Fitness to plead in Sri Lanka: a review

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Summary

Derived from the Indian Criminal Procedure Code, Sri Lanka's Criminal Procedure Code which provides for 'fitness to plead' criteria in the country is unchanged from when it was introduced in the nineteenth century. As it lacks clear definitions, does not provide specific instructions for the disposal of

mentally unwell offenders and operates in isolation from other related laws, the case for its review is both strong and urgent.

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Introduction

Fitness to plead is a legal construct that considers the ability of a defendant to take part in a criminal justice process initiated against that person (1). It is a principle of common law that is recognised in the statutes of many countries and is a fundamental component of any fair trial process (2). This concept takes into account the defendant's mental state at the time of the trial, as opposed to what it may have been at the time of the alleged offence. Most modern jurisdictions would allow defendants found unfit to plead to be excluded from the normal criminal justice process and to be offered treatment and rehabilitation.

In Sri Lanka the Criminal Procedure Code stipulates the minimum standards of a fair trial process. Sections 374 and 375 of the Criminal Procedure Code, grants an accused exemptions from the standard process of criminal justice, if found 'incapable of making a defense' due to unsoundness of mind (3). However, the statutory standards of the capacities a defendant needs to possess in order to be capable of making a defense is not defined in any one of the statutes in Sri Lanka's legislation. The dispositions currently available in Sri Lanka to the defendant, once found unfit to plead, are restrictive and can be considered to be in violation of an individual's fundamental right of liberty (4).

Sri Lanka is not alone in inadequately defining the statutory standards of fitness to plead. In many Asian democracies, the legal provisions concerning defendants who are unfit to plead are inadequately defined (5). Many of these countries do not provide for a standard legal test that can be performed to assess a defendant's fitness to plead.

History

The Anglo-American concept of being fit to plead originates from medieval English common law (6). The common law court procedure mandated that a trial could not proceed until the accused made a plea seeking justice. Thus, an accused who would not submit a plea (by remaining mute) had to be tested to determine if the inability to enter a plea was due to 'malice' or due to 'visitation by God'. Deaf and mute offenders as well as 'lunatics' were considered to be 'mute due to visitation

by God'. Those who were found to be mute due to 'malice' were subjected to 'peine forte et dure' (hard and forceful punishment), a procedure where the defendant would have a 'great weight of iron and stone' placed on the chest until he entered a plea or died (7). In the instance of a defendant being 'mute due to visitation by God' a plea of not guilty was considered and the trial was stayed.

Sir William Blackstone, in his Commentaries on the Laws of England (1765-1769), an 18th century treatise on the common law and its practice in England, notes that a defendant should not be arraigned or tried if the defendant becomes 'mad' after committing the offence as 'he is not able to plead to it with that advice and caution that he ought' and is not able to 'make his defence'. Blackstone's observations were made during a period when defendants were not permitted to have a legal representative and were expected to present their defence unaided. He considered it 'inhumane' to 'require one who has been disabled by an act of God from intelligently making his defense to plead or to be tried for his life or liberty'. The Commentaries had much influence on the development of the law in England and the United States.

The modern standards to assess a defendant for fitness to plead derive from English case law. In *R v. Pritchard* (1836) (8), the Judge directed the Jury to first consider whether the defendant was 'mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence – to know that he may challenge any of you he may object – and to comprehend the details of the evidence'. The judge added that it was not sufficient that the defendant had a 'general capacity of communicating ordinary matters' (8). The ability of the defendant to instruct his legal counsel became a minimum standard for fitness following the case of *R v. Davies* (1853) (9) where the trial judge's instructions to the jury included a reference to the ability of the defendant to give instructions to the counsel. In *R v. Podola* (1960) (10), it was held that loss of memory (of the events relevant to the alleged offence) would not render a defendant unfit to plead, if the defendant was deemed to have the capacities detailed in *R v. Pritchard*.

In these early cases, the test employed to assess the capacity of a defendant's fitness to plead was essentially based on the defendant's cognitive and physical abilities of comprehension and communication. In fact, in the case of *R v Pritchard*, the defendant (Pritchard) was a person who was deaf and mute with little evidence of a mental illness. In many defendants with mental illnesses the cognitive abilities of communication and comprehension may be intact while the person's decision making capacity (decisional competence) might be compromised due to delusions and hallucinations. This inherent deficiency in the Pritchard test remains uncorrected even in modern English law.

Rationality only became an important determinant in fitness to plead assessments in the more recent case of *Dusky v United States* (1960) (11). In *Dusky*, the U.S. Supreme Court held that, the defendant to be competent must have 'sufficient present ability to consult with his lawyer with reasonable degree of rational understanding' and have 'a rational as well as factual understanding of the proceedings against him'. The court also stated that it was not enough for the defendant to be 'oriented to time and place' and have 'some recollection of the events'. In the case of *Drope v Missouri* (1975) (12), the Supreme Court added another caveat to *Dusky* by stating that the defendant must be able to 'to consult with counsel, and to assist in preparing his defence' to be found competent to stand trial. These decisions broadened the narrow Pritchard criteria by adding 'rational understanding' to the test of fitness to plead.

Fitness to plead: Current legal provisions Sri Lanka

In Sri Lanka, the legal provisions dealing with defendants who are unfit to plead are detailed in chapter 31 of the Criminal Procedure Code (13).

Section 262 of the Criminal Procedure Code details the procedure to follow when a defendant cannot be 'made to understand proceedings of his or her trial', but is not insane. This section of the statute refers to individuals with sensory impairments, and communication difficulties, such as defendants who are deaf, mute or otherwise not able to follow trial proceedings. Defendants with intellectual disability will probably not fall in this group as they would be considered to be 'insane' under Sri Lankan law. When a defendant falls within the criteria of this section at an inquiry, the law allows the inquiry or the trial to proceed. If the trial results in a conviction, the proceedings would be submitted to the Court of Appeal with a report of the circumstances of the case. The Court of Appeal is given the authority to 'pass thereon such order as it thinks fit'.

Sections 374 and 375 of the Criminal Procedure Code stipulates that a defendant who is 'incapable of making a defence as a consequence of being of unsound mind' would be considered not fit to plead and that the court proceedings will be postponed (13). The veracity of the unsoundness will be inquired into by referring the defendant to a 'government medical officer', considered as the expert to assist the court on this issue. The findings of this expert will be considered as evidence. The final decision regarding the defendant's

fitness to plead will be made by the courts considering the evidence available.

Sections 374 and 375 fail to define the expression, 'incapable of making a defence'. The expressions 'fitness to plead' or 'fitness to stand trial' are not mentioned in any part of the Sri Lankan Criminal Procedure Code. However, it is assumed that the state of being 'incapable of making a defence' would serve the same function as being unfit to plead or unfit to stand trial in Sri Lanka. The Code does not differentiate between the unsoundness referred to in Sections 374 and 375 of the Criminal Procedure Code (the test for the fitness to plead) with the same expression used in Section 77 of the Penal Code (test for the insanity defence) (14). Defining these expressions as well as deciding on the ambit of these expressions has been left to the discretion of the courts.

The question of whether a defendant is mentally fit to stand trial may be raised at any time before or during a trial and may be raised more than once. The law is silent about who may raise the question of unsoundness. Section 375 states that the issue of unsoundness will be raised when the 'court has reason to believe that the accused is of unsound mind' (13). Thus the law does not prevent the question being raised by the prosecution, the defence or by the presiding judicial officer.

The Sri Lankan Criminal Procedure Code does not specify the quantum of proof required to find the defendant unfit; nor does it indicate which party (the prosecution, defence or the presiding judicial officer) bears the burden of proof. In the absence of explicit legislative provisions Sri Lankan law seems to have followed English common law and expects the person who alleges unfitness to prove the issue on the balance of probabilities (15). Section 105 of the Evidence Ordinance provides for the burden of proof to fall on the defendant in case of unsoundness being raised as a general exception from criminal liability (16). In such an instance, the defendant is expected to prove the issue of unsoundness on the balance of probabilities. However, this section would not apply to issues of unfitness to plead.

The Sri Lankan court has the power to resume a trial, postponed due to unsoundness of the accused, at any time or commence the trial *de novo* and can require the accused to appear or to be brought before it (Section 377) (13). However the trial will only proceed, if it is found that the defendant is 'capable of making his defence' (fit to plead). If the court considers the defendant to be still incapable of making his defence, it shall again postpone the inquiry or the trial (Section 378) (13).

Whenever a defendant is found to be of unsound mind and incapable of making his defence the judicial proceedings would be adjourned. The defendant may be granted bail if the Magistrate or Judge is satisfied that the person 'shall be properly taken care of and shall be prevented from doing injury to himself or to any other person' (Section 381) (13). If the offence is of a nature where bail cannot be taken or if the presiding judicial officer is not satisfied about the safety of the defendant

to the public or to himself, the case will be reported to the Minister of Justice who may order the defendant to be confined in prison or the mental hospital (the National Institute of Mental Health).

The Criminal Procedure Code of Sri Lanka does not provide specific instructions on how the inquiry may proceed or if the charge against the unfit defendant can be pursued in a different manner. Having such a section in the legislation describing a different course which the law may take in such instances especially if the unfit defendant is charged with a simple offence, prevents lengthy, expensive and time consuming procedures which may even ultimately deprive the defendant of natural justice. However, the Administration of Justice Law, which preceded the Criminal Procedure Code had a section stating that the defendant may be discharged if the charge against the defendant is of a 'trivial nature' and the court is satisfied that the defendant may be discharged 'without danger of doing injury to himself or to any other person' (17). This section specifically mentions that the decision to discharge the defendant must be taken after considering the medical evidence with regards to the dangerousness of the unfit defendant.

Defendants detained on the grounds of unsoundness of mind, whether as a result of being incapable of making a defence at trial (Section 376) or being of unsound mind at the time of committing the offence (Section 381), are treated similarly. The Commissioner of Prisons, if the defendant is detained in a prison, or the Visitors of the mental hospital, if detained in a mental hospital, would visit and assess the defendant's mental state every six months and would report to the Minister (Section 384) (13). If the defendant is being detained pending trial and the assessor (the commissioner or the visitor) is satisfied that the defendant's mental state has improved and is thus fit to plead (or capable of making a defence) the trial may commence (Section 384) (13).

However, in instances where the defendant is permanently unfit to plead due to unsoundness of mind the procedure to follow is undefined. To follow standard procedure would be to postpone the trial indefinitely. This would result in defendants who are unable to make bail, being detained indefinitely.

If a person is considered unable to make a defense due to reasons other than unsoundness of mind the Act states that the inquiry or trial will continue and that the conviction will be forwarded to the High court if the inquiry or trial was in a lower court. This referral has to be accompanied with a report of the circumstances of the case. The High court would subsequently make a judgment on the disposal of the case (Section 156) (13).

Discussion

The Sri Lankan Criminal Procedure Code was based on the Indian Criminal Procedure Code of 1882, with some changes to reflect local requirements (18). It is remarkable that the provisions dealing with defendants who are unfit to plead due to unsoundness of mind have remained unchanged through more than a century of amendments to read almost exactly as they

were originally drafted (19). In the present day, this legislation is outmoded, brief, and too ambiguous in defining the concept of fitness to plead.

The Sri Lankan Criminal Procedure Code does not have a clear definition of 'fitness to plead'. The test to assess for fitness in a defendant is also undefined. The term 'unable to make defence' which is the equivalent of not being fit to plead has not been operationalised through the elucidation of clear standards that need to be met by a defendant. The absence of clear definitions and standards may result in evaluators, called upon by courts (in Sri Lanka the evaluators being Government Medical Officers), adopting arbitrary standards to judge the question of fitness to plead.

The Sri Lankan case of *King v. Pindorrisa* (1927), demonstrates an instance when the judiciary defined the test for fitness to plead (20). In *Pindorrisa*, Lyall Grant J instructed the jury to consider whether the defendant (in this case a deaf and mute person on trial for murder), 'sufficiently understood the proceedings, what was alleged against him, what he was entitled to do and say, and his power to bring forward witnesses in his own defence'. As the defendant did not meet the standards specified, Pindorrisa was found 'incapable of making his defence' (unfit to plead). In this case Lyall Grant J refers to the English case of *R v Pritchard* in his instructions to the jury. Thus, it is necessary to have clearly defined standards incorporated into fitness to plead legislation, instead of having to rely on case law.

The definition of unsoundness referred to in fitness to plead legislation is different to the unsoundness referred to in Section 77 of the Penal code (14). The latter deals with specific incapacities in relation to criminal responsibility (such as being incapable of knowing the nature of the act, or that the act is either wrong or contrary to the law). The unsoundness in fitness to plead legislation deals with a set of different incapacities that interferes with cognitive and volitional capacities (such as comprehension and communication) of a defendant. This difference is not appreciated in any part of the legislation. This has resulted in some confusion, leading at times to the inappropriate use of these laws (21).

A finding of unfitness to plead in Sri Lanka under the present legislation leads to a mandatory and indefinite detention of defendants in a prison or a psychiatric hospital (Section 281) (13). Thus, a defendant who may or may not have committed an offence would have their freedom seriously curtailed due to this legislation. The length of the commitment may be longer than the length of imprisonment an individual would have received if found guilty of the alleged offence. This outcome would be disproportionate to the crime and would be contrary to natural justice. This will also be contrary to all international covenants on civil and political rights Sri Lanka has ratified (22).

Section 376 of the Code of Criminal Procedure treats those acquitted on grounds of unsoundness of mind (13) and those who are incapable of making a defence due to unsoundness in a similar manner. This section does not adequately describe the disposal arrangements

of such individuals and lack the necessary procedural safeguards to prevent breaches of human rights. The present legislation does not have an appeal process for the decisions to be challenged. The length of detention is at the discretion of the Minister of Justice.

Being brief, the Sri Lankan legislation on fitness to plead fails to provide specific instructions on who may raise the question of unfitness to plead, who bears the burden of proof (the prosecution, the defence or the presiding judicial officer), the quantum of proof required and the procedure of trying the issue of fitness to plead. The legislation is also silent on the presumption of fitness of a defendant. These matters as well as the definitions of the terms 'unsoundness' and 'incapable of making a defence' has been left to the discretion of the courts. The court is expected to rely on inherent determinations on these matters of procedure or to base their decisions on existing case law.

Another deficiency in the current Sri Lankan legislation is the lack of legal provisions that prevent the issue of unfitness being raised before the prosecution has made its case. The advantage of having a legal provision that prevents the issue of unfitness being raised prior to the end of the prosecution's submissions is that it allows the judge to dismiss the charges, if the prosecutor's case is weak, before the issue of unfitness may be raised and tried. This would save the time and resources of the judicial system in cases where the defendant's innocence is clear or where the prosecutor's case may be easily dismissed. In a country such as Sri Lanka where the judicial resources are scarce, such a provision would be invaluable.

In Sri Lanka, the Criminal Procedure Code, the Penal Code and the Mental Illness Ordinance appear to work in isolation. The disposal of unsound defendants occurs within the criminal justice process with little or no involvement of the civil commitment procedure available in the country. This results in the criminal justice process being unnecessarily burdened. This would also mean that the criminal justice system would need to be appealed to when attempting to secure the release of an unfit defendant who has been detained in a psychiatric hospital. The decision of such a release would not be done by clinicians but by the Minister who would base his decision on a separate review process sanctioned through the criminal procedure code (Section 382) (13). The referral of cases which can be easily dealt with through the civil commitment process and do not require the procedural rigour of the criminal justice process is unnecessary and a waste of sparse resources.

Conclusion

In Sri Lanka, fitness to plead criteria exists in a very rudimentary form despite the issue being one of great importance in maintaining the dignity of the criminal justice process. An update of the legislation is an urgent need. As a country with relatively high health care standards and a very high literacy rate, the current legislation is outmoded, in need of urgent review and in its present form, is a hindrance to the efficient dispensation of justice for those with mental health issues.

Declaration of interest

None declared

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