

# ADOPTION OF MODERN TECHNOLOGICAL MECHANISMS AND MEASURES TO MINIMIZE SECONDARY VICTIMIZATION PREVAILING IN THE CRIMINAL JUSTICE SYSTEM OF SRI LANKA WITH EMPHASIS ON THE COURT SYSTEM

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## I. INTRODUCTION

### A. An Overview of the Criminal Justice System of Sri Lanka

The criminal justice system of Sri Lanka is based on English Common Law and the adversarial system. The Sri Lankan Court system is established by the Constitution.<sup>1</sup> The Supreme Court of Sri Lanka is the apex court of the country and is the final court of appeal. The Magistrate Court and the High Court/Provincial High Court are the courts of first instance, which exercise criminal jurisdiction. The Court of Appeal of Sri Lanka is vested with the appellate, revisionary jurisdiction and of judicial review. It is the first court of appeal in respect of the criminal matters tried in the High Court/Provincial High Court. On the other hand, the Provincial High Court enjoys appellate and revisionary jurisdiction in respect of criminal matters tried in the Magistrate Court, apart from the normal criminal jurisdiction in relation to graver crimes.

The Code of Criminal Procedure Act<sup>2</sup> is the main procedural law in relation to all criminal matters, while the Penal Code of Sri Lanka sets out all the Common Law Offences,<sup>3</sup> their interpretations and punishments. In addition, there are a number of other statutes which lay down specific offences in relation to various other areas, inter alia, bribery, narcotics, money-laundering, terrorism and terrorist financing, computer crimes, torture, hate speech<sup>4</sup> etc.

### B. The Process Which the Victim Encounters

A victim of a crime has to invoke the system by lodging a complaint with the local police. If the victim has been subjected to either violence or sexual attacks, he/she would be referred to a forensic medical examiner apart from being treated at a hospital. If the perpetrator is unknown to the victim, he/she has to participate in an identification parade held by the magistrate.<sup>5</sup> If the necessity arises, the victim will be observed and taken into custody by the probation services. If the offence is either attempted murder or rape, the victim has to testify before the magistrate in an inquiry to ascertain whether it is a fit case to be tried in the High Court; thereafter, such victim has to testify at trial before a High Court in a case based on an indictment.<sup>6</sup>

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<sup>1</sup> Chapter XV, The Constitution of the Democratic Socialist Republic adopted in 1978 - <https://www.lawnet.gov.lk/>.

<sup>2</sup> Act No 15 of 1979 as amended.

<sup>3</sup> <https://www.lawnet.gov.lk/>.

<sup>4</sup> Ibid [3].

<sup>5</sup> S.124, The Code of Criminal Procedure Act No 15 of 1979.

<sup>6</sup> Chapter XV, The Code of Criminal Procedure Act No 15 of 1979; Chapter XVIII, The Code of Criminal Procedure Act No 15 of 1979.

## II. CURRENT STATUS OF INFRASTRUCTURE/SYSTEM

### A. Police Station

There are 432 police stations in the country.<sup>7</sup> The victims of crime, particularly bodily crimes, have to go to the local police station to lodge the complaint. However, there are instances where police officers visit a victim who would be admitted to a hospital following such violence.<sup>8</sup> The ordinary set up of a local police station is highly adversarial to a victim of a crime, especially to a female or child victim.

### B. The Hospital

Health care in Sri Lanka is fully free, which is a huge relief for victims. In most of the hospitals there are units of forensic examination with specialists. However, the attitudinal prejudices of the caregivers and constant and repeated inquiries of the traumatic event have plagued the system. Further, there is a dearth of victim support services including psychological support in the early stages of the process.

### C. The Courts

There were 33 High Courts/Provincial High Courts and 200 Magistrate's Courts in Sri Lanka by the end of 2019.<sup>9</sup> There is at least one High Court and 3-5 Magistrate's Courts per administrative district.<sup>10</sup> The average number of cases pending in a High Court was 760.45 by the end of 2019, Colombo High Court being top and having 3,674 cases.<sup>11</sup> The annual average of new criminal institutions is 589.36, and the annual average of disposals is 396.60.<sup>12</sup> Cases of common violence, child abuse and narcotics are the predominant crimes that prevail in the High Courts. The average number of cases pending in a Magistrate Court was 7,500 by the end of 2019, Colombo Magistrate's Court being top and having 29,942 cases.<sup>13</sup> The annual average of new criminal institutions is 12,500 and annual average of disposals is 10,000.<sup>14</sup> Non-grievous violence, illicit liquor, road traffic violations and drug-related crimes being the most common. In a survey done in 2017, it was found that it takes 10.5 years to conclude a trial in the High Court and another 7 years to conclude the appeal. It takes 3-5 years for a trial in the Magistrate's court to conclude.

### D. The Building Facilities

The annual budgetary allocation [for 2022] for the Ministry of Justice is Rs 13.9 billion [\$ 69.5 million] which is 3.74 per cent of the total national expenditure.<sup>15</sup> This lack of funding has been a major obstacle to the advancement of the criminal justice system. The result is the court system is saddled with outdated infrastructure and old systems.

<sup>7</sup> <https://www.police.lk/index.php/police-history>.

<sup>8</sup> S.122, The Code of Criminal Procedure Act No 15 of 1979.

<sup>9</sup> Statistics-Reports and Data-Ministry of Justice – Sri Lanka-<https://www.moj.gov.lk>.

<sup>10</sup> There are 25 Administrative Districts and 9 Provinces in Sri Lanka.

<sup>11</sup> Ibid [10].

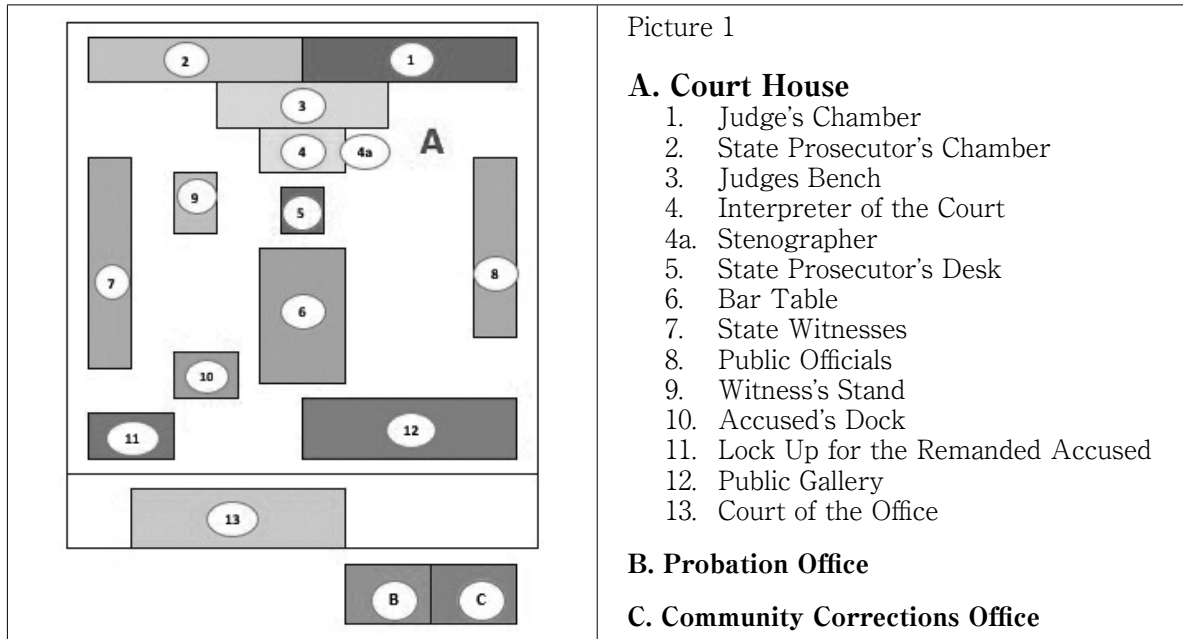
<sup>12</sup> Ibid [10].

<sup>13</sup> Ibid [10].

<sup>14</sup> Ibid [10].

<sup>15</sup> [www.treasury.gov.lk](http://www.treasury.gov.lk) > documents > budget.

The layout of an ordinary courthouse is shown in picture 1.



Following Pictures of several Court Houses across Sri Lanka, Old Buildings and newly built Court Complexes.



Picture 2  
Magistrate's Court,  
Panadura, [Old building]



[Western Province],



Picture 3  
Magistrate's Court,  
Kaduwela [Colombo Suburb], [Old building]



Picture 4  
Magistrate's Court,  
Ampara [Eastern Province] [Old building]



Picture 5  
Magistrate's Court,  
Ampara [Eastern Province] [Old building]



Picture 6  
High Court,  
Ampara [Eastern Province] [Old building]



Picture 7  
High Court,  
Kandy [Central Province] [Newly built complex]



Picture 8  
High Court, Homagama [Colombo Suburb]  
[Newly built Court complex]



Picture 9  
High Court, Homagama [Colombo Suburb]  
[Newly built Court complex]



Picture 10  
Magistrate's Court, Kandy [Central Province]  
[Newly built Court Complex]



Picture 11  
Magistrate's Court, Kandy [Central Province]  
[Newly built Court Complex]



Picture 12  
Magistrate's Court, Homagama [Colombo Suburb]  
[Newly built Court complex]

Since the courthouses, as depicted, are single buildings, they only house the structures shown in the layout. Thus, there are no separate waiting rooms for a victim to stay. There is hardly any space or facilities to take a matter *in camera*, and the judge has to oust the general public from the courthouse to take such evidence of a victim. However, the lawyers and the court officers still remain inside, such victim would anyway have to undergo the stigma again and again when the proceedings happen even *in camera*. Most of the courthouses need urgent reconstruction at least to have basic amenities for the people who come to court, including the victims.

#### **E. The Procedural Systems in Place**

The criminal justice system of the country is still paper based and is not digitalized. Not even is there an integrated system linking all the police stations in the country. When it comes to the courts of the country, there is a lack of facilities for a victim who has to participate in an identification parade at the early stage of the process. Though the law provides for such identification from a hidden place,<sup>16</sup> there is no such facility anywhere in the country. The victim has to face inquiries of personal intimacies in relation to the crime by an acting magistrate [mostly a counsel who regularly appears in the same court] in front of possible suspects and a number of outsiders who would stand in the parade. There is no facility for identification via video link as there is no comprehensive law which governs the use of digital means in the procedure. When it comes to the pre-trial procedure of cases of rape or attempted murder, the victim has to tender preliminary testimony. In trial before a High Court, the victim has to testify again and be subjected to cross-examination. There are no shorthand-typing machines in courts, and the task is done by a stenographer who has to type the proceedings which she has recorded manually.<sup>17</sup> This process has become cumbersome and contributed hugely to the inordinate delay. There is no procedure or facilities to video record the testimony in court proceedings which resulted in the victim facing continuous secondary victimization when the victim is recalled to testify due to various reasons. Child victims, too, have to undergo the same distressful court procedure, which is normally an adverse milieu. There is no witness support service or person who would guide and familiarize such a witness with the court and its procedure. Further, there are no set procedures or facilities to obtain such evidence from a remote location. In addition, a victim faces a great difficulty in obtaining free legal representation.

#### **F. The Effects of Secondary Victimization and Its Effects on the Criminal Justice System**

The effect of incessant secondary victimization is that the victims are extremely reluctant to participate in the criminal justice system, which has led the people to resort to extra judicial methods like burning vehicles after road traffic accidents. Due to the extreme delays of the proceedings, the victims have lost interest in tendering testimony and, more often than not, do not want to testify in view of the fact that it might jeopardize his/her present life. The reluctance on the part of victims of organized crimes has plagued the system due to non-availability of an effective witness protection scheme, which resulted in the State's

<sup>16</sup> Ibid [5].

<sup>17</sup> As shown in picture 10, still the proceedings are typed using old typewriters in most of Magistrate's Courts across the country.

failure to curb organized crimes.<sup>18</sup>

### III. ATTEMPTS TO REFORM

Sri Lanka has made several attempts to address the issue of secondary victimization by introducing new legislation. The law was amended to introduce video recording of a child victim's statement to be used in the court proceedings.<sup>19</sup> However, lack of facilities has made the provision almost obsolete. Further, the child victim still has to undergo cross-examination by the accused's counsel. Introduction of Assistance to and Protection of Victims and Witnesses Act No. 4 of 2015<sup>20</sup> has provided for the establishment of a National Authority to provide for a witness protection scheme and financial assistance to victims.

However, still there is no effective mechanism even by the Authority to reach the majority of the victims. A victim support service is not established even under the Act, which is a main setback. Sri Lanka has recognized the victims' rights including the right to legal representation under the Act. However, there are no schemes put in place to effectively implement such rights. Legal provisions for compensation of the victim have been introduced to the country with a focus on developing a system of restorative justice. However, the archaic attitudes of the judges of the High Court and Magistrates, inter alia, that their courts are mainly for punitive purposes and not for restorative purposes and that for restoration, a victim has to initiate civil litigation, have defeated the very purpose of such schemes of restorative justice.<sup>21</sup>

### IV. THE SYSTEMS ADOPTED BY OTHER COUNTRIES

#### A. Australia

Australia has developed a comprehensive victim support system which is based on state legislation, among other things, to minimize revictimization.<sup>22</sup> Obtaining testimonies via video link, obtaining child victim's evidence from a remote place where the child is familiarized with the court proceedings, without being subjected to adverse surroundings of the well of the court<sup>23</sup> have been in existence. Development of the office of the Victim Liaison Officer and the office of the Sexual Assault Officer have clearly led to the strengthening of victims. The duration of a trial before a Magistrate of Australia is 13 to 52 weeks, and same duration would apply to the 80% of cases in Higher Courts.<sup>24</sup>

#### B. Japan

From 2000, with the introduction of the Victims' Statement of Opinion to the Japanese Code of Criminal Procedure,<sup>25</sup> following the Kobe Murder in 1997,<sup>26</sup> Japan has started focusing more on victim participation in the criminal justice system. The Basic Act on Crime Victims of 2005<sup>27</sup> has provided for a legal regime for the new victim participatory scheme. Since the system is mainly based on examination of testimony without leading evidence with cross-examination, the criminal trials are concluded in 2.7 to 9.2 months.<sup>28</sup> Secondary victimization is minimized since the victim is not subjected to cross-examination.

<sup>18</sup> Author's experience of 15 years as the prosecutor in 20 districts including the capital city of the country.

<sup>19</sup> S.163A, Evidence Ordinance of Sri Lanka.

<sup>20</sup> <https://www.lawnet.gov.lk/>

<sup>21</sup> Ibid [18].

<sup>22</sup> <https://victimsupport.org.au>

<sup>23</sup> Author's experience gathered during training programme conducted in Melbourne County Court-Complex; <https://mypolice.qld.gov.au/news/2021/10/21/sexual-violence-liaison-officers-to-be-established-state-wide> & <https://police.act.gov.au/sites/default/files/PDF/Victims-of-crime-booklet-September-2013.pdf>

<sup>24</sup> <https://www.aic.gov.au/sites/default/files/2020-05/rpp074.pdf>

<sup>25</sup> <http://www.japaneselawtranslation.go.jp/law/detail/?id=3364&vm=02&re=02> & <https://www.cairn.info/revue-internationale-de-droit-penal-2011-1-page-245.htm>

<sup>26</sup> [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2215&context=faculty\\_scholarship](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2215&context=faculty_scholarship)

<sup>27</sup> [https://www.justice.gov.za/vc/docs/international/2005\\_JAPAN.pdf](https://www.justice.gov.za/vc/docs/international/2005_JAPAN.pdf)

<sup>28</sup> <https://www.moj.go.jp/EN/hisho/kouhou/20200120enQandA.html>

### C. United Kingdom

The Victim support system in the United Kingdom is governed by the Victims Code.<sup>29</sup> The National Crime Agency<sup>30</sup> provides many complex services to victims like Witness Care Officers, victim supporting teams which would provide the required support and protection to the victims that in turn empowers him/her to stand against injustice. Her Majesty's Court and Tribunal Service [HMCTS-Digital Platform]<sup>31</sup> has brought the court services closer to the public, and victims, too, have benefitted. Kinly Cloud Video Platform (CVP)<sup>32</sup> has taken the trial proceedings to a new level from mere video linkage. Speaking to Witnesses at Court guidance,<sup>33</sup> The Citizens' Advice Court Based Witness Service,<sup>34</sup> Independent Sexual Violence Advisors (ISVA)<sup>35</sup> and Independent Domestic Violence Advisors (IDVA)<sup>36</sup> are some of the other victim support services available in the United Kingdom.

## V. HOW TO APPLY THE SYSTEMS IN SRI LANKA

Development hitherto had happened without a role model in an *ad hoc* manner which resulted in creating the same old structures without any changes. This is evident by the pictures No 7-12, which show the newly built courthouses in Kandy and Homagama containing the same old structures akin to the rest of the courthouses built 50-75 years ago. The dire economic situation of the country is a major challenge.

Lack of awareness among the policymakers as to the goals which need to be achieved and the means of achieving them is another challenge. Hence, the development of a role model, based on the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>37</sup> is essential. The infrastructure and the system development must be implemented after creating a role model. Introduction of new architectural designs for courthouses with designated infrastructure to reduce the encounters between the victim and the perpetrator, with facilities to basic amenities and sanitation, with witness waiting rooms and support staff, based on such role model, is important. Introducing comprehensive procedural legislation for the use of digital and electronic methods in procedure is crucial as a start. Digitalization of proceedings, obtaining evidence of victims from remote location via a video link has to be developed based on such legal regime. Development of victim support services with victim support officers and victim liaison officers is another essential step. Shifting from a punitive justice system to a restorative justice system where a victim can obtain adequate compensation without a need to resort to civil litigation is another major goal which will minimize secondary victimization. Orienting towards local and foreign grants, as well as technical and advisory assistance, is critical since Sri Lanka lacks such knowledge and capital.

With such developments, the purpose of minimizing secondary victimization can be achieved since such efforts would reduce the litigation time and the victim's encounter with the rigours of the criminal justice system.

<sup>29</sup> <https://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime>

<sup>30</sup> <https://nationalcrimeagency.gov.uk/>

<sup>31</sup> HM Courts & Tribunals Service -GOV.UK- <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service>

<sup>32</sup> <https://www.kinly.com/solutions/digital-workplace/kinly-cloud>,

<https://www.governmentcomputing.com/criminal-justice/news/hmcts-kinly-cloud-video-platform/>

<sup>33</sup> <https://www.criminalbar.com/files/download.php?m=documents&f=160627063558-SpeakingtoWitnessesatCourtguidanceMar16.pdf>

<sup>34</sup> <https://www.citizensadvice.org.uk/about-us/about-us1/citizens-advice-witness-service/about-the-citizens-advice-witness->

<sup>35</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/647112/The\\_Role\\_of\\_the\\_Independent\\_Sexual\\_Violence\\_Adviser\\_-\\_Essential\\_Elements\\_September\\_2017\\_Final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/647112/The_Role_of_the_Independent_Sexual_Violence_Adviser_-_Essential_Elements_September_2017_Final.pdf)

<sup>36</sup> <https://saferfutures.org.uk/our-programmes/idva/>

<sup>37</sup> <https://www.ohchr.org/en/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx>