

# Should Positive Prescription on Land be Swept Away from the Sri Lankan Legal System as a Result of Introducing a Torrance System?

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## Background

Positive prescription<sup>1</sup> is not an unfamiliar concept to Sri Lankan land law. The history of this concept dates back to Roman days when it had originated as a mode of acquiring land ownership under Roman Land law. Positive prescription became part of Sri Lankan land law when Roman-Dutch law was received by the Sri Lankan legal system. However, Roman-Dutch law principles on positive prescription were changed and abolished<sup>2</sup> by way of introduction of English law in 1871.<sup>3</sup> Thus current Sri Lankan law on positive prescription is a mixture of both Roman-Dutch and English law principles. Prescription Ordinance 1871 contains specific provisions to regulate law relating to acquiring land ownership by adverse possession. By fulfilling these requirements<sup>4</sup> an adverse possessor can acquire ownership to a plot of land.

The registration of documents system was introduced to Sri Lanka in 1863.<sup>5</sup> There were previous attempts to introduce Title Registration to Sri Lanka;<sup>6</sup> registration of documents system prevailed till 1998 as none of these attempts were successful. Title Registration Act which is operational now was enacted in 1998. The Act is currently being implemented in various parts of the country<sup>7</sup> and is expected to be fully implemented by the year 2020, and till then, both systems will function as parallels. Registration of prescriptive title to a land based on adverse possession is accepted under registration of documents system and, Prescription Ordinance and Registration of Documents Ordinance were functional together without any conflict. Nevertheless, law of positive prescription was abolished by section 57 of Registration of title Act in 1998. Consequently prescription will not be considered as a method of acquiring ownership to lands in Sri Lanka after Torrance system is fully implemented. This paper intends to research whether this is essential and justifiable in a Torrance system and also whether Sri Lanka should abolish prescriptive ownership to land entirely. The paper would also bring suggestions to amend section 57 of registration of title act of 1998.

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<sup>1</sup> Scope of this paper is limited to positive prescription on land

<sup>2</sup> *Terunnanse v Menike* (1895) 1 NLR 200, *Dabare v Martelis Appu* (1901) 5 NLR 210, *Fernando v Wijesooriya* (1947) 48 NLR 320, *Perera v Ranatunge* (1964) 66 NLR 337

<sup>3</sup> Regulation No. 13 of 1822, Ordinance No 08 of 1834, Prescription Ordinance No 22 of 1871

<sup>4</sup> Section 03 of Ordinance No 22 of 1871 as amended by Ordinance No 2 of 1889

<sup>5</sup> Ordinance No 8 of 1863, Ordinance No 3 of 1865, Ordinance No 14 of 1891, Ordinance No 23 of 1927

<sup>6</sup> Ordinance No 8 of 1863, Ordinance No 3 of 1907

<sup>7</sup> Some areas in Central and Southern provinces

## Methodology

A comparative study method will be adopted to observe the possibilities of applying law of positive prescription in a Torrance system. Two similar legal systems, South Africa and Scotland are the preferable counterparts for the purpose as legal writers<sup>8</sup> and judges in a few cases<sup>9</sup> had mentioned that these three jurisdictions share common mixed legal systems. According Carry Miller<sup>10</sup>, all three systems' development of the law occurs through similar forms of law making. Thus a comparative research on these three legal systems is justifiable and findings could help to reach a better conclusion.

## Outcome

### Scotland

The positive prescription in Scotland is regulated by Prescription and Limitation (Scotland) Act 1973. Section 1 of the Act states: "A land possessed for a continuous period of ten years, openly, peaceably and without any judicial interruption will be entitled for prescriptive title". The validity of such a title becomes unchallengeable if prescribed proceedings stated in the Act are followed in order to acquire the title.<sup>11</sup> Development of positive prescription was mainly done by the Scottish legislature and bringing down the required period of adverse possession from forty years to ten years was a significant amendment which came about over the years.<sup>12</sup> It is worth to spell out Para 3.8 of the Scottish Law commission discussion paper on "Land Registration: Void and Voidable Titles"<sup>13</sup> which reads as follows;

" A positive system of registration of title is no substitute for positive prescription. Prescription makes a void title good beyond challenge. Registration of title makes it good but challengeable"

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<sup>8</sup> T Nadaraja, *The Legal System of Ceylon in its Historical Setting*, 1972, 247 , Sharaya Scharenguivel, *Parental and State Responsibility for Children*, 2005, Rohan Edrisinha, "The Future of the Roman Dutch Law in Sri Lanka's Mixed Legal System: The Law of Defamation in Sri Lanka: a Case Study" paper at 2007 World Society of Mixed Jurisdiction Jurists Edinburgh Conference , L J M Cooray, *An Introduction to the Legal System of Sri Lanka*, 2ed.1992, 95 , G L Peiris, *The Law of Property in Sri Lanka*, I, (2nd edn 1983) , Weeramantry, *The Law of Contracts*, I, 66 , In the centenary volume of the *South African Law Journal* published in 1993 editor Professor Ellison Kahn acknowledged the contributions since 1949 of "eminent judges, practitioners and academics from abroad" including, "from Sri Lanka, Professor C F Amerasinghe, Professor L J M Cooray, L Kadirgamar, M Sornarajah, Professor G L Peiris, R S de Soysa...", David L Carry Miller, *Three of a kind? positive prescription in Sri Lanka, South Africa and Scotland*, *Electronic Journal of Comparative Law*, vol. 12.1 (May 2008)

<sup>9</sup> *Kodeeswaran v The Attorney General* (1971) 72 NLR 337 Lord Diplock , *Silva v Mohamedu* (1916) 19 NLR 426 Pereira J in *Fernando v Perera* (1914) 18 NLR 150, 151 ,

<sup>10</sup> David L Carry Miller, *Three of a kind? positive prescription in Sri Lanka, South Africa and Scotland*, *Electronic Journal of Comparative Law*, vol. 12.1 (May 2008)

<sup>11</sup> Section 1 of Prescription and Limitation (Scotland) Act 1973

<sup>12</sup> Johnston, *Prescription and Limitation* Para 1.26

<sup>13</sup> Scottish Law Commission, Discussion paper No 125, "Land Registration: Void and Voidable Titles", 2004, para 3.8

In Scotland registration of rights to land is regulated by Land Registration (Scotland) Act 1979. This Act provides opportunity to register interests of possessors to a land even before they are entitled to bring a claim on positive prescriptive right to such land.<sup>14</sup>

#### South Africa

The South African law on positive prescription is regulated by Prescription Act 68 of 1969. According to section 1 of the Act, “A person shall by prescription become the owner of a thing which he has possessed openly as if he were the owner...for an interrupted period of thirty years.....” Though this Act replaced some common law requirements<sup>15</sup> stated in the previous Act<sup>16</sup>, South African law still holds slightly adjusted common law requirements on positive prescription. Van der Merwe commenting on current law on positive prescription in South Africa, states that nothing more or less is needed for prescription than *possessio civilis*.<sup>17</sup> However, unlike its counterparts, positive prescription is not quite common in South Africa as a method of acquiring ownership. There could be two possible reasons for this trend. One could be the requirement of thirty year possessory period which is only ten both in Sri Lanka and Scotland. The other could be the Section 25 of South African constitution which protects right to property<sup>18</sup> including right to lands. Section 25 of the constitution secures and protects land owners rights inter alia. However, positive prescription being a less popular mode of acquiring property in South Africa, its legal system still recognizes positive prescription as a pure form of original acquisition.<sup>19</sup>

#### Conclusion

Though positive prescription gives the impression that it is an unfair and unjust method of acquisition of ownership, it contains deep and wide underlying principles. It is a fact that concepts such as positive prescription are regulated according to the domestic laws of each selected jurisdiction. However as this is a unique common law concept, legal framework on positive prescription in these three jurisdictions can benefit from each other.

Sri Lanka is a country with a mixed jurisdiction in which Roman-Dutch common law plays a major role. With the outcome of this comparative research, it will be proven that there is no stipulation to abolish law of positive prescription entirely from Sri Lankan legal system. If there is a need, if at all it should happen with reasonable justification but not merely because there is a need to implement Torrance system in the country. Most importantly, acquiring ownership by prescriptive possession is not based on owner’s faulty ownership at the time of the possessor’s entry. Similarly, the possessor need not

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<sup>14</sup> Section 1 of Prescription and Limitation (Scotland) Act 1973

<sup>15</sup> *nec vi, nec calum, nec precario*

<sup>16</sup> Prescription Act 18 of 1943, s 2(1)

<sup>17</sup> C G van der Merwe “Original Acquisition of Ownership” in R Zimmermann and D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa*, 702-717 at 716

<sup>18</sup> Constitution of the Republic of South Africa, Act 108 of 1996

<sup>19</sup> David L Carry Miller, *Three of a kind? positive prescription in Sri Lanka, South Africa and Scotland*, *Electronic Journal of Comparative Law*, vol. 12.1 (May 2008) at 20

have any title to the land at the entry. Therefore there is no need to abolish law of positive prescription, just because the owner of a plot receives a title certificate under new Registration of Title Act. There is a need to amend the existing law on positive prescription so both systems can operate smoothly without any conflict, but there is no need to sweep it away from our legal system especially without valid grounds.