immemorial developed such a practice, which has received the recognition of our courts."*

FAILURE TO OBJECT; CLOSING THE CASE -

Apex courts have decided in numerous occasions if no objection is taken to the document when it is read in evidence at the time of closing the case of the party who tendered the document it becomes evidence in the case.

In **Sri Lanka Ports Authority and Another Vs Jugolinija -Boal East** (1981 SLR 18) Samarakoon CJ held that;

> *"if no objection is taken, at the close of a case documents are read in evidence, they are evidence for all purposes of the law. This is the curses curiae of the original civil courts."*

This principle was followed in **Jamaldeen Abdul Latheef Vs Abdul Majeed Mohamed Mansoor and another.** Further, in **Balapitiya Gunananda Thero Vs Talalle Methananda Thero** (1997(2) SLR 101) it was held that where a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence in the case. This is the cursus curiae.

In the light of the above cases although the objection was raised when at the time of the document was marked but if no objection is taken to the document when it is read in evidence at close of the case then the document has to be considered as proved document.

The Explanation to section 154 of Civil Procedure Code explicates whether the document is admitted or not it should be marked as soon as any witness makes a statement with regard to it. Effortless identification of documents in a trial is the motive for this.

In terms of section 114(2) of Civil Procedure Code every document so proved or admitted shall be endorsed with some number or letter sufficient to identity it. The Judge shall then make an entry on the record to the effect that such document was proved against or admitted by (as the case may be) the person against whom it is used.

Moreover, Section 114 (1) of Civil Procedure Code states that no document shall be placed on the record unless it has been proved or admitted in accordance with the law of evidence for the time being in force and Section 114(3) of Civil Procedure Code states that all documents produced at the hearing and not so proved or admitted shall be returned to the parties respectively producing them.

Nevertheless, common practice in our courts are to file all marked documents in the records and among them the trial judge decides admitted and proved document in his judgment.

DOCUMENTS AND RESPONSIBILITY OF THE JUDGE -

Section 114(2) of the Civil Procedure Code states that every document so proved/ admitted shall be endorsed with a number/letter, and the Judge shall then make an entry on the record to the effect that such document is proved or admitted. Document should then be filed as part of the record; there is a duty cast on Court to take the documents tendered and marked to its custody and keep them filed of record; documents marked become part of the record.

There is no unique practice related to the custody of marked documents. In some instance marked documents are filed of record during the trial and in some instance marked documents are handed over to parties and allowed to file them at the end of the case with written submissions. Following judicial reviews illustrate that there is no unique agreement on this practice.

It was held in an unreported judgment **CA/SC 63/76(F), CA minutes of 25.10.1984)** that;

> *"we are of the view that the document once marked in the evidence become part of the record and should be remain in the custody of the court."*

In **Chandrasena Vs Piyasena and others** (1999(3) SLR 201) held that;

> *"the duty of a trial Judge to direct parties after the trial to tender all documents to Court with a list attached before writing the judgment"*

In **Podiralahamy Vs Ran Banda** (1993(2) SLR 20) Senanayaka J, held that;

> *"there is a duty cast on the Court once the, document is admitted and endorsed with a letter to identify it that the Court should have the custody of the documents*

so marked and identified, though the original Courts for convenience return the documents to Attorneys of the respective parties to tender the documents if necessary after being stamped with an accurate list of the documents".

The court has enough experience in numerous occasions after the court returns the documents to the parties during the pendency of the trial there may be a possibility to alter, destroy or lose the evidential value of the document. Therefore, it is better to keep all marked documents in the custody of the court to avoid such hardships.

JUDICIAL SERVICE ASSOCIATION 2016

Executive Committee

President:
Ms. Inoka Ranasinghe

Vice President I:
Mr. Sujeewa Nissanka

Vice President II:
Mr. Hasitha Ponnamperuma

Secretary:
Mr. Ranga Dissanayake

Assistant Secretary:
Mr. Bandula Gunartne

Tresurer:
Ms. Geethani Wijesinghe

Editor:
Mr. Asanga Bodaragama

Assistant Editor:
Mr. Uddala Suwandurugoda

Web Master:
Mr. Ravindra Premarathna

Committee Members

Ms. Nirosha Fernando
Ms. Chandima Dela
Mr. Ruchira Weliwatta
Mr. Rashantha Godawela
Mr. Jeyaraman Trotsky
Mr. Mahie Wijeweera
Mr. Prashantha Liyanage
Mr. Udesh Ranathunga
Mr. Chinthaka Gunasekara
Mr. A.G Alexrajah
Mr. Prasanna Alwis
Ms. Aruni Attygalla
Mr. Anthonipillai Judeson
Mr. Kosala Senadeera
Ms. Bharathi Wijeratne
Mr. Anushka Seneviratne
Ms. Nilupuli Lankapura
Ms. Dulani Amarasinghe
Ms. Chathurika De Silva
Mr. Chamara Wickramanayake
Mr. Isuru Neththikumara
Ms. Kusalani Punchihewa
Mr. Jayaruwan Dissanayake
Ms. Rajindra Jayasuriya
Ms. Kanchana Silva
Mr. Sampath Gamage
Mr. Mohomad Fazeel
Mr. Keminda Perera
Mr. Nalaka Weerasinghe
Mr. Sanjaya Wijesinghe
Mr. Suranga Munasinghe
Mr. Rakitha Abeysinghe

Printed by Sanghinda Printers & Publishers