

# The insanity defense and the assessment of criminal responsibility in Sri Lanka

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## Summary

Insanity or unsoundness of mind is one of the general exceptions that exist in the penal code of Sri Lanka that excludes an individual of responsibility for a crime (criminal responsibility). Despite the many advances in science and law, the sections on the insanity defense in the penal code of Sri Lanka remain unchanged from the time the penal code was originally formulated in the 19th Century. The

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## Introduction

Insanity or unsoundness of mind is one of the general exceptions that exist in the penal code of Sri Lanka that excludes an individual of responsibility for a crime (criminal responsibility) (1). The defense of insanity is based on the principle that a person who is of unsound mind or insane at the time of the offense is unable to form the mens rea (guilty mind), necessary for the act constituting the crime (2), thus not subject to punishment (3).

Provisions for the acquittal of defendants, who are deemed insane, exist within the legislature of many countries that follow the traditions of English law (4). Sri Lanka, which draws her law from the English system of law, has similar statutory standards to that of the United Kingdom. Thus, the laws relevant to insanity in Sri Lanka are based on the case of Daniel McNaughton in England in 1843 (known as the McNaughton standard) (5).

Despite the many advances in science and law, the sections on the insanity defense in the penal code of Sri Lanka remain unchanged from the time the penal code was originally formulated in the 19th Century. Thus, the law with regards to the defense of insanity gives rise to unique challenges to the Sri Lankan experts who are called upon to advise the trier of facts on the applicability of the defense to an individual person. Some statutes that work together with the insanity defense in the criminal justice process are archaic and have not incorporated advances in science and law (6). The statutes that provide for the disposal of the offender once exculpated due to reason of insanity appears be more geared towards protection of the society through confinement of the mentally ill offender than being therapeutic (7).

This article attempts to summarize the legal provisions of the insanity defense, the process of assessment and the disposal of the defendant once exculpated on grounds of insanity, at a time when Sri Lanka is contemplating replacing the existing Mental Health Ordinance.

## Statutory standards of the Insanity defense

Section 77 of the Penal Code of Sri Lanka states the law with regards to the insanity defense. It reads, "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law" (8). This section, a variation of the English McNaughton standard, completely exonerates criminal responsibility from a defendant deemed to be of unsound mind at the time of the offence. Thus it is a complete defense (also known as an exculpatory defense).

Section 77 of the Penal Code provides the legal definition of insanity to be used within the judicial system of Sri Lanka. This section has references to the existence of a mental illness (referred to as 'unsoundness of mind') and to the presence of specific incapacities that allow for the acquittal by reason of insanity (being incapable of knowing the nature of the act and whether it is wrong or right).

## Presence of a mental illness

None of the statutes in Sri Lankan law provide for a definition for mental illness. The term used in the penal code to refer to a mental illness is the term 'unsoundness of mind'. The term 'unsound mind' is also used in the Mental Health Ordinance of 1973 (the piece of legislature governing the care and custody of persons with psychiatric illnesses and their properties), the Criminal Procedure Code of Sri Lanka of 1979, and the Evidence Ordinance of 1895, to refer to mental illnesses. The term 'unsoundness of mind' is considered to be wide enough in scope to include mental illnesses due to 'disease of the mind' as well as those due to retarded development such as mental retardation (5).

Though statutes do not offer a legal definition for mental illness it is expected that all defendants claiming a defense of insanity should provide evidence to the court to the effect that they suffer from a 'severe' mental illness and not just be 'odd' in their personality (9, 10). The severe mental illness is generally considered as a psychotic disorder (e.g. schizophrenia), a major affective disorder (e.g. severe

depression, bipolar disorder) or an organic psychiatric illness (e.g. delirium, dementia) (11). These disorders are recognized as grossly and demonstrably impairing the person's perception or understanding of reality (12). However in Sri Lanka there is no legislature barring less serious, non psychotic illnesses being used as part of an insanity defense as long as the defendant is able to demonstrate to the courts, how the disorder gave rise to the specific incapacities as stipulated in the insanity defense, thus negating the requisite mens rea to commit a criminal act.

Ability to form a clinical diagnosis (ICD – 10, DSM-IV) or the inclusion of such a diagnosis in the insanity defense is theoretically non essential, as none of the diagnoses directly match the legal concept of unsoundness as defined in Section 77 of the Penal Code of Sri Lanka. However, it is considered good practice to include a formal clinical diagnosis when applicable in the report as it facilitates communication, helps in the gathering of information and gives access to research data available on a diagnosis (13). The reports provided to the courts by one of the authors have always included a formal ICD 10 diagnoses. A formal diagnosis is not in itself sufficient to establish an insanity defense as the mental illness and the defendant's symptoms must also be shown to deprive the defendant of the legally relevant capacities at the time of the alleged offence.

### Legally relevant capacities

Section 77 being an adaptation of the M'Naughton standard focuses on the 'cognitive' aspect (i.e. on the 'knowing') of the offending behaviour. Thus section 77 does not recognize impairments in volitional control leading to offending behaviour. These two broad types of incapacities are conventionally called the cognitive and the volitional prongs of the defense of insanity. The Sri Lankan law on insanity, tests only the cognitive prong in a defense of insanity. This is consistent with the M'Naughton standard. Due to the difficulty of defining and accurately assessing the volitional prong many jurisdictions have refrained from including it in the test for insanity (12, 14).

The wording of the cognitive prong in section 77 is that the defendant was 'incapable of knowing the nature of the act or that he was doing what is either wrong or contrary to law'.

Not knowing the nature of the act is considered when a person may harm another believing that the victim is non human such as a devil or an inanimate object. E.g. A man hacks his mother with a large knife believing that she has been replaced by a devil or that she is a piece of wood. Deprivation of this legally relevant faculty could also be considered when the defendant is unable to 'reason about the matter with a moderate degree of sense and composure' or when he has little capacity to 'understand the nature of life or the destruction of it' (15). Capacity to know the offence in the abstract or the knowledge of the propensity of the act to cause death is not considered sufficient to deprive the person of this defense because the absence of knowledge about the act is considered from essentially a subjective point of view (5) at the time of the alleged offence.

The cognitive prong of the insanity defense in Sri Lanka accepts both the inability to appreciate the 'legal wrongfulness' (being contrary to the law or illegal) as well as 'moral wrongfulness' (being contrary to moral standards) within its definition. In many cases the defendant is aware of the act as well as being aware that it is illegal, but is convinced that the act would be morally justified. According to section 77 if the defendant's mental illness incapacitates the person's ability to tell moral or legal wrong they can be exonerated from criminal responsibility. For example, a psychotic illness might make a person believe that a crime is morally justified – because it had been 'ordered by God'. This moral standard may be objective (society's standards) or subjective (where it violates society's standards but is acceptable within his own moral standards). This is different to the M'Naughton standard and can be considered an instance where the Sri Lankan insanity defense has widened its ambit.

The volitional prong of the insanity defense (i.e. criteria related to deprivation of the defendant's ability to control his behaviour at the time of the offence) is not defined in the Sri Lankan legislature. Some jurisdictions have adopted the volitional prong to their insanity defense by incorporating a variant of the 'irresistible impulse' test (16) into the existing M'Naughton test (17). This allows a defendant who was unable to control his conduct due to mental impairment to be exonerated from criminal responsibility. Controversy exists with regards to the addition of a volitional prong to legal definitions of insanity due to the difficult nature of measuring an individual's ability to control one's behavior. Absence of provisions for a volitional prong leads to difficulty when trying to offer an insanity defense to a defendant who commits an offence during an episode of severe mania or severe depression without psychosis. In such instances the cognitive prong is not directly applicable and the volitional prong becomes more relevant. In the experience of the authors, in such instances it is useful to explain to the courts the totality of the circumstances of the offence using the concepts from the cognitive prong of the insanity defense to justify the deprivation of volitional control.

### Intoxication and the defense of insanity

Absence of the legally relevant capacities due to voluntary intoxication from alcohol or drugs is not considered as basis for an insanity defense as stated in Section 78 of the Sri Lanka penal code. It can only be considered as a basis for a defense when the substance has been administered to the defendant involuntarily (18). The underlying moral and legal principle for this exception is the premise that an insane person should only be excused from punishment because of his lack of control over the presence of the mental illness and because the law considers that the mental illness was brought on due to external circumstances. Thus individuals who 'voluntarily' take substances leading to the deprivation of relevant capacities should be held responsible for their actions. However mental illnesses which are the direct effects of psychoactive substances such as substance induced psychotic disorders, delirium tremens or alcoholic dementia are considered as a basis for an insanity defense within Sri Lankan law.

This section of the penal code adds another factor to be considered in an insanity defense when the mentally ill person being assessed for insanity was also intoxicated at the time of the offence. In such an instance the expert has the difficult task of assessing the separate effects intoxication and mental illness had on the legally relevant capacities.

### **The process of assessment for criminal responsibility**

#### **Raising the issue of insanity and the referral to the expert**

A request to perform an evaluation to determine criminal responsibility may originate from a Magistrate's court or from a higher court (19). As the district courts in Sri Lanka does not deal with matters pertaining to breaches of the criminal code no such referrals would arise from them (20). The defense, the prosecution or the judge may raise the issue of unsoundness. The issue may be raised before or during the trial process. According to the criminal procedure act of Sri Lanka, the courts would have the ultimate authority with regards to requesting criminal responsibility evaluation in Sri Lanka. The judge would have prerogative to raise the issue of unsoundness even when the defense pursues a different approach to the case (21). In addition to the court ordered criminal responsibility evaluations the defense may also request an evaluation performed on the alleged offender.

Sri Lankan law accepts that assessment of a person for criminal responsibility due to unsoundness of mind requires specialist expertise and moves to call upon an 'expert' for the determination. The criminal procedure act identifies 'medical officers' (employed by the government or otherwise) as 'experts' in the assessment of unsoundness in a defendant. The same act identifies a medical officer as any officer in the department of Forensic Medicine or any doctor who has qualified from any of the universities of Sri Lanka. Thus any doctor with MBBS qualifications (the medical degree awarded to all medical graduates in Sri Lanka) can be called upon by the courts to perform an assessment. Only individuals with medical qualifications (physicians) are allowed to be called upon by Sri Lankan law to perform assessments for unsoundness of mind. Thus, the existing legislature excludes other mental health clinicians (e.g. psychologists) from performing such assessments.

The evidence ordinance of Sri Lanka identifies an 'expert' as someone who has 'special skills' in a field of 'science' and is capable of helping the court to 'form an opinion' (22). This section in the evidence ordinance has been identified as clearly out of date and recommended for revision. These laws were formulated in a time when there were few, if any psychiatrist in Sri Lanka (23) and the Judicial Medical Officers (medical doctors who specialize in forensic pathology) were the preferred experts in criminal responsibility evaluations. Since the number of psychiatrists have increased in Sri Lanka a significant number, if not all such referrals are now directed by the courts to the regional general psychiatrists or to the forensic unit of the National Institute of Mental health.

Neither the criminal procedure act nor the evidence ordinance specifies the level of competence required by the evaluator. Identifying mental illness and determining the absence of the legally relevant capacities clearly requires an expert who has knowledge, skills and the experience to perform such an evaluation. The evaluator should not only have training and experience on applying knowledge in criminal responsibility assessments but should also have relevant experience with populations similar to the individual being evaluated (such as children and adolescents). Thus it is permissible to report back to the courts suggesting a different expert to oneself or refer the case through professional channels to a different expert when the expert called upon by the judiciary, feels it necessary, due to lack of training or experience. The authors have on many occasions made use of professional colleagues (especially in fields of child and adolescent mental health) to perform joint evaluations and have produced reports in collaboration with these experts.

#### **Collecting information**

The quality of the criminal responsibility assessment would invariably depend upon the amount of information available to the expert doing the assessment. It is the responsibility of the police and other law enforcement agencies to reconstruct the 'criminal act' (actus reus) in as much detail as possible. The expert can form a judgment of the cognitive and the volitional capacities only up to the extent of the available information. If there is information that the expert would require in order to make a correct assessment, the law enforcement authorities have the responsibility of making available this information to the expert. At present, the Sri Lankan expert has no legally sanctioned authority to request the police briefs (the police B report) or the brief of evidence with regards to the crime. Thus, if the expert is unable to access this data through professional channels of communication he or she has to make a request from the courts to provide this data. It is acceptable for the expert to inform the court that he or she is unable to comment on the criminal responsibility of a defendant if there is insufficient information.

It is considered not suitable for the expert to rely only on the information provided by the defendant and the informants identified by him. Since the assessment is done on a defendant of a criminal trial, there is much conscious and unconscious motivation on the part of the defendant to present data to achieve a desired outcome. There have been instances where the authors have resorted to visiting the crime scene or the neighbourhood of the defendant to collect first hand information about behaviours of the defendant.

Section 46 of the Evidence Ordinance in Sri Lanka allows the expert to rely on data that might be considered as irrelevant or as hearsay if presented by a lay witness. However, this data must support or be inconsistent with opinion of the expert when the opinion is relevant (24). Thus the expert conducting the criminal responsibility evaluation may rely on sources of data such as medical records and information from collateral sources. However, the court would have the ultimate authority on the admissibility of all data used to formulate the expert's opinion (25). The information used to establish a person's mental illness and to show the absence of the

legally relevant capacities must be clearly established and not be vague or desultory in nature (26).

When the defendant claims to have been treated for a mental illness it is always prudent to trace the treatment records from the relevant institutions. The Bed Head Tickets (official documents maintained by hospitals in Sri Lanka) of previous admissions and clinic follow up notes (especially prior to the offence) are very valuable and may often be the only objective data available. The authors invest a lot of time and effort to obtain such data. Bed Head Tickets are preserved in all government hospital as standard procedure. They provide valuable objective information about the mental illness of a defendant. If the records cannot be obtained by the expert it is possible to request the courts to obtain the information on the behalf of the expert. The personal experience of the authors is that such information (be it the police or hospitals) can be readily accessed by clinicians.

When Sri Lankan courts call upon an expert to comment on the mental state of the defendant at the time of the offence, the main objective of the courts is to determine if the person fulfils the criteria for the insanity defense as specified in Section 77 of the penal code. However, the authors believe that the responsibility of the expert goes beyond the narrow task of assessing whether an individuals' mental state matches the legal standards of insanity. The expert should attempt to reconstruct the mental state of the defendant at the time of the offence, as completely as possible using the sources of information that is available.

### **The assessment**

Psychiatrists performing criminal responsibility assessment are generally aware of the rights of the defendant granted by the Constitution of Sri Lanka and would take all necessary steps to protect them. The expert would make sure the defendant understands his rights, the purpose of the interview, and how the information obtained would be used. Information obtained by the expert in a criminal responsibility assessment is not privileged. Even though not directly admissible, this information may help the state find other evidence ("fruits of the statement") which may be potentially incriminating. It is also of interest that there is no legislature in Sri Lanka barring evidence obtained through such means in the trial process and being used against the defendant (27). Thus it becomes extremely important for the defendant to understand the role of the psychiatrist and the implications of the information revealed.

If the expert feels that the mental state of the defendant would compromise the capacity of the defendant to understand this information he would postpone the assessment until the defendant is better and has regained these capacities. At present, there are no specific legal provisions guaranteeing the right for representation to pretrial defendants and thus the expert would not be found at fault for performing an assessment in the absence of a legal representative (28).

At the beginning of the assessment the expert needs to explain his role and explain the limits of confidentiality

in the assessment. It is mandatory to obtain the consent of the defendant before proceeding any further. At present, verbal consent is obtained and recorded in the notes. The statements of the defendant are recorded verbatim on most occasions. The assessments include a detailed account of the alleged offence from the defendant as well as his explanation of the motivation behind his behaviours. Information about his previous contact with mental health services and law enforcement authorities are also sought. The assessment would inquire regarding details that would be required in a comprehensive psychiatric history. A detailed mental state will also be done at the time of the assessment.

This assessment may be done in an in-patient or an out-patient setting. The number of assessment sessions required would be decided on a case by case basis. On average it is the experience of the authors that 2- 3 sessions will be required by the expert to complete the report.

In Sri Lanka the assessing expert has another role to play as the treating clinician. This generally causes a significant amount of role confusion in the assessor as well as the defendant. This role confusion makes it even more important to explain to the defendant at the onset of the criminal responsibility evaluation the role played by the expert and the limits of confidentiality. However this also leads to the assessing clinician having a better understanding of the defendant due to the increased contact in the therapeutic setting. Unless called for a second opinion, almost all criminal responsibility assessments are done by the respective treating psychiatrists.

The law in the country does not bar the expert from obtaining information from other sources, where the defendant had a privileged relationship such as therapeutic relationships without getting the prior consent of the defendant. However, the sharing of such confidential information with the expert conducting the criminal responsibility assessment would be subject to ethical considerations.

### **Burden of proof**

When the insanity defense is raised, the burden of providing evidence in support for the defense falls on the defendant (29). The degree of proof is the balance of probabilities, analogous to the burden that rests upon a plaintiff or defendant in a civil case (30). Thus a defendant to be entitled to the defense of insanity must provide a preponderance of evidence, in support of the insanity defense, to the judge and jury. The opinion given by an expert following a criminal responsibility evaluation would add to the balance of probabilities. However, the opinion given by the expert is not based on balance of probabilities but on clinical criteria as opposed to the courts who make there decisions on legal criteria as discussed. This difference becomes relevant to the Sri Lankan psychiatrist as they frequently provide an opinion to the courts on the ultimate issue.

### **The report**

The expert communicates his opinion to the courts using a written report. The current Criminal Procedure Code of Sri Lanka allows a written report of an expert

to be accepted as evidence without calling the said expert to testify as a witness (31). There is currently no set format or guideline issued by local judicial authorities for criminal responsibility evaluation reports. Historically the reports submitted to courts on criminal responsibility have been very short. These reports would comment on the issue of soundness or the unsoundness of mind at the time of the offence, without necessarily elucidating the rationale on which one's opinion was based on. As much as a short report is appreciated by Sri Lankan courts due to their busy nature (especially Magistrate's courts) the expert runs the risk of being frequently summoned to explain his opinion to the courts. It is the experience of the authors that a comprehensive report explaining the opinions expressed would help the courts as well as reduce the chance of being summoned to court to elaborate upon one's opinion.

Contemporary reports frequently address the ultimate issue of the defendant being of sound or unsound mind at the time of the alleged offence. The experience of the authors is that, the courts in Sri Lanka prefer the expert commenting on the ultimate issue rather than commenting on the nature and degree of the impairment and stopping short of informing the court, if the degree of impairment is 'enough' to meet the criteria of legal insanity. Addressing the ultimate issue in Sri Lanka would be to address whether the defendant met the criteria for legal insanity (unsoundness of mind).

In addition to the issue of criminal responsibility, it is quite common to include the defendant's capacity to stand trial as well as the expert's recommendation on treatment and disposal in the report

### **Expert testimony**

Even though a written report is sufficient as evidence the expert may be summoned to give expert testimony when the courts, the prosecution or the defense deems this process necessary. Given the long procedural delays existent in the administration of criminal justice in Sri Lanka (32), it is quite common to be called to give expert testimony for reports compiled many years ago. Thus it would be prudent for the Sri Lankan expert to compile detailed reports which would be self explanatory and to preserve clinical notes made during the assessment.

The expert in a Sri Lankan court is given a special seat in the courts and is not sequestered (allowed to remain in court when other witnesses are giving evidence). In voir dire (the first part of expert testimony) the expert is expected to present his qualifications that make him an expert to comment on the mental state of a defendant. The expert may be questioned during direct examination, cross examination and re examination regarding his findings and his opinions. The court may bar the expert from presenting information about aspects of his or her report if some of the information is considered not admissible. The expert evidence in most courts in Sri Lanka is given in Sinhala or Tamil.

### **The disposal of the defendant**

If the person is found to be of unsound mind at the time of the alleged offence, it reasons alone for the

person to be acquitted of the offence (8). The code of criminal procedure details that, following an acquittal on grounds of insanity, the courts has the discretion of holding the defendant in a 'safe place of custody' as the court thinks fit. The Minister of Justice needs to be informed of such offenders and he makes a decision on the place of custody. The safe place of custody has been identified as a prison, a mental hospital or other suitable place of safe custody as identified by the Minister in charge of the subject (33). The only mental hospital as identified in the Mental Health Ordinance being the National Institute of Mental Health, in Angoda, Sri Lanka, all such persons are sent to the forensic section of this hospital. Apart from the Forensic unit of the National Institute of Mental Health and the various prisons around the country, there are no other facilities in Sri Lanka that can provide custody to defendants acquitted on grounds of insanity.

Those who are detained are visited by either the Prisons Commissioner or by the Visitors (persons who do not hold any public office under the state, appointed by the Minister to independently inquire into the welfare of prisoners) (34) at least once every 6 months and recommendations are made to the Minister. A Visitor's board consisting of a Magistrate, an independent psychiatrist and representative from the department of prisons would convene every 6 months and review those who are detained at the Forensic unit of the National Institute of Mental Health in Angoda to determine the suitability of these individuals for release in to the community. On each sitting the treating psychiatrist will provide a report about the individual being reviewed and the members of the Visitors Board will give their independent opinions to Minister on the suitability for release from the mental hospital. If the Visitors or the Commissioner of prisons is satisfied that the person can be released into the community the person may be released subject to approval from the Minister (35). When a relative, a friend or any other person volunteers to take care of the person so detained, that person will be given responsibility for the care of the person with mental illness provided that the friend or family member is willing to bring the person for review as ordered by the Minister. The Minister has the discretion of revoking this decision and incarcerating the person or committing him back to the mental hospital (36).

There are no legal provisions for monitoring the person found to be of unsound mind after being discharged from hospital or prison other than being asked to come back for a review by the Minister. In reality, individuals who are thus released are frequently lost to follow up. There are also no legal provisions for conditional release or for the granting of leave (which is available for individuals civilly committed under the mental health ordinance) for those disposed following a judgment of unsoundness. In the experience of the authors this archaic legislature has lead to individuals being unfairly detained long after being clinically suitable for being managed in the community. Until 2010, the process of review conducted by the Visitors' Board was dysfunctional leading detainees being held in custody for extremely long periods (37). The present laws regarding the disposal of insane offenders

have taken away the decision making authority from the clinicians and placed it with the law enforcement authorities reflecting the attitude of society at the time these laws were originally formulated.

### Mitigation

The present Sri Lankan law on insanity does not provide for mitigation of punishment in circumstances that lead to impairment but not deprivation of the legally relevant capacities (5). Thus the insanity defense of Sri Lanka has an all-or-none property. Sri Lanka lacks legislature similar to the diminished responsibility law in the UK which provides for mitigation in cases of homicide. However, expert testimony provided as part of a criminal responsibility evaluation may facilitate acquittal of a defendant or provide a basis for mitigation. Defenses other than insanity such as automatism, provocation, duress, necessity and self-defense may become available to the defense in the light of expert testimony (38).

### Conclusion

The exclusive emphasis on the cognitive capacities (while ignoring the volitional capacities) makes the insanity defense of Sri Lanka less comprehensive but more measurable. This is an inherent deficiency present within many legislatures around the world due to the varied nature of the insanity defense as well as the influences of salient cases towards its development. The present law acting in isolation (in the absence of laws similar to diminished responsibility) fails to provide relief to a significant proportion of individuals who would be considered to be insane on medical criteria. However, the insanity defense in Sri Lanka can also be considered an improvement on the more restrictive McNaughton standards, given the deprivation of understanding is given a wider interpretation.

The Sri Lankan psychiatrist performing criminal responsibility assessment is not only hampered by the inherent deficiencies in the law of insanity but also by the poorly functioning administrative processes around collecting information and disposal of defendants once acquitted on grounds of insanity. Much responsibility is placed on the Sri Lankan psychiatrist by the courts expecting the psychiatrist to comment on the ultimate issue as well as providing for rudimentary monitoring upon acquittal of a defendant.

The present system provides little protection towards human rights of defendants through absence of specific legislature governing the processes of assessment for criminal responsibility.

It is hoped that the above deficiencies will be addressed, with the advancement psychiatry and the law in Sri Lanka, and through the passage of the new mental health act and other legislature.

### Declaration of interest

None

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