

# A Brief Guide to the Judicature (Amendment) Act No 9 of 2018

Centre for Policy  
Alternatives

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CENTRE FOR POLICY ALTERNATIVES  
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மாற்றம் கொண்டுவரக்கான நினைவு

The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

6/5, Layards Road, Colombo 5, Sri Lanka

Tel: +9411 2081384, +94112081385, +94112081386

Fax: +9411 2081388 Email: [info@cpalanka.org](mailto:info@cpalanka.org)

Web: [www.cpalanka.org](http://www.cpalanka.org)

Email: [info@cpalanka.org](mailto:info@cpalanka.org)

Facebook: [www.facebook.com/cpasl](http://www.facebook.com/cpasl)

Twitter: @cpasl

This brief guide is prepared by the Centre for Policy Alternatives (CPA) to raise awareness on salient points in relation to the Judicature (Amendment) Act No 9 of 2018 enacted in May 2018. As the guide indicates, if fully implemented, the present legislation can address delays with justice with specific cases in Sri Lanka. While this is legislation addresses several areas requiring reforms, CPA also notes several concerns that require further attention and urges the authorities to also consider addressing delays in relation to other areas.

### **1. What is the Judicature Act?**

The Judicature Act is an act of Parliament which provides the legal basis to establish the system of courts of first instance in Sri Lanka. The Act also defines the jurisdiction of these courts.

### **2. What is a court of first instance?**

A court in which a case will be first heard is a court of first instance. Legal proceedings begin in courts of first instance and these courts will often hear evidence and make the first ruling about a case..

### **3. What was the recent amendment to the Judicature Act?**

The Judicature (Amendment) Act, No. 9 of 2018<sup>1</sup> was passed by Parliament in May 2018. This Act allows for certain High Courts to function as “Permanent High Courts at Bar”.

### **4. What is the Permanent High Court at Bar?**

It’s a permanent High Court consisting of three Judges sitting together to hear and determine cases relating to a number of financial and economic offences. The cases will be heard on a day to day basis (i.e. on consecutive dates). The Act provides for more than one Permanent High Court at Bar to be set up.

### **5. What do “financial and economic offences” mean?**

The Act does not define these terms. Instead it provides a schedule (the Sixth Schedule) which contains a list of offences which could be tried by the Permanent High Court at Bar.

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<sup>1</sup> The Judicature (Amendment) Act, No. 9 of 2018, certified on 15<sup>th</sup> May 2018, Available at [http://www.documents.gov.lk/files/act/2018/5/09-2018\\_E.pdf](http://www.documents.gov.lk/files/act/2018/5/09-2018_E.pdf)

**6. Will every case where a person is charged for an offence mentioned in the Sixth Schedule of the Act get heard by the Permanent High Court at Bar?**

No. After considering several criteria, the Attorney General or the Director General for the Prevention of Bribery and Corruption (when directed by the Commission to Investigate Allegations of Bribery or Corruption) can refer such cases to the Chief Justice to ask whether criminal proceedings for such offences should be taken in a Permanent High Court at Bar or elsewhere.

If the Chief Justice is satisfied that one or more of the criteria has been satisfied, s/he can direct the Attorney General or the Director General for the Prevention of Bribery and Corruption to institute criminal proceedings in the Permanent High Court at Bar. [Section 12A(4a)]

**7. What are the criteria to be considered by the Attorney General or the Director General for the Prevention of Bribery and Corruption, and then the Chief Justice?**

- the nature and circumstances of the offence
- the gravity of the offence
- the complexity of the offence
- the impact on the victim or the impact on the State [Section 12A(4a)]

**8. Who nominates the judges sitting in the Permanent High Court at Bar?**

The Chief Justice nominates the judges who will sit in this court [Section 12A(1)]

**9. Did Sri Lanka already have provision for Trials at Bar?**

Yes, it did; prior to the present amendment the Sri Lankan legal system had already recognised Trials at Bar. The Judicature Act allows for Trials at Bar to be held by the High Court for offences punishable under the Penal Code and other laws. The Chief Justice has the power to nominate a Bench of three Judges of the High Court to these Trials at Bar. [Section 12]

Under section 450 of the Code of Criminal Procedure Act, the Chief Justice can decide to hold a Trial at Bar for any offence punishable under Sections 114, 115 or 116 of the Penal Code<sup>2</sup>, taking into consideration:

- the nature of the offence

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<sup>2</sup> Offence punishable under sections 114, 115 or 116 of the Penal Code are waging or attempting to wage war, or abetting the waging of war against the State, Conspiracy to waging of war against the State and Collecting arms with the intention of waging war against the State

- the circumstances relating to the commission of the offence
- in the interests of justice

The person accused of the offence will be tried before a Trial at Bar by three Judges without a jury.

**10. How are the Permanent High Court at Bar different from Trials at Bar?**

Unlike Trials at Bar, which are established on a case by case basis, the Permanent High Court at Bar will be permanent and will hear the cases referred to it by the Chief Justice (See answer to question 4)

**11. Do we have enough High Court judges to have dedicated Permanent High Courts at Bar? Will other cases get delayed?**

The Judicature (Amendment) Act, No. 26 of 2017<sup>3</sup> increased the maximum number of High Court judges from 75 to 110. With this increase of the number of High Court Judges, the Permanent High Court at Bar can be established without diverting judges from existing High Courts. This would allow the existing workload of the High Court to be spread among more judges in more court rooms.

**12. Is there a problem of delays in High Court cases ? Is there a backlog of cases?**

A report of Parliament’s Sectoral Oversight committee on Legal Affairs (anti-corruption) & Media, found that:<sup>4</sup>

- The actual period between the date an indictment was filed and the date the prosecution commenced (Average) – 3.7 years
- The period between commencing recording evidence and the ruling of the case at High Court (Average) – 1.8 years
- The period for the completion of the two appeals in the Court of Appeal and the Supreme Court (Average) – 0.7 years

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<sup>3</sup> The Judicature (Amendment) Act, No. 26 of 2017, certified on 17<sup>th</sup> November 2017, available at [http://www.documents.gov.lk/files/act/2017/11/26-2017\\_E.pdf](http://www.documents.gov.lk/files/act/2017/11/26-2017_E.pdf)

<sup>4</sup> “Recommendations Pertaining to the Expeditious and Efficient Administration of Criminal Justice”, Sectoral Oversight committee on Legal Affairs (anti corruption) & Media, 20 September 2017, at pg 3, available at <http://www.parliament.lk/uploads/comreports/1510738363068517.pdf>

According to the Ministry of Justice, there is a considerable backlog of cases in the High Courts.

Date	No of Cases Pending in High Court
30 <sup>th</sup> September 2017	17,143 <sup>5</sup>
31 <sup>st</sup> December 2016	16,366 <sup>6</sup>
31 <sup>st</sup> December 2015	16, 259 <sup>7</sup>

However it has to be noted that this represents all cases before the High Courts and not just criminal cases.

### **13. Is the backlog of cases only due to the delays in the Courts?**

No. Some of the problems that cause these delays are related to investigation agencies and the Attorney General's Department, whilst at least part of the problem is the delays caused by the heavy workload of existing courts and postponement of cases.

Some problems that cause these delays can be solved through increasing resources available to the investigation agencies and the Attorney General's Department and judiciary. This would mean recruiting more skilled personnel, providing more training, investing in equipment and technology to increase efficiency and streamlining administrative procedures.

Other problems require legislative fixes. These include streamlining court procedures and providing for more judges and court rooms (see answer to question 14).

These solutions are not mutually exclusive.

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<sup>5</sup> Progress Report, Ministry of Justice , January - September 2017, pg 42, available at [http://www.moj.gov.lk/web/images/pdf/progress\\_report/14.11.2017/English.pdf](http://www.moj.gov.lk/web/images/pdf/progress_report/14.11.2017/English.pdf)

<sup>6</sup> Progress Report, Ministry of Justice , January - December 2016, pg 41, available at [http://www.moj.gov.lk/web/images/pdf/progress\\_report/pr\\_january\\_december\\_2016\\_en.pdf](http://www.moj.gov.lk/web/images/pdf/progress_report/pr_january_december_2016_en.pdf)

<sup>7</sup> Ibid.

**14. How do these amendments to the Judicature Act hope to ensure cases are concluded faster?**

- By setting up court rooms to exclusively hear a particular category of cases, progress on these cases is sped up.
- By taking away a particular category of cases from the other High Courts, the workloads in those courts are reduced.
- The cases in the Permanent High Court at Bar are expected to be heard on a day to day basis (i.e. on consecutive dates), this prevents long gaps between dates and would help to ensure cases are progressed quickly. [Section 12A (5)]
- As opposed to having two appeals (one to the Court of Appeal and one to the Supreme Court) there is only one appeal from the Permanent High Court at Bar. This appeal is heard by five judges of the Supreme Court (the same as Trials at Bar) [Section 12B]

**15. What are the other benefits of having a dedicated Court hearing a particular category of cases?**

- During their tenure in the Court, the judges will be able to focus on a specific category of cases. Considering that these crimes are highly technical and require specialised knowledge this would help judges focus on developing the necessary skills to adjudicate such cases.
- Having dedicated Court rooms makes it easier to allocate specialised resources (i.e. specialised translators, audio visual equipment etc.)

**16. What guarantees are there that the Permanent High Court at Bar will be independent?**

- The Judges in the Permanent High Court at Bar are High Court judges. High Court judges are appointed by the President<sup>8</sup> on the recommendation of the Judicial Services Commission (JSC)<sup>9</sup>. The JSC in turn makes its recommendations in consultation with the Attorney General.
- The Chief Justice appoints Judges to the Permanent High Court at Bar from among existing High Court Judges.

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<sup>8</sup> See Article 111(2)(a) of the Constitution.

<sup>9</sup> The Judicial Service Commission comprises of the Chief Justice and the two most senior Judges of the Supreme Court appointed by the President. See Article 111D of the Constitution.

- The Chief Justice decides (based on cases forwarded by the Attorney General and the Director General for the Prevention of Bribery and Corruption) which cases get referred to the Permanent High Court at Bar.
- Despite these safeguards to prevent against political interference there still continues to be concerns (see below) in this regard.

### **17. Why does the Chief Justice have such an important role to play in the entire process?**

The Chief Justice appoints judges to the Permanent High Court at Bar and makes the final decision on which cases are heard by the Permanent High Court at Bar.

In the original gazetted Bill it was up to the Attorney General or the Director General for the Prevention of Bribery and Corruption to decide which cases would be referred to the Permanent High Court at Bar.<sup>10</sup> However based on several Petitions filed challenging the constitutionality of this, the Supreme Court said that this power should be with the Chief Justice.<sup>11</sup>

The gazetted Bill also enabled the JSC as well as the Chief Justice appointing judges to the Permanent High Court at Bar.<sup>12</sup> However the Supreme Court determined that this power should solely be with the Chief Justice.<sup>13</sup>

### **18. What are the risks associated with having a dedicated Permanent High Court at Bar?**

- The main risk is that the Permanent High Court at Bar would not have the desired impact and would not be able to conclude cases within a short period of time. This could happen if;
  - The necessary resources are not allocated to these courts;
  - Causes for delays within investigation agencies and the Attorney General's Department are not adequately addressed;
  - The judges do not adhere to the requirements specified in the amendment act including of day to day trial and not granting postponements unless in exceptional circumstances.

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<sup>10</sup> Clause 12A(7), Judicature Amendment Bill, Published in the Gazette on 6<sup>th</sup> February 2018, available at <http://www.parliament.lk/uploads/bills/gbills/english/6082.pdf>

<sup>11</sup> SC SD 7 – 13 of 2018 , available at <http://www.parliament.lk/uploads/bills/scdet/6082.pdf>

<sup>12</sup> Clause 12A(2), Judicature Amendment Bill, Published in the Gazette on 6<sup>th</sup> February 2018, available at <http://www.parliament.lk/uploads/bills/gbills/english/6082.pdf>

<sup>13</sup> SC SD 7 – 13 of 2018 , available at <http://www.parliament.lk/uploads/bills/scdet/6082.pdf>



- The role of the Chief Justice is also less than ideal in that it gives one individual a lot of power (see answers to question 16 and 17 above). There could be a situation where these powers are misused to scuttle attempts to prosecute financial crimes or to target political opponents. The original proposal of giving this power to the JSC<sup>14</sup> would have been an improvement. However it should be remembered that with the 19<sup>th</sup> Amendment to the Constitution, the executive wields much less influence over the Chief Justice than before but there continues to be a need for greater safeguards to protect the integrity of the judiciary and other key state structures.
- Concerns have also been raised with specialised courts that there is the risk of stereotypes being developed which can be prejudicial to either the prosecution or to the accused. This could result in more verdicts of such courts being more likely to be overturned in Appeal. Therefore in order to ensure that there is a fair trial process there should be specially trained judges hearing cases on rotation.
- There is only one appeal from a verdict of the Permanent High Court at Bar and five judges of the Supreme Court will hear such an appeal. This will add to the workload of the Supreme Court and could potentially create more backlogs in the Supreme Court.

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<sup>14</sup> Judicial Service Commission comprises of the Chief Justice and the two most senior Judges of the Supreme Court appointed by the President. See Article 111D of the Constitution.