

Development of the Law of Servitudes in Sri Lanka

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Abstract

Back Ground

Sri Lanka is a developing country with a rising population and limited economically productive land.¹³ Consequently, the development of infrastructure is a priority for which many parcels of land have been and will continue to be acquired by the state. Thus the development of state land is stimulated while the development of private rights in land such as the creation of servitudes attract less attention and are neglected by the state and other public authorities. The Civil War which raged over the whole country affected all aspects of Sri Lankan life such as the economy, social life, infrastructure, human rights as well as private law. In summary each and every aspect of day-to-day life of the country's citizens were affected by the Civil War which came to an end only very recently. As said earlier this caused a diversion of interest from private ownership to public ownership of land and widely speaking from the private law to the public law sphere. As a result areas of law such as family law, land law, and the law of delict received less attention when compared with the public law areas such as human rights law, administrative law and intellectual property law. Thus while these areas of the law were widely developed, the private law areas had to wait at the back of the queue when legislative innovations were needed, fewer academics selected them for further research and they attracted less public discussion with regard to their future development.

The law of property, particularly relating to land and buildings, is a good example of this trend. The new Registration of Lands Act introduced in the country about a decade ago has proved to be riddled with anomalies but neither the Law Commission nor the government has raised a finger to address these anomalies and get the law back on track. Likewise the Apartment Ownership Act in Sri Lanka is subjected to severe criticism, but

¹³ The Central Bank of Sri Lanka publishes the following figures in 2002: 19.24 million
Land area excluding inland waters 62,705 (sq.km.)
Density of Population (No. per sq.km)- 303
Central Bank of Sri Lanka 2002.

none of the public authorities are interested in bringing about the necessary changes to make it more effective in practice.

The more traditional sphere of the law of property comprising, *inter alia*, the law of servitudes also attracts very little attention in Sri Lanka. This is so despite the fact that the law of servitudes plays an important role in the daily lives of all the citizens of Sri Lanka and that every person in the country experience a servitude daily either knowingly or without knowing that they are actually enjoying a servitude. For example, condominiums and housing schemes are currently quite popular in the country. The residents in such schemes are enjoying servitudes such as running cables, telephone lines and sewerage pipes which run through their neighbor's walls but the problem is that most of the general public (other than property lawyers) are unaware of the benefits or burdens attached to these rights. Consequently the number of claims or disputes based on the law of servitudes reaching the Sri Lankan courts is presently very small. The parties involved in servitude disputes either attempt to enforce other remedies (typically the general remedy of nuisance or delict) or simply forego the opportunity to grasp the benefits inherent in rights based on servitudes and if a servitude issue reaches the court, the judges seem less inclined to solve the issue in an innovative way. Thus there is little fruitful discussion on servitude issues in the courts and among academics.

Another reason is that the foundation or basis of servitude law is Roman-Dutch common law. There is a common myth among some academics and practitioners including judges, that Roman-Dutch law is an ancient law which does not have the ability of adjusting to the needs and demands of modern society. Some judges, in particular, seem to regard it as a fossilized system which is not worth discussing or developing. Because of all these and other reasons the law of servitudes has not developed in Sri Lanka at all in the last few decades and if this continues, this area of law will atrophy in the Sri Lankan legal scene.

Methodology

This question needs to be explored by researching the way this area of law has been developed in two other similar jurisdictions such as Scotland and South Africa. The similarities between these systems are that these jurisdictions are mixed legal systems and that the law of property and especially the law of servitudes have been substantially

influenced by and mainly governed by Roman and Roman-Dutch law principles in their systems.

The comparative research method is used in this paper as cross-judicial study, analysis, and identifying and explanations of similarities and differences in order to achieve the objective of the paper. Examination of the law in these selected jurisdictions is needed to explore whether there is a pattern for the development of the law of servitudes and also to ascertain whether this pattern will be suitable for adoption in Sri Lanka.¹⁴ The application of a comparative method of analysis, allows us to observe how other societies at a similar stage of civilization face up to the same and corresponding problems.

Comparing certain aspects of the law of servitudes in these systems will make it possible to find answers to the question and perhaps derive a solution.

Outcome

One of the main objectives of the paper is to find out whether the area of law pertaining to servitudes or the Roman and Roman-Dutch principles on servitudes is fossil areas or systems. Another is to focus on the difference between the three systems consists basically in the way in which the principle and the sources are used by the law-makers in the specific country as they can either breathe life into a dead system or make a dead system alive by the way they handle issues in their judgements. The study will aim to discover how the same principle has been used to create a radical, innovative judgement in one system while the same principle was swept under the carpet in the other systems.

Conclusion

The paper will prove that because of an unwillingness to break new ground Sri Lanka is lagging behind the other two systems while there is a marvellous opportunity for both the courts and the legislature to use the experience of its counterparts to develop this area in the country instead of labelling it as a dead law and not taking any effort to develop it. Finally, suggestions will be made of the areas which may be rejuvenated and proposals are provided for what needs to be done. Hopefully these suggestions will be considered by the law-making bodies to adapt the law of servitudes to the everyday social needs of the public and to dispel the myth that Roman and Roman-Dutch principles can generate new ideas and innovative solutions.

¹⁴ Djalil I. Kiekbaev (Bashkir State University), “*Comparative law: Method, Science or Educational Discipline?*” EJCL, Vol 7.3 September 2003, <http://www.ejcl.org/73/art73-2.html> visited on the 21st of May 2010.