

Sri Lanka

**The Employment Relationship
(scope) in Sri Lanka**

RKS Suresh Chandra

Table of Contents

I	INTRODUCTION.....	3
II	DEPENDANT WORK AND INDEPENDENT WORK.....	4
	DEPENDANT WORK	14
	INDEPENDENT WORK	19
III	WORK OF AN AMBIGUOUS OR DISGUISED NATURE	19
IV	CASE STUDIES.....	20
IV	CONCLUSION	21

I Introduction

The employment relationship in Sri Lanka is based on the Employer-Employee relationship, which over the years has gained protection under the law. The common Law concept of the contract based on a Master and servant relationship under the Roman Dutch Law, which was later influenced by the English Law concepts. The influence of English Law was seen mostly in the area of the rights and liabilities of the Master and servant relationship in regard to third parties.

The relationship comes into being when a person lets out his services to another who hires them for a fee. Under the Roman Dutch Law the relationship between the Employer and the Employee as treated as a pure contract between equals as free agents. However, such a description does not divulge the realities of the situation in relation to social and economic factors as the relationship in most instances is not one between equals as the economic disparity between the parties would often show that the contract is not one between equals. The contract of employment under the Roman Dutch Law imposed rights and duties on both parties for the breach of which remedies falling short of specific performance were available.

But with the advent of social welfare legislation, the contract of employment has undergone a transformation with the emphasis on the protection of the Employee's rights specially in relation to wages, conditions of employment, health and safety and termination. The modifications in the Common Law have been brought about by legislation, the rise of the Trade Unions and collective bargaining and has resulted in rendering the relationship to one more of status rather than that of a strict contract. This position in Sri Lanka is clearly seen in the area categorised as "dependant workers" but in the area of self-employment the position under the Common Law remains the same with no additional protection being afforded to them by law.

According to a survey on the labour force in Sri Lanka carried out in the year 2000 the economically active population was estimated at 6.7 million of which 6.17 million were employed and 0.53 million were unemployed. Nearly half of the working age population is economically active. Of all working age males, 66.6 percent are economically active while nearly one third of the working age females are economically active. The total activity rate increased up to the age group 35-39 years and declined thereafter. The highest participation rate can be seen in the age group 40-44 years for males and in the group 35-39 years for females.

Of the employed persons 67.2 percent are males and 32.8 percent are females. Occupations under the major industrial group "Agricultural, Livestock and Fisheries" have dominated all other industrial groups in the rural sector. More than half the employed persons are reported under the major industrial groups "Personal and community Services " and "Trade and Hotels" in the urban sector. Of the employed persons, nearly 57 percent work as "employees" and another 28.6 percent work as "own account workers".

Out of a total of 100 percent, 13.8 percent are in the public sector, 43.9 are in the private sector, 27 percent are own account workers and 13.2 are unpaid family workers according to the aforesaid statistics.

The majority of the population in Sri Lanka fall into the category of dependant workers, in relation to the Government sector and the Private sector. Those in the Government Sector do not come under the purview of Labour legislation and it is only the private sector and the semi government sector who come under their purview. In the private sector although labour legislation is expected to be followed in a uniform manner, the manner in which they are followed in practice is not really satisfactory. The employers can be categorised into a Formal Established Category and a non-formal and not properly established category or small time employers. The Established Categories generally follow the Labour Legislation with much responsibility but they are very often observed in the breach by the latter category. This perhaps is due to the fact that Sri Lanka is still a developing country and the machinery for the proper implementation of the labour legislation is not quite in place.

In the area of dependant workers, there are attempts by employers to disguise such relationships by employing common law concepts such as "contract work", "contract employment", "labour contracts", "hiring of labour" etc. However, such concepts have been proved to be unsuccessful when challenged in Courts. The latest trend seen in this connection is the concept of "outsourcing" whereby matters which are cumbersome to be handled by an organisation are handed over to a third party on the basis of a contractual agreement.

There is no legislation covering self-employment in Sri Lanka though occasionally attempts have been made to introduce welfare schemes regarding them.

II Dependant Work and Independent Work

The protection granted by legislation applies to employees who are strictly so called. Therefore the distinction between Independent Contractors and Workmen has been maintained in this area. This is so specially because apart from the Shop and Office Employee's Act, there is no other Statute which imposes an obligation on the employer to issue a letter of employment to employees. In the said Shop and Office Employee's Act S.17 provides that "Every employer by whom any person is employed in or about the business of any shop or office shall furnish such person on the date of his employment with such particulars as may be prescribed relating to the conditions of his employment". So, in the absence of a letter of appointment and sometimes in the absence of documentation to establish such a relationship, the distinction between Independent Contractors and Workmen becomes all the more important.

The Statutes dealing with Labour legislation such as the Industrial Disputes Act, The Shop and Office Employees' Act, The Wages Boards Ordinance, The Workmen's Compensation Ordinance, The Employees' Provident Fund Act, The Employees Trust

Fund act, The Factories Ordinance, etc have definitions of Employers and Workmen which facilitate the drawing of the above distinction between Independent Contractors and Workmen.

The Shop and Office Employees' act No.19 of 1954 which is an Act providing for the regulation of employment, hours of work and remuneration of persons in shops and offices and for matters connected therewith or incidental thereto defines an "Employer" (a) in relation to any shop, means the owner of the business of that shop, and includes any person having the charge or the general management and control of that shop, and (b) in relation to any office, means the person carrying on, or for the time being responsible for the management of, the business for the purposes of which the office is maintained.

The Employment of Women, Young Persons, and Children Act No.47 of 1956 defines an "Employer" as any person who on his own behalf employs or on whose behalf any other person employs any woman, young person or child and includes any person who on behalf of any other person employs any woman, your person or child.

The Industrial Disputes Act No.4 of 1950 has the following definitions:

"Employer" means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union) and any person who on behalf of any other person employs any workman.

"Workman" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any person whose services have been terminated.

The Workmen's Compensation Ordinance No.19 of 1934 has the following definitions:

"Workman" means any person who is employed on wages not exceeding five hundred rupees per mensem in any such capacity as is for the time being specified in Schedule II, whether the remuneration is calculated by time or by work done or otherwise, and whether the contract of employment or service was made before or after the commencement of this Ordinance and whether such contract is expressed or implied, oral or in writing.

"Employer" includes the Republic of Sri Lanka and any body of persons whether corporate or unincorporate and any managing agent of an employer and the heirs, executors or administrators of a deceased employer, and, when the services of a workman are temporarily lent or let on hire to another person by the person with whom the

workman has entered into a contract or service or apprenticeship, means such other person while the workman is working for him.

The Wages Boards Ordinance No.27 of 1941 has the following definitions:

"Employer" means any person who on his own behalf employs, or on whose behalf any other person employs, any worker in any trade, and includes any person who on behalf of any other person employs any worker in any trade.

"Worker" means any person employed to perform any work in any trade.

The Trade Unions Ordinance No.14 of 1935 has the following definition:

"Workman" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is express or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour and includes any person ordinarily employed under any such contract, whether such person is or is not in employment at any particular time.

The Maternity Benefits Ordinance No.32 of 1939 has the following definitions:

"Employer" means any person who on his own behalf employs or on whose behalf any other person employs any woman worker; and includes any person who on behalf of any other person employs any woman worker.

"Woman worker" means a woman (other than a woman employed in or about the business of a shop or an office or a woman whose employment is of a casual nature) employed on wages in any trade, whether such wages are calculated by time or by work done or otherwise and whether the contract of employment or service was made before or after the commencement of this Ordinance, and whether such contract is expressed or implied, oral or in writing.

The Employees' Provident Fund Act No.15 of 1958 has the following definitions:

"Employer" means any person who on his own behalf employs, or any person on whose behalf any other person employs, or any person who on behalf of any other person employs, any person in a covered employment.

"Employee" includes any apprentice or learner who is paid a remuneration.

The Employees' Trust Fund Act No. 46 of 1980 has the following definitions:

"Employer" means any person who employs or on whose behalf of any other person employs, any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union) and any person, who on behalf of any other person, employs any workman, and includes the legal heir, successor in law, executors or

administrator and liquidator of a company and in the case of an unincorporated body, the President or the secretary of such body, and in the case of a partnership, the managing partner or manager.

"Employee" includes any apprentice or learner who is paid a remuneration.

The Termination of Employment of Workmen Act No.45 of 1971 has the following definitions:

"Employer" means any person who employs, or on whose behalf any other person employs, any workman and includes a body of employers (whether such body is a firm, company, corporation, trade union or other body unincorporate), and any person who on behalf of any other person employs and workman.

"Workman" has the meaning as in the Industrial Disputes Act.

The Payment of Gratuities Act No.12 of 1983 has the following definitions:

"Employer" means any person who employs or on whose behalf any other person employs any workman and includes a body of employers or any person who on behalf of any other person employs any workman any person or body of employers who or which has ceased to be an employer.

"Workman" means any person who has entered into or works under a contract with an employer in any capacity. Whether the contract is expressed or implied, oral or in writing and whether it is a contract of serviced or of apprenticeship or a contract personally to execute any work or labour and includes any person ordinarily employed under any such

contract whether such person is or is not in employment at any particular time, and includes any workman whose services have been terminated.

The above definitions are fairly comprehensive and encompass a fairly wide area where the contract of employment can arise. Situations have arisen where the above definitions have been the subject of analysis by Courts but such situations are few as set out below.

Apart from the definitions in these statutes, the Sri Lankan Courts have even where there have been letters regarding the contract of employment which do not clearly draw out the distinction, looked into the realities of the situation and decided in favour of the employee. The Courts have in this connection used the traditional tests, viz., **The Control Test, The Integration Test and the Economic Reality Test.** Vide Carson **Cumberbach & Co. Ltd. v Nandasena** 77 N.L.R.73; Associated Newspapers of Ceylon Ltd. Vs De Silva 1978-79 2S.L.R.173; Ceylon Mercantile Union v Ceylon Fertilizer Corporation 1985 1 S.L.R. 40; Perera v Marikkar Bawa Ltd. 1989 1 S.L.R. 173.

The definition of Employer and Workman have been the subject of analysis in some cases the most noteworthy of which is the decision in Carson Cumberbatch & Co. Ltd. v Nandasena. This case dealt with the position of a Managing Agent of the Employer and the Court came to the conclusion that there was no contract of employment between the workman and the Agent.. Justice Tennekoon in the course of his Judgment dealt with the definition of the term "Employer" in the Industrial Disputes Act. He stated that the definition can be split up into three limbs:

- 1) any person who employs any workman,
- 2) any person on whose behalf any other person employs any workman,
- 3) any person who on behalf of any other person employs any workman.

Justice Tennekoon went on to state that "We are of opinion that the person referred to as a person employing a workman in each of the three limbs of the definition is intended to refer to a person who is under contractual obligation to the workman. Thus the first limb of the definition will catch up a person who himself engages a workman and also one who engages a workman through an agent who is known to the latter to be acting as agent; the second limb will apply to a principal on whose behalf an agent, without disclosing the existence or identity of his principal engages the services of a workman; in such case the workman on discovering the existence and identity of the principal can hold him to the contract; the 3rd limb would include the type of agent who is referred to under the second limb, because in such a case the agent is at common law regarded as having contracted personally."

Apart from this Judgment there has been no other instance where the definition of "Employer" has been dealt with in great detail. A comparison was made with the definition of Employer in the Workmen's compensation Ordinance, The Shop and Office Employees' Act, the Maternity Benefits Ordinance.

In De Silva Vs Associated Newspapers of Ceylon Ltd. the question arose as to whether a news correspondent who was appointed under a series of written contracts which were renewed from time to time came within the definition of the term "workman" in the Industrial Disputes Act when his contract was not renewed and when he sought relief from the Labour Tribunal. The Court of Appeal in the course of its Judgment stated thus: "The inadequacies of the "control test" have led Judges to formulate other tests in the context of modern industrial complexities. One of them known as the "integration test" was formulated by Lord Denning thus: "under a contract of service a man is employed as a part of the business; whereas under a contract for services, his work although done for the business, is not integrated into it, but is only accessory to it". Stevenson, Jordan and Harrison Ltd. v McDonald and Evans or as stated by the same learned Judge in another case "The test of being a servant does not nowadays depend on submission to orders. It depends on whether a person is part and parcel of the organisation.In U.S. v Silk the Supreme Court of the United states has decided that in determining whether certain person were "employees" within the meaning of a statute the

test to be applied is not "power of control" whether exercised or not, over the manner of performing services to the undertaking", but whether the men were employees "as a matter of economic reality". Based on this decision the English courts have recently evolved a test which is really a refinement of the integration test, and it was status thus by Cooke, J in *Market Investigations Ltd. v Minister of Social Security* "the fundamental test to be applied is this: Is the person who has engaged himself to perform these services performing them as a person in business on his own account? If the answer to the question is 'yes' then the contract is a "contract for services". If the answer is "no" then the contract is a "contract of services".

The Court reached the conclusion that the correspondents of the Newspaper Company were certainly not doing business on their own account. They were employed as part and parcel of the company's business of newspaper publishers. They were an integral part of the company's business, and not merely accessory to it. They were therefore employed under contracts of service by the company and were "workmen" within the meaning of the Industrial Disputes Act.

In *Perera v Marikar Bawa* the question arose as to whether a person engaged as the Head Cutter of the Tailoring establishment of the Respondent Company was a workman within the definition of the term in the Industrial disputes Act. Perera was provided with a cubicle but employed his own workmen and used his own tools. The Company passed on tailoring orders to him and on execution he was paid a commission from the collections for each month. The company collected the payment from the customer and kept the accounts. The appellant did not sign the attendance register and was not entitled to a bonus like other employees.

Justice Viknarajah having considered the Control Test, the integration test and the economic reality test went on to state that it would appear that the greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of service. Control is just one of many factors whose influence varies according to circumstances. The test which emerges from the authorities seem to me, as Denning L.J. said, whether on the hand the employee is employed as part of the business and his work is an integral part of the business or whether his work is not integrated on to the business but is only accessory to it or as Cooke J expressed it, the work is done by him in business on his own account. The appellant did not carry on his business of head cutter as a business belonging to him. It was a business done by the appellant for the respondent. He was not on par with the other staff of the respondent because the mode of payment was different but he still remained part and parcel of the organisation. The Court held that the appellant was an employee within the meaning of the Industrial Disputes Act.

The above cases have expanded the concept of "workman" widely to encompass what would normally have been though not to be a contract of employment. The widening of the net of the term workman brings with it with several other consequences. The payment of provident fund, trust fund, gratuity, regulation of work in respect of time and payments, termination would have an effect if a person is brought under the

definition of the term "workman". It would be a fruitful academic exercise to expand the concept of workman in order to bring in new areas under its umbrella, but at the same time several far reaching consequences would also arise specially from the point of view of the employer. In a world of extreme competition it would be timely to consider whether such expansion should be done or not.

The situations which have been brought under the umbrella of the term "workman" would probably have never been envisaged by the parties to constitute situations of contracts of employment. They would have been quite satisfied with the terms agreed upon at the commencement of the arrangement. But only when disputes arise specially when the contract is not renewed or there is a cessation of the contract that the question of the application of the relevant laws come into play. It would appear that the party seeking to establish a contract of employment is certainly trying to take advantage of the situation and to put the employer into jeopardy. Therefore it may be necessary to consider the basis of the creation of the relationship and its genuineness before embarking on the attempt to establish a contract of employment so that the party seeking to establish that he is a workman can get the advantage of the application of the various aspects of labour legislation. In order to do this it would be necessary to consider the intention of the parties at the commencement of the relationship, which could be gathered from the attendant circumstances. However, the case law which has considered these situations have been centered on the actual working of the relationship and not as regards the intention of the parties.

The definitions in the above Statutes which are favourable to employees has sometimes resulted in Employers adopting ways and mean of avoiding the statutory duties caste on them for example employing labour through a Labour Contractor. However, case law in Sri Lanka is indicative of the fact that such methods have been failures as the tendency is to bring the employee under the definition of the term "workman". Vide Fertilizer Corporation Vs The Ceylon Mercantile Union.

In this case The Fertilizer Corporation employed labour through a third party with whom there was a contractual agreement to supply labour. However, it was shown that the Corporation had exercised control over the employees supplied by the third party and that the contract entered into between the corporation and the third party was a subterfuge to overcome the application of the labour laws. It was held that the Corporation was the employer of the employees.

A similar situation arose in relation to the Termination of Employment (Special Provisions) Act in the case of Free Lanka trading Co. Ltd. v De Mel 1979 N.L.R. Vol. 2 188. Seven persons were engaged by the Company as "Technical Sales representatives" on a written agreement. Clauses 3(e) and 5(f) of the agreement read as follows:

3(e) "The Independent Agents agrees to determine for himself the hours and days he will work in the company's behalf and will only submit those reports to the company that he deems necessary in the conduct of his business as an Independent Agent."

5(f) "The Independent Agent is aware of the definition of 'worker' as appearing in the annual Holidays Act, Shops and Office act, Wages boards Ordinance, Workmen's compensation Ordinance and the definition of 'employee' as appearing in the Industrial Disputes act, and agrees and acknowledges that he is not within such definitions and that he has received legal advice to that effect and to the import and meaning of all the provisions of this Agreement."

However, it appeared that in fact, the position was that the work done by these Sales Representatives and their relations with the management were regulated not by the terms of this agreement but carried out in a very different manner very much at variance with the said terms. The conduct of the business by these Sales Representatives and the mode of the discharge of their duties appeared to have been very much under the control of the management and so much so that they had, inter alia, to finish Daily Call Sheets, a work calendar every Saturday for the following week, weekly reports on sales etc. and came under the direct supervisions and disciplinary control of the general sales Manager.

It was held (1) that the said agreement appeared to have been entered into so as to erect a façade under cover of which the management could seek to avoid performance of obligations cast by law upon employers towards the employees. Though it is proved that the representatives were paid a commission or a salary and commission, the mode in which remuneration was paid was not decisive on the question whether a person was an employee or an independent contractor.

(2) That the clauses of the said agreement which purported to set out the agreement of the parties on the legal effect were not relevant as the contract was not intended to be and/or was not acted upon.

(3) That the Sales representatives came within the category of workmen within the meaning of the Act.

Apart from the conventional types of employment such as where an organisation engages persons to work for them in their institution, there are certain types of situations in Sri Lanka which may be necessary to consider.

In the transport sector, relating to the plying of lorries, taxis and three wheelers (tri-shaws) there is an arrangement between the Owner of the Cab or three wheeler with the person engaged to drive such vehicle for profit sharing. Out of the earnings for the day, the amount for expenses are set apart and out of the net balance a portion is paid to the driver, usually one third and the balance is taken by the owner of the vehicle. In some instances there is a fixed amount that has to be paid by the driver to the owner at the end of the day irrespective of the amount that has been earned for the day. There is a tendency to consider such situations as creating employer employee relationships which may bring into effect the application of the labour laws. If that happens, fairly a large number of owners of vehicles will desist in supporting the transport system of the country.

In the industrial sector, in the use of lathe machines, there is a practice where owners of lathe machines have arrangements with operators of such machines where the owner collects a fixed amount at the end of the day from the operator. If this situation is brought under the economic reality test, since the machinery belongs to the owner and very often it is in a building owned by him, the owner would be considered as having an employer-employee relationship with the operators of the lathe machines.

In village areas, there is a practice relating to the manufacture of beedis (a small cigar where tobacco is rolled up in a special kind of leaf) which is popular among manual labourers, where the entrepreneur engages mostly women to produce the cigars by providing them with the leaf and the tobacco which are taken to their homes. The women hand over the manufactured beedis to the owner and collect a fee for their labour. If the advanced tests used by Courts are applied to this situation, it may be argued that this situation also brings about an employer-employee relationship.

There is a similar practice regarding the manufacture of joss sticks (incense sticks) where again the raw material is given out to people who take it to their homes and produce the finished product.

The concept of "outsourcing" is a new innovation adopted by some manufacturers and organisations to reduce the hazzle of controlling labour and having space to house labour etc. This is seen in some organisations in relation to the providing of security, where rather than having their own employees to provide security in the organisation, the entire security aspect is handed over to a Security Company who would engage their personnel to carry out the security work of the organisation.

Similar arrangements are seen sometimes in the transport sector of some organisations. Rather than having their own transport managers and drivers to drive vehicles, vehicles are hired out from outsiders to provide the necessary transport of the organisation, thus doing away with employing drivers.

It has also been observed in certain Garment Manufacturing Companies, that certain items are given out to third parties, such as for example doing a small embroidery pattern on a ladies garment and such third parties take it to their own homes and attend to same and get paid on a piece rate basis.

Similarly it has been observed certain manufacturers in confectionaries, give out their products to third parties for purposes of wrapping or bottling who do the same outside the manufacturers factory and get paid on a piece rate basis.

The question of whether such "outsourcing" would attract the application of the labour laws is yet to be seen.

In recent times, certain problems have been encountered by some institutions in relation to the engaging of skilled personnel in relation to their businesses which have been traditionally considered as not bringing about an employer-employee relationship.

This has occurred in the area of the payment of Employees Provident Funds. The labour Department has in recent times taken the view that such relationships do not debar the application of the Employees Provident Fund Act and has called upon Institutions to pay such funds for persons who had been engaged by them for period of 30 to 40 years and in relation to whom the payment of such provident funds had never been considered. Such situations are seen in relation to Insurance business, where persons who are engaged as "Assessors" who are not considered as employees but who are called upon to assess damages to vehicles when insurance claims are made and who are paid on the basis of assessments done by them. Such persons had not been considered to come under the purview of the E.P.F. Act for the 30 to 40 years that they have been engaged as Assessors but suddenly the Institution is being called upon to pay them their Provident Funds. This has created a very serious situation in Sri Lanka and would certainly lead to litigation.

If the issuing of a letter of appointment is made mandatory by legislation, it may be possible to overcome the difficulties encountered in relation to the determination of the question of whether an employee is a workman or an independent contractor to some extent. But caution must be drawn to the fact that an employer may try to issue a letter of appointment, which would on the face of it show that there is no contract of employment. However, in such situations as shown above the Courts would determine whether there exists a contract of employment or not.

The question of whether a person engaged by another is a workman or not is determined specially when there has been a termination of such engagement and the Employer takes up the position that the claimant is not a workman when the workman challenges such termination. Termination is challenged in Sri Lanka in two situations.

If the termination is categorised as a non-disciplinary termination, i./e. where termination has taken place due to reasons which are not categorised as disciplinary reasons, then the forum for such challenge is the Commissioner of Labour in terms of the Termination of Employment (special Provisions) Act No.45 of 1971 where the question of whether the Applicant is a workman or not would be gone into.

On the other hand if the termination is a disciplinary termination then the forum is the Labour Tribunal established under the Industrial Disputes Act No.43 of 1950 which will go into the questions of whether the Applicant is a workman or not. However, the jurisdiction of the Labour Tribunal is not limited to cases of disciplinary termination and has a wider jurisdiction to deal with non-disciplinary terminations as well.

There are certain other instances where the question of whether a person is a workman or not arise specially in relation to the payment of Provident Funds under the Employees' Provident Fund, the payment of Trust Funds under the Employees Trust Fund and the payment of gratuity under the Payment of Gratuity Act. In these instances it is the Commissioner of Labour who is clothed with jurisdiction to determine the question of whether a person is a workman who is entitled to such benefits under the relevant laws.

Apart from these instances where the Labour Tribunal or the Commissioner of Labour would look into the question of the contract of employment, under the legal system of Sri Lanka a person is entitled to go before the ordinary Civil Courts, (District Court) regarding questions relating to employment. However, these ordinary Civil Court remedies are not resorted to as they are time consuming and expensive for the workman.

The manner in which it can be determined as to whether there is a true Employer - Workman relationship is to see whether there has been a letter of appointment setting out the terms and conditions of employment, and whether there is compliance with statutory payments by the Employer to the workers, such as provident fund benefits, trust fund benefits, gratuity, minimum wages where stipulated, etc.

If the issuing of a letter of appointment is made mandatory by legislation, it may be possible to overcome the difficulties encountered in relation to the determination of the question of whether an employee is a workman or an independent contractor to some extent. But caution must be drawn to the fact that an employer may try to issue a letter of appointment, which would on the face of it show that there is no contract of employment. However, in such instances as shown above the Court would determine whether there exists a contract of employment or not.

But as stated above, the issuing of a letter of appointment is set out only in the Shop and Office employment Act which applies to employment in shops and offices and therefore is not mandatory in respect of other categories of employment. In 1994 there was an attempt by the Ministry of Labour to introduce a Labour Charter where one of the proposals was to make the issuing of a letter of appointment mandatory. However, the Charter was not approved.

As to the supervision of the payments of statutory payments by Employers to workers, the Commissioner of Labour is empowered by the relevant statutes to carry out inspections, hold inquiries, to make orders for such payments and to prosecute employers who do not comply with such orders. Though there are effective legislative measures in this sphere, the practical applicability of them due to lack of proper machinery seems to be a major problem in Sri Lanka.

Dependant Work

1. The relationship of employer and employee may be characterised as a 'voluntary relationship into which the parties may enter on terms laid down by themselves, within limitations imposed only by the general law of contract'. It imposes obligations on both parties.

The contract of employment may be identified from the following criteria:

- (a) Selection
- (b) Giving of orders
- (c) control

- (d) Right of dismissal
- (e) Payment of remuneration.

The definition of the terms "workman", "employer" in the statutes regarding labour legislation are the best sources available in determining the relationship of employer and workman. These definitions have been given above. In addition, case law too as shown above has assisted in establishing this relationship. The term that is used in most of the Statutes to describe the employee in the contractual relationship is the term "workman".

2. The issuing of a letter of appointment, the payment of a salary or wage as opposed to a fee, the exercise of disciplinary control, the contribution to Provident Funds, Trust Funds, payment of gratuity, granting of maternity benefits, seeking the approval of the Commissioner of Labour for purposes of redundancy and closures, are all indicative of the existence of the contract of employment and the relationship of employer and workman. Where these matters are complied with there is an assumption that there exists a proper Employer-workman relationship. The Commissioner of Labour (now known as the Commissioner General of Labour) is the Head of the Labour Department and he has been conferred wide powers regarding the implementation of the provisions of the Labour Statutes.

Therefore where there is no letter of appointment and where there is non-compliance of the statutory requirements in respect of labour legislation, questions arise as to the very nature of the employment as to whether there exists a true employer-worker relationship. It is in such circumstances when complaints are made to the relevant authorities as stated above that determinations would be made regarding the actual relationship.

3. The provisions in the various Labour Statutes entitle the workman to seek the assistance of the Commissioner of Labour in the event of breaches of the provisions of the labour statutes, for example non-payment of wages, granting of leave, overtime payments, gratuity etc. The Commissioner is empowered to inquire into such complaints and make orders and to enforce them. Such inquiries are conducted by his Officers.

The Commissioner of Labour through his Officers are expected to carry out inspections regularly to see whether Employers carry out the basic conditions of employment specially in relation to the provisions in the Shop and Office Employees' Act, The Provident Fund Act, The Employees Trust Fund Act, The Factories Ordinance, Wages Boards Ordinance, Maternity Benefits Ordinance, even in the absence of complaints regarding breaches. However, this is an area, which is not very satisfactory as many an errant employer is not brought to book or even if action is taken implementation of such action is very slow.

A further drawback in this area is the inability of a worker to take steps to implement orders made by the Commissioner of Labour on his behalf, as such

steps have to be taken only by the Commissioner of Labour. Due to the lack of proper personnel and machinery, there are considerable delays in this process. There have been instances where workers have resorted to obtaining Writs of Mandamus against the Commissioner of Labour to compel the commissioner to take steps to enforce orders.

The implementation of the provisions of the various Statutes is carried out by the Commissioner of Labour as only he is empowered to do so. Such actions are taken through the Magistrate's Courts and the procedure that is involved is very slow, as matters relating to labour are taken up sometimes only once a week among other matters. If there are separate Labour Courts dealing exclusively with labour related matters, there would be proper implementation of the various statutory requirements.

4. (a) Conditions of Employment and Remuneration

Conditions of employment are sometimes laid down in certain Statutes e.g. Shop and Office Employees Act, Factories Ordinance. But the proper implementation of these provisions is not very satisfactory, as the supervisions that is expected to be carried out by the Labour Department is not satisfactory.

As regards remuneration, the concept of minimum wages is seen only in the provisions of the Wages Boards Ordinance. But it is only those categories of employees for whom Wages Boards are set up who come under the provisions of this law.

(b) Occupational Safety & Health Conditions

Mandatory provisions relating to these are found in the Shop & Office Employees Act, The Factories Ordinance, the Maternity Benefits Ordinance. Here again implementation of these provisions is not very satisfactory due to lack of supervisions by the Authorities.

The Workmen's Compensation Ordinance provides for the payment of compensation for injuries suffered by workmen, including the causing of death in the event of injuries or death resulting out of or arising out of course of employment. A schedule of payments to be made depending on the nature of the injury is set out in the said Ordinance. Many established employers have taken out Insurance covers in respect of such contingencies. A Commissioner is in charge of the implementation of the provisions of this Ordinance and he is empowered to hold inquiries and determine the quantum of compensation payable. The Ordinance also provides for sickness due to occupational disease and provides for the payment of compensation in such instances too.

(c) Social Security

There are no legislative measures in this area.

(d) Freedom of Association

It is a fundamental right guaranteed by the Constitution of Sri Lanka. Article 14(1) (c) provides that every citizen is entitled to the freedom of association.

The Trade Unions Ordinance provides for the formation of and registration of Trade Unions. However, the Trade Unions Ordinance does not have any provisions imposing any obligations on an employer to recognise Trade Unions. But the amendment to the Industrial Disputes Act in 1999 has made it mandatory for an Employer to recognise Trade Unions for purposes of collective bargaining. This has been in keeping with the ratification of the ILO Convention regarding same by Sri Lanka. This Act has aroused much dissatisfaction among Employers and the Commissioner of Labour has been rather slow in implementing the provisions of this amending Act.

(e) Collective Bargaining

There have been many instances of collective bargaining, which resulted in the formulation of Collective Agreement between Employers and Trade Unions. The provisions of the Industrial Disputes Act provide for the formulation and registration of Collective Agreements. Until the amendment to the Industrial Disputes Act in 1999 there was no compulsion on an Employer regarding collective bargaining. The amendment was again in keeping with the ratification of the ILO convention regarding collective bargaining. However, the provisions in the amending Act do not seem to be quite satisfactory and has caused dissatisfaction among the Trade Unions.

(f) Access to Justice

All the Labour Statutes provide for access to the relevant authorities in the event of breaches of the statutory provisions by employers. The Commissioner of Labour is empowered in relation to the various Statutes to grant relief to workmen when complaints are made to him regarding non compliance with statutory requirements. Such complaints may relate to non-payment of wages, non granting of leave, non-granting of bonus payments, non conformity with the Provident Fund and Trust Fund Acts, non payment of gratuity, etc.

The Industrial Disputes Act has provision for conciliatory measures to be taken by the commissioner of Labour when complaints are made to him by employees. Such conciliations can relate to a wide range of industrial disputes inclusive of termination of employment. If by a process of conciliation, a settlement is arrived at, the Commissioner of Labour is empowered to record such settlements which are thereafter binding on the parties.

The Commissioner of Labour has also been conferred the power to refer industrial disputes for settlement by Arbitration. The Industrial disputes Act has provision for voluntary arbitration as well as compulsory arbitration. Voluntary Arbitration is referred to by the Commissioner where both parties agree to a reference to arbitration, while compulsory Arbitration is referred to at the instance of the Minister of Labour. The reference to compulsory arbitration can be in relation to matters pertaining to minor industrial disputes as well as major disputes inclusive of termination of employment.

There is also provision under the Industrial Disputes Act for employees to seek relief from Labour Tribunals in relation to Termination of Employment, and in relation to non-disciplinary termination of employment to seek relief from the Commissioner of Labour under the provisions of the Termination of Employment (Special Provisions) Act.

Labour Tribunals have been conferred a special jurisdiction to grant just and equitable relief including the granting of reinstatement of workmen where termination of the employment is determined as being unjustified. However, such orders can be subjected to an appeal firstly to the High Courts and thereafter even to the Supreme Court.

5. Possible Solutions

The strengthening of the machinery to implement statutory provisions which impose obligations on Employers would ensure the overcoming of most of the problems encountered. Further, public awareness of the provisions of the Statutes too would enable employees to be conscious of their rights which in turn would prompt them to alert the authorities concerned to take action.

A drawback encountered in this area is the delay in the enforcement procedures that are available. There has to be proper legal mechanisms to ensure speedier enforcement of the relevant provisions of law.

As stated above, the enforcement machinery is not quite satisfactory in Sri Lanka as such enforcement has to be done through the Magistrate's Courts. The Labour Tribunals though they have the jurisdiction to determine matters relating to termination of employment and grant relief to workmen in the event of wrongful or unjustifiable termination of employment, have no jurisdiction to enforce such orders. At present Labour Tribunal Presidents are also designated as Additional Magistrates. This move should enable Labour Tribunal Presidents to enforce their orders, but certain amendments may have to be made to the Industrial Disputes Act to enable them to do so. If this is made possible there would certainly be less delay in implementing orders made by Labour Tribunals.

Independent work

The Labour legislation in Sri Lanka does not apply to Independent Workers as they are considered to be their own masters. There is no protection afforded to them under the law except where the contract between them and their employers provide some protection, which would come strictly under the law of contract, and recourse would have to be made to ordinary civil courts. . There are no legal instruments regulating them. Therefore questions regarding conditions of employment, remuneration, occupational safety and conditions, social security, freedom of association, collective bargaining, access to justice, etc do not arise.

III Work of an ambiguous or disguised nature

Situations arise where it is necessary to determine whether an employee is a workman (dependant worker) or an independent contractor. These situations have been dealt with above in relation to Dependent work and Independent work.

As stated above, the main difficulties in determining whether a worker is dependent or independent would be in relation to the nature of the work entrusted, the skill required, the manner in which the work is carried out, the nature of the payment made and the granting of other benefits. If statutory benefits such as payment of provident fund benefits, trust fund benefits, gratuity etc are granted to the employees, they would certainly be considered as dependent workers.

When work is entrusted to persons on the basis of written contracts, which are not usually considered as letters of appointment, questions arise whether such contractual documents are genuine or not and Courts have considered such documents and treated them as situations which tend to avoid the application of labour laws.

As case law has clearly established the position relating to the distinction between workmen and independent contractors, there is a reduction in the attempts to have ambiguous or disguised situations. The only area where there is a development in this regard would appear to be situations where "outsourcing" is resorted to by Institutions to cut down on costs. Outsourcing takes place when certain aspects of a business establishment are taken out of the ordinary routine and given over to a third party to provide for such aspects purely on a contractual basis. The third party may employ labour to carry out such work. In such a situation, the third party would become the employer.

But even situations of "outsourcing" would soon be considered by Courts as there appears to be an increase in the use of this concept. In such an eventuality, it would appear that the courts would treat them in a similar way, as had been the case in determining the distinctions between workers and independent contractors.

IV Case studies

In transport enterprises, drivers are usually employed as employees and are treated as dependant workers who get protection under the various statutes. Some of the drivers are employed on the payment of a salary as stipulated under the Wages Boards Ordinance. Some work on the basis of the sharing of the turnover, which in turn may turn out to be a dependant worker situation.

Sales persons in large stores fall into the same category of dependant workers.

Construction workers too fall into the same category of dependant workers. In this area sometimes a triangular relationship is seen, which is usually referred to as "sub-contracting" but here again the employer can be easily identified using the definitions in the various statutes. Even in the instance of sub-contracting, if it appears to be a mere façade the main Employer may be considered as the employer of the workmen under the sub-contractor. Vide the decision in *Ceylon Mercantile Union v The Fertilizer corporation* (infra).

Apart from these, a problem situation has arisen in Sri Lanka regarding the increase in the use of the concept of "contract employment on the basis of a fixed term". Many employers have resorted to this concept in employing personnel in order to avoid regular or continuous employment. Usually fixed term contracts are resorted to in situation where projects have fixed time periods, as there would be no need to continue the workers after the project is completed. Therefore it is usual to assume that fixed term contracts cannot be utilised where the nature of employment is regular. However, it is seen that many employers resort to this type of fixed term contracts in relation to regular employment of personnel such as labourers, drivers, clerks, etc. whose contracts are renewed every year.

Questions have arisen in relation to such fixed term contracts when after some time there is no renewal of the contract. In such situations, courts have considered the nature of the employment and considered such situations as those of regular employment, and the contractual documents which sets out the fixed term contract are rendered nugatory.

In dealing with dependant work and independent work, different types of situations were considered. For example, the cases of contract labourers, sales representatives, news correspondents, skilled employees in tailoring establishments, beedi wrappers, joss stick assemblers, lathe machine operators, tri-shaw drivers, lorry drivers, taxi drivers, etc. It was seen that in these situations such workers were considered as workmen and thus falling into the category of dependant workers. Once they are categorised under that head, they are entitled to the protection of the various labour statutes enumerated above.

The Workers Charter which was proposed in 1994 had a solution to the problems relating to fixed term contracts by confining such contracts only to specific categories but unfortunately the said Charter did not come into effect.

A further area that needs clarification is the area of "casual employment". Many employers resort to this concept in order to avoid permanent or regular employment. The Statutory provisions are not very satisfactory in this area and need looking into to bring about a satisfactory solution.

The word "casual" denotes such employment as is subject to, resulting from or occupying by chance and without regularity. A casual employee is one employed by chance on no contract to employ. He will be offered work as and when work is available. An employer cannot expect a casual employee to arrive work continuously. He can report for work as and when he so desires. He cannot as of right expect work from the employer. By its very nature such employment cannot confer upon a workman a right to reinstatement as there is no former position in which he can be placed again or a previous state to which he can be restored as in the case a permanent employee. Vide Merrill Fernando vs. Deimon Singho 1988 2 S.L.L.R.242.

The description or designation on a document where the workman may have agreed to be designated as a casual employee is not conclusive. The actual relationship between the parties much be examined and if it is revealed that the employer had treated the employee as a person with a permanent character, then he will not be treated as a casual employee.

The Workers Charter, which was proposed in 1994, had a solution to the problem relating to casual employee but unfortunately the said charter did not come into effect.

IV Conclusion

The nature of the contract of employment has assumed fairly satisfactory proportions and the basis has been firmly established through the various statutes and case law. The distinctions between workers and independent workers have been clearly set out and all that is required is only refinement of such principles.

The distinction between dependant workers and independent workers is very clearly established in Sri Lanka. As far as work of an ambiguous or disguised nature are concerned, attempts at such have proved to be a failure when brought to book when considering the case law that is available on the subject.

Attempts at creating Triangular situations have also proved a failure in Sri Lanka when brought to book and the distinction between dependant and independent workers has been firmly rooted.

Independent workers do not get special protection under the law except the general law relating to contracts, and they do not get any protection under the labour laws nor are there any welfare measures provided to them under the Labour laws.

In Sri Lanka as there is a strong Trade Union movement, (there are more than 1000 registered Trade Unions) employees are fairly aware of the benefits afforded to them by the various labour statutes. Unawareness of such benefits lies only in the unorganised sector or the small time business community. The only way in which they can be made aware of such benefits is to carry out awareness programmes aimed at such persons specially in the rural areas.

In Sri Lanka the Statutory measures that are available are fairly satisfactory in protecting the workers. There are certain areas where there can be some improvement, specially the need for a mandatory letter of appointment, categorisation of fixed term contracts, settling the questions relating to casual employment, etc. However, the problems are not mainly regarding inadequacy of legal provisions, but in the implementation and enforcement of same. The weaknesses in the enforcement machinery has been stated above. The mechanisms and the machinery available are not adequate and not very satisfactory and this is an area, which has to be strengthened.