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Editor's note...

This issue of the LST Review features a presentation made by ***Justice Catherine A. Fraser,*** Chief Justice of Alberta (Canada) on 15th December 2002 at Hotel Taj Samudra (Sri Lanka) titled ***"Human Rights in Canadian Criminal Law: Striking the Appropriate Balance"***. The presentation was made at a seminar on 'Comparative Public Law & Human Rights in South Africa and Canada', which was organised by the Law & Society Trust (LST) in collaboration with the Governance and Institutional Strengthening Project (GISP) and the Bar Association of Sri Lanka (BASL). Assistance for the event was also provided by the Berghof Foundation for Conflict Studies (Sri Lanka).

The presentation deals broadly with the issue as to how the international human rights discourse has shaped the criminal justice system of Canada. Using the Constitutionally entrenched 'Canadian Charter of Rights & Freedoms' as a point of reference; the paper discusses the human rights guaranteed under the Canadian criminal justice system, starting from the accused to the victims including the witnesses. The author also engages in a discussion of the due process rights guaranteed under the *Charter,* drawing interesting parallels to the Sri Lankan Constitution of 1978 and the 2000 Draft where applicable.

In conclusion, Justice Fraser touches on more practical issues encountered by the judiciary of Canada and also by judges around the world: safeguarding the interests of national security in the face of growing incidents of global terrorism. The paper concludes with an interesting discussion that deals with the controversial topic of the plight of human rights in the face of threats to national security through increased incidents of global terrorism.

As the author rightly points out,

> *Terrorism raises complex legal issues. A delicate balancing act must be performed by both the legislative and judicial branches of government. When the threat of terrorism is real and pressing, the test justifying a restriction of a right may result in a tilting away from individual rights and freedoms in favour of a country's collective security interests. However, even then, it remains necessary to respect the rule of law and ensure that the state's power is not wielded in an arbitrary or disproportionate manner.*

Mr. Nikhil Roy, who functions as a juvenile justice consultant in London, has contributed with an overview of international trends and emerging issues for the administration of juvenile justice. Mr. Roy has first considered the international instruments that are available in this regard, and the standards that have been set by them. While it is the writer's opinion that these standards reflect progressive values, he draws the reader's attention to the anomaly that exists in their implementation. He has strongly advocated law reform, particularly with a view to making the juvenile justice system more child-friendly, thus distinguishing it from the formal criminal justice system. He ends on the note that children have the right, and must be given the opportunity, to participate in the decision-making process related to the issue of juvenile justice, as it is a topic that has the capacity to impact heavily on their lives.

Combining the issues of criminality and children is *Ms. Lakmini Seneviratne*'s article on Child Combatants. The author describes the post-war condition in Sri Lanka and evaluates the position of the child combatant in view of the protection afforded to children, both under Human Rights laws as well as International Humanitarian law. The status of a child combatant in an international armed conflict situation is contrasted with that of a child combatant in an internal armed conflict, with a view to gaining a better understanding of the implications for the many thousands of children who have been used as combatants in Sri Lanka's two-decade long war.

The article looks at child soldiers as being neither heroes nor martyrs, but innocent victims of circumstance. It deals with their right to childhood and freedom, and evaluates the extent to which those rights are marginalized when the child is made to be a combatant. The author strives to make the point that children are not fitted for the complexities of war, and should not be made to participate in it. Quoting Graça Machel, the UN expert on the impact of armed conflict on children, she makes the point that "peace is every child's right."

We Sri Lankans as a community are generally concerned with the external manifestations of a war, and it is those aspects that we often address once the war is ended. However, long-term implications that cannot be easily seen are often ignored in our quest to rebuild and repair. This article is a timely reminder of the fact that the ending of war does bring with it a host of issues that need urgent attention, but that many of them are psychological, not physical, and that the rehabilitation of child combatants is one that is too important to be ignored.

Human Rights in Canadian Criminal Law: Striking the Appropriate Balance

Catherine A. Fraser[*]

1. Introduction[1]

Twenty years ago, Canada constitutionally entrenched a *Charter of Rights and Freedoms*[2] guaranteeing a broad range of human rights to everyone in Canada, including those accused of crimes. Thus, the focus of this paper will be on these *Charter* rights and their effect on our criminal justice system.

The Canadian and Sri Lankan Constitutions contain many of the same rights, though the content of, and limitations on, those rights often differ. Therefore, despite our varied dialects, we have much to talk to each other about, and we should have no trouble understanding each other.

Mention the word "rights" and we often think of someone accused of a crime – their rights – and the subsequent police investigation. This is the focus of scores of movies, books and television shows and understandably so, because it dramatically highlights many of the competing forces in our criminal justice system, for example, our desire to bring criminals to justice and our need not to convict the innocent.

But to many, "rights" does not simply mean rights for the accused; it also includes the rights of law-abiding members of the community. In this context, "rights" means living without fear and without discrimination in an atmosphere of mutual respect, trust and caring. And it most certainly includes the right to a criminal justice system, which is effective in protecting the safety and security of all citizens from crime, corruption and the wrongdoers responsible for both.

To understand the role of human rights in Canada's criminal justice system today, it is first necessary to explain how we treated this issue in the past. Historically, Canada's approach to human rights in criminal law was a civil liberties due process model. The goal of this model was clear – to protect those accused of crime from the overbearing state apparatus and its

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[1] The writer wishes to thank Jeffrey Keller, Executive Legal Officer, for his invaluable assistance in the research and preparation of this paper.

[2] *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act*, 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter, *"Charter"*]. The *Charter's* roots can be found in the *United Nations' Universal Declaration of Human Rights* in 1948 and other international human rights treaties and covenants. These instruments, with their broad declarations of individual rights tempered by societal or group rights, foreshadowed many modern human rights guarantees around the world. In Canada's case, the *Charter* was also influenced by the *European Convention for the protection of Human Rights and Fundamental Freedoms*, the *United Nations International Covenant on Civil and Political Rights* and the *United Nations Convention on the Elimination of all Forms of Discrimination Against Women*.

focus on law and order. In this competition, which pitted the accused against the state, an accused's individual rights or civil liberties became an important protection against state power.

In Canada, we have gradually shifted away from a purely due process model towards a more complex criminal justice model – what may be characterized as an equality or human rights model. This model is based on a new generation of guaranteed rights, new rights-bearers, new interests and new articulation of accepted ideas. This does not mean that due process rights are no longer of critical importance. They most certainly are. What it does mean, however, is that today, more than ever, judges recognize that the interpretation of rights inevitably involves a weighing and balancing of competing rights or values. With respect to due process rights, sometimes that competition remains between the state and the accused only; other times, the equality rights of other rights-bearers will affect the scope and content of due process rights and vice versa.

Several factors led us to this stage. Certainly, the constitutional entrenchment of *Charter* equality guarantees resulted in a more explicit balancing of competing rights along with a recognition that all rights continue to evolve. In addition, we came to understand that to "achieve the goal of safer communities, we also must ensure that we are effectively protecting the most vulnerable members of society."[3] To accomplish this and maintain respect for the rule of law, we realized that the criminal justice system must meet the needs of all groups in society, including those historically disadvantaged by the law. At the top of this list were women. But women were not alone. The list included several other disadvantaged groups: children, the disabled, Aboriginal peoples, people of colour, people of different races, gays and lesbians, and people of different faiths.

As a society, we also recognized the legitimacy of victims' calls for a larger role in the criminal justice system. In the past, victims had been regarded as mere witnesses to a battle between the state and the accused. As one author noted: "The public nature of crime muted the voice of victims at all stages of the criminal process."[4] By contrast, victims' rights have now begun to influence several aspects of the criminal justice system, from the content of substantive laws, to rules of procedure and evidence, and to sentencing.

Today, there is another feature common to many countries around the world that might affect the selected balance – concerns about terrorism. There will be times when the state's interest clashes with civil liberties and national security will be more important. In those situations, the balancing of state versus individual rights may well be weighted differently than at other times. Even then, however, it falls to the judiciary as the institution charged with defending constitutional rights to ensure that the rights of all our citizens are protected to the greatest extent possible.

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[3] The Honourable Martin Cauchon, Minister of Justice and Attorney-General of Canada, "Canada's Justice System – New Directions" (The Canadian Bar Association, London, Ontario, 12 August 2002) [unpublished]

[4] Joan Barret, *Balancing Charter Interests: Victims' Rights and Third Party Remedies*, looseleaf (Toronto: Carswell, 2001) at 1 – 2.

Therefore, today, it is widely accepted that human rights in criminal law involve more than the accused's due process rights; they also include the equality rights of others, including victims, and the state's rights. The role of both Parliament and the judiciary is to strike the appropriate balance amongst competing rights when called on to do so.

The paper begins with a brief discussion of *Charter* rights. The discussion then considers equality rights and how they have informed and affected our criminal justice system. This is followed by a basic outline on the legal rights guaranteed under the *Charter,* which briefly highlights how they intersect with the rights of other rights-bearers. Finally the writer looks at how Canada is currently attempting to deal with issues of national security and terrorism. In doing so, she projects to the future and the challenges judges around the world face when rights collide with national security.

2. The Canadian Charter of Rights and Freedoms

The *Charter* "guarantees a set of civil liberties that are regarded as so important that they should receive immunity, or at least special protection, from state action."[5] Being part of the Constitution, the *Charter* takes precedence over all statutes in the country, both federally and provincially. Although the *Charter* applies only to governmental action, it has influenced the evolution of many areas of the law.[6]

The rights enshrined in the *Charter* fall into six categories, and include the following:

- **Fundamental Freedoms**
  Protection for freedom of conscience, religion, thought, belief, expression and assembly

- **Legal Rights**
  Right to life, liberty and security of the person; protection from unreasonable search and seizure and arbitrary imprisonment. These rights also include rights upon arrest, at trial and sentencing.

- **Democratic Rights**
  Right to vote and run for political office.

- **Mobility Rights**
  Right to live and work in any part of the country, and the right to leave and re-enter the country.

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[5] Peter Hogg, *Constitutional Law of Canada,* (3rd Edition) , (Toronto: Carswell, 1992) at 795

[6] Anybody exercising statutory authority, such as the Governor General, Lieutenant Governor, government ministers, officials, municipalities, administrative tribunals and police officers, is also bound by the *Charter*: Peter Hogg, *Constitutional Law of Canada,* (3rd Edition) (Toronto: Carswell, 1992) at 836

- **Language Rights**
  Guaranteed use of English and French in all federal institutions and minority language education where numbers warrant.

- **Equality Rights**
  Prohibition of discrimination on the *basis* of race, ethnic origin, colour, religion, sex, age, mental or physical disability and other analogous grounds.[7]

Except for gender equality guarantees, *Charter* rights are not absolute.[8] Weighting and balancing of constitutional rights occurs on more than one level and by more than one actor. Under Canada's parliamentary liberal democracy, it is the legislative branch of government, which is responsible for enacting legislation. Parliament is of course free in the first instance to limit the scope of a constitutional right so that the right itself already reflects a balancing of competing interests quite apart from any other constitutional limitations on it. For example, in Canada, the *Charter* guarantees the right to be free from unreasonable search and seizure, not all searches and seizures.

However, the most powerful tool, which Parliament has in balancing competing rights under the criminal law, is s 1 of the *Charter*.

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 24(2) of the *Charter* provides another vehicle for balancing of rights. It provides that where evidence has been obtained in a manner which infringes a Charter right, it will be excluded if the admission of evidence would damage the reputation of the justice system. This often requires a balancing of rights as between the accused on the one hand, and the state and victims of crime on the other.

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[7] While the victim's rights are not specifically enshrined in the *Charter*, the same way legal rights for the criminally accused are, victims and third parties can use *Charter* rights to assist in their protection. As well, every province of Canada has enacted a victim's bill of rights to establish standards for the treatment of crime victims. These rights are not legally enforceable and only two provinces, British Columbia and Manitoba, provide for a formal complaint procedure for alleged violations. Therefore, these bills of rights have been criticized as being merely symbolic: *Victims of Crime Act*, S.A. 1996, c. V – 3, 3; *Victims of Crime Act*, R.S.B.C. 1996, c. 478; *The Victims' Rights Act*, S.M. 1998, c. 44; *Victims Services Act*, S.N.B. 1987, c. V – 2.1; *Victims of Crime Services Act*, R.S.N. 1988, c. v-5; *Victims of Crime Act*, R.S.N.W.T. 1988, c. 9; *Victims' Rights and Services Act* S.N.S. 1989, c. 14; *Victims' Bill of Rights* 1995, S.O. 1995, c. 6; *Victims of Crime Act*, R.S.P.E.I. 1988, c. V – 3.1; *An Act respecting assistance and compensation for victims of crime*, S.Q. 1993; c. 54; *The Victims of Crime Act* 1995, S.S. 1995, c. V- 6.011. A national victim's bill of rights does not exist. However, numerous amendments have been made to the *Criminal Code* to reflect the needs of victims through the criminal process.

[8] Section 28 of the *Charter* states: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Also rights of the Aboriginal people of Canada cannot be overridden by Section 1 of the *Charter* as these rights, under s. 35 of the *Constitution*, are not part of the *Charter*.

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a matter that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Under the Sri Lankan Constitution, Parliament has adopted a limitation on rights similar to, but broader than, Canada's s 1limitation. Many rights are "subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others ....."[9]

Thus, in both Canada and Sri Lanka, our Constitutions contemplate that there will be circumstances in which our respective Parliaments may legitimately limit constitutional rights in the interests of the rights of others.

Under the Canadian Constitution, the judiciary is assigned the responsibility of reviewing state action for the purpose of ensuring constitutional compliance. In particular, s. 24(1) of the *Charter* makes it clear that the adjudication of these questions falls within the responsibility of a "court of competent jurisdiction."[10] Accordingly, the judiciary also plays an integral role in the weighing and balancing of constitutional rights. As the defender of constitutional rights, the judiciary's review of Parliament's efforts to balance rights occurs most often in the context of a challenge to statutory legislation. In the course of that review, the courts will engage in a weighing and balancing exercise to determine if the challenged legislation passes constitutional muster. If Parliament has not lived up to its constitutional obligations, then the offending legislation may well be struck down.

3. Equality Rights and the Criminal Law

Canadian Charter

Section 15: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Sri Lankan Constitution (1978)

Article 12 (1): All persons are equal before the law and are entitled to the equal protection of the law.

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[9] *Constitution of the Democratic Socialist Republic of Sri Lanka* (certified 31 August 1978) article 15 (7)

[10] *Charter* s. 24(1) states: "Anyone whose rights or freedoms, as guaranteed by this *Charter* have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds...

Sri Lankan Constitution (2000 draft)

Article 11(1): All persons are equal before the law and are entitled to the equal protection of the law.

(2) No citizen shall be discriminated against the grounds of race, religion, language, caste, sex, political or other opinion, place of birth or any one of such grounds...

Equality plays a central role in human rights worldwide. Equality is the common language of all humanity and is now part of the international lexicon of universal rights, fair treatment and entitlement. It is also an integral part of Canada's parliamentary democracy.

Why are Canadians so concerned about equality? The answer is a simple one. We are trying to ensure that our system of justice is an inclusive one. To be inclusive, it must be fair and equal. And to be fair and equal, it must do more than meet the needs and concerns of any one group in society because access to justice involves more than just serving those for whom the system already works well. If we fail in this task; if the public's expectations for fair and equal justice do not match the reality of the delivery of justice and the gap between the two cannot be explained on some credible basis, then we risk a loss of confidence and trust. And without public confidence and trust in the administration of justice, who will accede to the rule of law?

This helps explain the importance attached to human rights, and especially equality rights, in Canada. The right to equality has been described as the broadest of all *Charter* guarantees, applying to and supporting all other guaranteed rights."[11]

The Supreme Court of Canada requires that courts use a contextual approach to equality issues.[12] When determining whether a law breaches equality guarantees, the Court must not look at the law in an isolated or abstract manner but in the context of the circumstances of the group affected by it in Canadian society and the prior response of the legal system to those circumstances. This means considering whether the individual is part of a group which has a history of exclusion (for example, one that suffers from pre-existing disadvantage, stereotyping, prejudice or vulnerability); the effect of the impugned law on the disadvantaged person or group; whether by excluding the claimant the law has an ameliorative effect on

[11] Per McIntyre, J in ***Andrews v. Law Society of British Columbia*** [1989] 1 S.C.R. 143 at 185

[12] This approach was set out in the decision of Justice McIntyre in ***Andrews v. Law Society of British Columbia*** [1989] 1S.C.R. 143. The Court also expressly rejected the similarly situated test on the basis that it was "seriously deficient" for equality comparisons because it excluded any consideration of the nature of the law or its impact on different people (at 166). Instead, the Supreme Court decided that "... for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions" (at 169). The Court stated that equality issues may involve "a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society" *Ibid* at 152

other more disadvantaged individuals; and the nature and scope of the claimant's interest affected by the law. In the end, the critical question is whether the law is discriminatory and has the effect of demeaning the claimant's human dignity.[13]

Not every distinction, which the law makes, is considered discriminatory. Under Canadian law, discrimination involves adverse treatment, disadvantage and improper burdens. Writing for the Supreme Court in a leading equality rights decision, one judge stated:

> *I would say that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.*[14]

Discrimination takes many forms: direct discrimination, adverse effect or indirect discrimination, and systemic discrimination. Direct discrimination is very clear and recognizable. It occurs when someone adopts a rule or practice or makes a comment, which[15] singles out the target group for discriminatory treatment on a prohibited ground. For example, "No Catholics or no women or no blacks employed here."[16]

Adverse effect, or indirect discrimination occurs when a rule or standard is adopted which is supposedly neutral but has a disproportionate adverse effect on one or more classes of persons.[17] A good example of this is where an employer offers employment to a person in a wheelchair without having a ramp available to permit the necessary access.[18] Or where a

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[13] See ***Law v. Canada (Minister of Employment and Immigration)*** [1999] 1 S.C.R. 497.

[14] ***Andrews v. The Law Society of British Columbia*** [1989] 1 S.C.R. 143, per McIntyre, J. To prove discrimination, it must also be established that there is a conflict between the purpose or effect of an impugned law and the purpose of the equality guarantee, which is said to be safeguarding of a person's dignity: ***Law v. Canada*** [1999] 1 S.C.R. 497.

[15] Direct discrimination includes the unconscious use of stereotypes to attribute to individuals characteristics which those individuals do not possess but which they supposedly have by reason of membership in a certain class.

[16] ***Ontario Human Rights Commission and O'Malley v. Simpson - Sears et al*** [1985] 2 S.C.R. 536 at 551.

[17] ***Ontario Human Rights Commission and O'Malley v. Simpson-Sears et al*** [1985] 2 S.C.R. 536. This case established that even though an employer might have a good business reason for a practice or policy, it could still be discriminatory if it had a disproportionate and prejudicial effect on particular people because of a prohibited ground of discrimination. As McIntyre J. said at 551:

> *An employment rule honestly made for sound economic or business reasons, equally applicable to all whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from other to whom it may apply.*

[18] Another example of the duty to provide reasonable accommodation can be found in *Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd. (1985)* 18 D.L.R. (4th) 93 (Sask. C.A.) *(Huck)*, leave to appeal to S.C.C. refused June 3, 1985. In this case, a theatre owner was required to make the theatre accessible to those in wheelchairs so that they could view movies without having to be placed at the very front of the movie theatre.

hospital fails to provide sign language for deaf patients in the publicly-funded health system.[19]

Systemic discrimination is the most difficult to identify because it is so deeply embedded in existing structures that often it is simply seen as "the way things are".[20] Perhaps one of the best examples of systemic discrimination were the rules developed (many of which were judge-made) to deal with complaints of sexual assault.

For example, under the now abolished doctrine of recent complaint, an adverse inference could be drawn from the failure of a woman to raise an immediate hue and cry. And the now repealed laws on corroboration required that, unless there was corroborating evidence available, the judge had to warn a jury about the danger of convicting an accused solely on the basis of the complainant's testimony.[21] These rules – classic examples of gender bias in the law – disadvantaged women in sexual offences through the centuries for no reason other than that they were female.

As Madam Justice Claire L'Heureux-Dubé of the Supreme Court of Canada explained:

> *For a long time, these rules of evidence were cloaked with the colour of reason, and accepted without question. Students were told that the rules were necessary because of the nature of sexual crimes ... Why was credibility more of an issue in this area of law where the complainants were mostly women?*[22]

While many of the laws which discriminated against women were abolished by Parliament following the adoption of the *Charter*, an equality model approach to the criminal law has resulted in profound changes to the criminal law and to the criminal justice system itself. Discriminatory statutory provisions have been repealed and conduct previously condoned by society, such as marital rape, has been criminalized. But *Charter* equality guarantees have affected more than the content of our laws and rules of evidence and procedure. They have also influenced other actors in the criminal justice system: police, prosecution, corrections and parole.

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[19] ***Eldridge v.British Columbia (Attorney General)* [1997] 3 S.C.R. 624.**

[20] It was described by Chief Justice Dickson in *Action Travail des Femmes v. Canada (Canadian Human rights Commission)* [1987] 1 S.C.R. 1114 at 1139:
In other words, systematic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job"

[21] This rule was abolished as of January 4, 1983 as regards complainants in sexual offences (s. 246.4 of the *Criminal Code*) but it was not until January 1, 1988 that the rule was abolished with respect to child witnesses giving unsworn evidence.

[22] L'Heureux – Dubè, J. *"Beyond the Myths: Justice"* (Address to the Canadian Bar Association, Family Law Section, April, (1994)) [Unpublished] at 2 – 3.

It is not only *Charter* equality rights themselves which have influenced the evolution of the criminal law. Equality thinking, which motivated the adoption of these rights, has also played a significant role. After all, while Parliament can eliminate the most egregious laws, it is sometimes more difficult to eliminate the myths and stereotypes underlying those laws.[23] Purging the criminal law of unfair myths and stereotypes, especially about women, has been one of the most positive results of the emergence of the human rights model.

> *The task of rooting out inequality and injustice from our society is advancing to a higher stage since, increasingly, we are recognizing that inequality and discrimination often stem not from express intentions on the part of any given individual or group, but rather from the effects of innocently motivated actions. This requires that we understand equality and make it part of our thinking on every issue. We must keep our minds open to as yet unchallenged assumptions and stereotypes.*[24]

What has perhaps been most interesting about the post-*Charter* evolution of equality rights in Canada has been the extent to which these rights have pollinated other areas of the common law, for example tort and even contract law. Equality has also played a significant role in the interpretation of a wide variety of statutes such as those governing family law.[25]

3.1 Equality Rights and the Accused

It is important to understand that rights do not always conflict. For example, equality rights may in fact enhance the due process rights of an accused. There are several examples where this has occurred.

- **Battered Women and Self-Defence**

In ***R. v. Lavallee***[26], the Supreme Court of Canada reformulated the law of self-defence by making it responsive to the life experiences of women.[27] The Court recognized that our

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[23] "[I]n examining other areas of the law, we must be alert to the ways the law's assumptions may not respect the principles of equality." The Honourable Claire L' Heureux – Dubè, *"Conversations on Equality"* (1999) 26 Man. L.J. 273 - 298 (QL JOUR) at paragraph 17.

[24] The Honourable Clair L' Heureux-Dubè, *"The Legacy of the 'Persons Case': Cultivating the Living Tree's Equality Leaves"* (2000), 63 Sask. L.Rev. 389 at paragraph 32.

[25] See, for example, The Honourable Clarre L' Heureux-Dubè, *"Making Equality Work in Family Law"* (1997) 14 Can J. Fam. L. 103

[26] [1990] 1 S.C.R. 852

[27] *Criminal Code*

34 (1) Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

traditional approach to this defence, which had been interpreted to require imminent danger as a prerequisite to the use of force, was based on the male perspective of self-defence. This has been referred to as the bar-room brawl model.

> *The law of self-defence is designed to ensure that the use of defensive force is really necessary.... If there is a significant time interval between the original unlawful assault and the accused's response, one tends to suspect that the accused was motivated by revenge rather than self-defence. In the paradigmatic case of a one-time bar-room brawl between two men of equal size and strength, this inference makes sense.*[28]

The problem, though, is that interpreting the scope of the defence in this way fails to take into account the perspective of the battered woman. Lavallee, a battered woman, had killed her abusive male partner even though she did not face immediate imminent danger as historically interpreted.[29] She was acquitted by the Supreme Court on the following facts: Lavallee

(1) had been beaten numerous times by her partner;
(2) was again violently attacked on the evening of the shooting;
(3) was told by her partner that he was going to kill her after their friends left;
(4) was handed a loaded gun by her partner; and
(5) shot her partner in the back as he left the room.

In essence, the Court recognized that women may respond in self-defence in a manner that differ from what would be expected of the "reasonable man". As explained by Wilson, J. in the Supreme Court of Canada:

> *If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted in circumstances, which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man."*[30]

The Supreme Court also recognized the need to admit expert evidence about battered women to assist the jury in determining whether the woman's actions were "reasonable" in the circumstances. Expert evidence had been presented at Lavallee's trial showing that the accused suffered from battered woman syndrome. The syndrome, a psychological pathology of learned helplessness resulting from a continuous cycle of abuse, explains why a woman would remain in a violent domestic situation. Women who suffer from it feel trapped and see no way to escape the abuse or the abuser. Therefore, an abused woman who kills her partner

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[28] ***R. v. Lavallee***, [1990] 1 S.C.R. 852 at 876
[29] ***R v. Lavallee***, [1990] 1 S.C.R. 852
[30] ***R v. Lavallee***, [1990] 1 S.C.R. 852 at 874

may, depending on the circumstances, be able to rely on self-defence even if another violent attack had not been "imminent."

> *Lavallee is a clear statement that it will be reasonable for battered women to act in self-defence in circumstances and in ways that the law would not consider reasonable for the ubiquitous (and fictitious) "reasonable man". Mme. Justice Wilson's acceptance of the significance of the "battered woman syndrome" indicates a willingness on the part of the Court to consider expanding the traditional notion of self-defence to incorporate perspectives of women that differ from the male norm. Movement in this direction is not only important for battered women but is an important step towards gender equality in the law.*[31]

It is not enough, however, for judges to understand the language of equality. Juries must understand it too. Judges must therefore explain to jurors how to use the expert evidence on battered women and how the pattern of conduct, between husband and wife, including past conduct, might have affected the wife's assessment of the risk of death or serious bodily injury as well as whether, given the history, the wife believed that she could not preserve herself from death or serious bodily injury except by taking the preventative action that she did against the victim. The judge must point out that the expert's evidence can be of assistance in making the decision. The jury charge in Canada based on this form of self-defence covers these issues in depth. Without this information; it is not likely that a jury would know what use to make of the evidence that it has heard.

- **Sentencing of Aboriginal Offenders**

A number of reports, studies and articles have been compiled about Aboriginal[32] bias in the

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[31] Martha Shaffer, "*R v. Lavallee: A Review Essay*" (1990) 22 Ottawa L. Rev. 607 at 610.

[32] There have been more than 25 documenting the concerns of the Aboriginal communities about the justice system. See for example Nova Scotia, *Royal Commission on the Donald Marshall, Jr. Prosecution: Commissioners Report: Findings and Recommendations* (Halifax: The Commission, 1989) (Commissioner: T. Alexander Hickman); Task Force on the Criminal Justice System and its impact on the Indian and Metis People of Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Metis People of Alberta* (Edmonton: The Task Force, 1991); Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*, August 12, 1991; Royal Commission on Aboriginal Peoples, Aboriginal Peoples and the Justice System: *Report on the National Round Table on Aboriginal Justice Issues*, 1993; *Justice For and By the Aboriginals: Report and Recommendations of the Advisory Committee on the Administration of Justice in Aboriginal Communities* (Quebec: The Committee, 1995); *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group, 1996); *Contemporary Aboriginal Justice Models* (Ottawa: Canadian Bar Association, 1996); *Royal Commission on Aboriginal Peoples* (Canada: The Commission, 1996); Royal Commission on Aboriginal Peoples, *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Royal Commission, 1996); *Final Report and Recommendations of the Aboriginal Justice Implementation Commission* (Winnipeg: AJIC, 2001).

Canadian justice system.[33] Numerous social programs have been developed to assist Aboriginal people with the serious problems they often face, problems which have led to their being disproportionately represented in Canadian jails. To remedy the excessive use of incarceration as a sanction and to ameliorate the disproportionate representation of Aboriginal offenders in prison, Parliament adopted sentencing principles to allow courts to take into account the particular circumstances of Aboriginal offenders.[34]

Thus, a sentencing judge must consider the unique systemic or background factors which may have played a part in bringing the offender before the court and the types of sentencing sanctions, which may therefore be appropriate.[35] Although this means that a different methodology should be used when determining a fit sentence for an Aboriginal offender, it does not necessarily follow that there will be a different result.[36]

One sentencing method which has been successfully used for Aboriginal offenders is the sentencing circle. This is based on traditional methods of Aboriginal justice and involves a gathering of the accused, the victim, members of the community, elders of the community, and the family members of the accused and victim. Together, the group reaches a consensus as to the appropriate sanction for the accused. This model is premised on a restorative justice approach in which the community plays a direct role and the focus is on the offender's rehabilitation and integration, rather than simply on punishment.[37] This method also allows for the participation of the victim and community in the sentencing process. Even with sentencing circles, however, the final decision as to the fitness of the sentence remains with the sentencing judge.[38]

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[33] Bias can manifest itself in different ways, some of which are not easy to identify. Dr. Sheilah Martin mentions a number of these in the context of gender bias, but the thoughts expressed apply equally to bias against other disadvantaged groups:

> Gender bias includes the exclusion of women because they are women, the improper use of incorrect and unchosen stereotypes, the use of double standards, the use of a male defined norm, the failure to incorporate or be sensitive to the perspectives of women, not recognizing or valorizing women's harms because they are done to women, being gender blind to gender specific realities, and using sexist language: Dr. Sheilah Martin, "*Proving Gender Bias in the Law and the Legal System*" in Joan Brockman and Dorathy E. Chunn, eds. *Investigating Gender Bias: Law, Courts and the Legal Profession* (Thompson Educational Publishing Inc.: Toronto, 1993) 19 at 24 - 25

[34] S. 718. 2 (e) of the *Criminal Code*: A court that imposes a sentence shall also take into consideration the following principles: all available sanctions other than imprisonment that are reasonable in the circumstance should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. Also, see ***R v. Gladue*** [1999] 1 S.C.R. 688

[35] ***R v Gladue*** [1999] 1 S.C.R. 688 at paragraph 66.

[36] ***R v. Wells*** (2000) 141 C.C.C. (3d) 368 (S.C.C.)

[37] See, Joan Barret, *Balancing Charter Interests: Victims' Rights and Third Party Remedies*, looseleaf (Toronto: Carswell, 2001) at 4 –26 – 4 –32.

[38] ***R v Morin*** (1995) 134 Sask. R. 120 (C.A)

- **Jury Selection**

The principle of equality has also played a role in jury selection. At one time, only male, property-owners could act as jurors. No system based on this approach could hold up under any equality analysis. Now, anyone may serve as a juror, subject only to certain statutory exceptions, for example, for lawyers.[39] Most important, an attempt to keep members of a certain ethnic or racial group off a jury panel is impermissible.[40] Similar reasoning would apply to efforts to pick a jury based on only one gender. Although there is no guarantee that members of the jury will be of the same gender, race or ethnicity as the accused, "there is now much greater recognition that the concern for equality requires that the process for choosing a jury be fair, that there is at least the possibility of a diverse jury, and that steps may be taken to eliminate bias or prejudiced jurors."[41]

Accordingly, it is permissible to challenge potential jurors for cause based on partiality.[42] Racial and gender bias unfortunately still exist in our society and thus, it may be appropriate to question potential jurors in order to ensure that the accused is judged by an impartial and unbiased jury.

3.2 Equality Rights and Victims of Crime

While the state still carries forward criminal prosecutions in the name of the state, victims, as rights bearers, have altered the rights landscape in Canada and with it, the criminal law. Although equality is the broadest of all *Charter* guarantees, the Supreme Court of Canada has emphasized that there is no hierarchy of rights in the *Charter*. That said, however, the Court has also confirmed that the fullest possible effect must be given to the rights of both the accused and the victim.[43]

Equality rights have affected the evolution of many other areas of the criminal law, for example, the decriminalization of abortion[44] and homosexual sex.[45] But it is in the context of sexual assault and domestic violence where the tension between the rights of the accused – who are usually male – and the rights of the victims – usually female – are most dramatically highlighted. The obvious question we had to face in examining these laws was this. How can women be equal under the law and entitled to the equal protection of the law when the legal system provides that for crimes of sexual violence against women, male accuseds are

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[39] *Criminal Code* s. 626 stipulates that anyone may serve as a juror subject to rules in the province in which they serve. In Alberta, the *Jury Act* , R.S.A. 2000, c. J –3 ss. 3 and 4 provide that any person 18 years of age or older who is a Canadian Citizen and resident of Alberta is qualified to serve as a juror unless they fall within an enumerated list of excluded persons such as elected officials, barristers and solicitors, and persons engaged in the administration of justice.

[40] ***R v. Butler*** (1984) 3 C.R. (4th) 174 (B.C.C.A.)

[41] *Tim Quigley, Procedure in Canadian Criminal Law* (Toronto: Carswell, 1997) at 424.

[42] ***R v. Parks*** (1993) 15 O.R. (3d) 324 (Ont. C.A.); leave to appeal to Supreme Court of Canada dismissed April 28, 1994.

[43] ***R v. Mills*** [1999] 3 S.C.R. 668 at 713 - 714

[44] ***R v. Morgentaler***, Smoling and Scott, [1988] 1 S.C.R. 30

[45] Although S. 159 of the *Criminal Code* declares anal intercourse to be an offense unless engaged in pvt, between a husband & wife or two persons 18 years or older, this section has been struck down as discriminating on the basic of age contrary to S. 15 of the *Charter*: ***R v. M*** (C) (1995) 98 c.c.c. (3d) 481 (Ont. C.A.)

entitled to super-added rights not accorded to those accused of other crimes? The answer is equally obvious: they cannot be.

Women and children constitute the overwhelming majority of victims of both sexual assault and domestic violence. Historically, laws governing sexual assault and domestic violence perpetuated existing inequities by denying women and children the equal benefit and protection of the law.[46] As a consequence, unfair myths and stereotypes, especially about women, led to their double victimization under the criminal justice system. Often, these myths and stereotypes "hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecutions of sexual offences."[47]

Under an human rights model, these inequalities and injustices have been thoroughly exposed for what they are – persistent and resistant gender bias against women – and Canadian laws changed accordingly. Following are some examples of how Canada has attempted to combat violence against women by eliminating this systemic discrimination and removing unfair legislative and institutional barriers.

- **Sexual Assault**

(i) Reinterpreting consent

The sea change, which has occurred in Canadian law relating to sexual assault and consent, can be summed up in one sentence. **The question is no longer whether a woman said "No" to sexual activity, but whether she said, "Yes**".

Until 1992, the *Criminal Code* did not define what was meant by "consent". It contained, (as does the present Sri Lankan Penal Code), a number of provisions as to what was **not** consent. But in the absence of any positive definition of what "consent" meant, it is fair to say that if the complainant's evidence did not reveal a "No" in words or actions, then her consent to what transpired could be presumptively implied by the judge as well as the perpetrator – and often was. In other words, she was treated as having given her "implied consent".

There are several problems with this archaic thinking. First, it proceeds on the assumption that all women are available at all times for sexual intercourse, and consenting to it, unless and until the word "No" is uttered or physical resistance offered. Second, it focuses only on the man's view of events and not the woman's. If she does not communicate her non-consent to him, he is entitled to presume consent. Third, to further compound the inequity, it imposes no obligation on the man to ascertain a woman's wishes at the time of the alleged "consensual" intercourse. Fourth, and most important, it completely ignores women's sexual autonomy and their right to be free from unwanted sexual activity.

In 1992, Parliament expressly defined consent as "the voluntary agreement of the

[46] ***R v. Seaboyer*** [1991] 2 S.C.R. 577 at 604, 653 and 665-674, ***R. v. Osolin*** [1993] 4 S.C.R. 595 at 670 – 671.
[47] ***R v. Mills*** [1999] 3 S.C.R. 668 at 741.

complainant" to engage in the subject sexual activity.[48] Accordingly, the law now requires that the issue of "consent" be considered from the complainant's perspective. A man is under a duty to ensure the woman is truly consenting to each and every sexual act. Defining "consent" from the complainant's perspective is in keeping with the remarkably uncontroversial principle that the right to sexual autonomy and control over one's body is a basic human right – and one that applies as much to women as it does to men.

The defence of "implied consent" (sometimes called "tacit consent") has been firmly rejected by the Supreme Court. For a trial judge to rely on it is an error of law. As explained by the Chief Justice of Canada, the Honourable B. Mclachlin:

> *The specious defence of implied consent (consent implied by law)... rests on the assumption that unless a woman protests or resists, she should be "deemed" to consent (see L'Heureux-Dubé J.). On appeal, the idea also surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions find their roots in many cultures, including our own. They no longer, however, find a place in Canadian law.*[49]

Although the Sri Lankan Penal Code does not define "consent," there is arguably nothing to prevent the Sri Lankan courts from interpreting "consent" in sexual assault cases to mean the voluntary agreement of the woman to engage in the sexual activity in question. The Penal Code effectively states that evidence of resistance does not equal consent.[50] It also contains an extensive list of circumstances under which the law will treat consent as not having been obtained, including sexual intercourse with a woman where the "consent" was obtained by use of force or threats or intimidation, or by putting her in fear of death or of hurt or while she was in unlawful detention, or when she was in an involuntary state of intoxication.[51] In these circumstances, the courts may have the option to adopt further policy-based limits on the scope of consent under s. 363 of the Penal Code.[52]

In any event, interpreting consent to require a woman's positive affirmation to engage in sexual activity would certainly be in keeping with women's sexual autonomy as well as constitutional equality guarantees and international human rights instruments.

(ii) Implementing "rape shield" laws

The fundamental rationale for "rape shield laws" – limiting the scope of evidence of the complainant's past sexual history – is to prevent those accused of sexual crimes from using unfair myths and stereotypes about women to attack their credibility and secure an acquittal. Given the kind of improper reasoning endorsed by the common law coupled with its

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[48] *An Act to Amend the Criminal Code (sexual assault),* S.C. 1992, c. 38, s.1.
[49] ***R** v. **Ewanchuk***, [1999] 1 S.C.R. 330 at para. 103.
[50] Section 363 of the Sri Lankan *Penal Code* (as amended) Explanation (ii) states: "Evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent."
[51] Sections 363(b) and (c) of the Sri Lanka *Penal Code* (as amended)
[52] That was the approach taken by the Supreme Court of Canada in ***R** v. **Jobidon***, [1991] 2 S.C.R. 714. Although this was a case of limits on consensual fistfights, the same principle can be applied to cases involving sexual violence against women to further refine the contour and shape of "consent" to sexual activity.

treatment of women in sexual offences, the critical need for these laws is indisputable.

Two of the most discriminatory myths were that unchaste women are more likely to consent to sexual relations and are less worthy of belief. To overcome the inequities in allowing unfettered reliance on these "twin myths", Parliament enacted "rape shield" laws[53] to significantly restrict the admissibility of evidence of a complainant's sexual history with the accused or others. Parliament recognized that to allow an accused to routinely access and exploit a complainant's sexual history has a disproportionate adverse effect on women, discourages disclosure of sexual offences and distorts the truth-seeking function of the trial process.[54]

If an accused wishes to tender such evidence at trial, the judge must rule on its relevance and admissibility. In doing so, the judge is required to balance the victim's privacy rights and the prejudicial effect the evidence will have on the administration of justice along with the accused's right to make full answer and defence.[55]

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[53] Criminal Code, R.S.C. 1985, c. C. – 46 (as amended), ss. 276 - 277

[54] Moreover, it may well further disadvantage the most vulnerable. "When prior victimization is used to test the credibility of a complainant, the result is that those women most frequently assaulted will actually receive less protection from criminal law for reasons entirely unrelated to their truthfulness" Susan M. Chapman, "Section 276 of the Criminal Code and the Admissibility of 'Sexual Activity' Evidence" (1999) 25 Queen's L.J. 121 at 130.

[55] *Criminal Code of Canada,* ss. 276 and 277. They presently read as follows: 276. (1) In proceedings in respect of an offence under section 151, 152,153,153.1,155 or 159, subsection 160 (2) or (3) or section 170, 171, 172,173, 271, 272 or 273 evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject –matter of the charge; or
(b) is less worthy of belief

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject –matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedure set out in sections 276.1 and 276.2, that the evidence

a) is of specific instances of sexual activity;
b) is relevant to an issue at trial; and
c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice

(3) In determining whether evidence is admissible under (2), the judge, provincial court judge or justice shall take into account

a) the interests of justice, including the right of the accused to make a full answer and defence;
b) society's interest in encouraging the reporting of sexual assault offences;
c) whether there is a reasonable prospect that evidence will assist in arriving at a just determination in the case;
d) the need to remove from the fact-finding process any discriminatory belief or bias;
e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
f) the potential prejudice to the complainant's personal dignity and right of privacy;
g) the right of the complainant and every individual to personal security and to the full protection and benefit of the law; and
h) any other factor that the judge, provincial court judge or justice considers relevant.

276.1 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).

(2) An application referred to in subsection (1) must be made in writing and set out

(a) detailed particulars of the evidence that the accused seeks to adduce, and
(b) the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

(4) Where the judge, provincial court judge or justice is satisfied

(a) that the application was made in accordance with subsection (2)
(b) that the copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial judge or justice may allow where the interests of justice so require, and
(c) that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial judge or justice shall grant the application and hold a hearing under section276.2 to determine whether the evidence is admissible under subsection 276(2).

276.2 (1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and the public shall be excluded.

(2) The complainant is not a compellable witness at a hearing.

(3) At the conclusion of the hearing, the judge, provincial judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and

(a) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
(b) but reasons must state the factors referred to in subsection 276(3) that affected the determination; and admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

(4) The reasons provided under subsection (3) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

276.3(1) No person shall publish in a newspaper, as defined in section 297, or in a broadcast, any of the following;

(a) the contents of an application made under section 276.1;
(b) any evidence taken, the information given and the representation made at an application under section 276.1 or at a hearing under section 276.2;
(c) the decision of a judge, provincial court judge or justice under subsection 276.1(4), unless the judge, provincial court judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published; and
(d) the determination made and the reasons provided under section 276.2, unless

(i) the determination is that evidence is admissible,
(ii) the judge, provincial court judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published.

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction

276.4 where evidence is admitted at trial pursuant to a determination made under section 276.2 the judge shall instruct the jury as to the uses that the jury may and may not make of that evidence.

276.5 For the purposes of sections 675 and 676, a determination made under section 276.2 shall be deemed to be a question of law.

277. In proceedings in respect of an offence under section 151, 152, 153, 153.1,155 or 159, subsection 160 (2) or (3) or section 170, 171,172, 173, 271,272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging the credibility of the complainant.

(iii) Restricting access to third-party records

When considering an accused's right to make full answer and defence and his right to a fair trial, a victim's rights to equality and privacy must be taken into account.[56] These rights often clash in determining whether the accused is entitled to access to a complainant's personal records and whether such records are admissible at trial.

Although not expressly protected under the *Charter*, the Supreme Court of Canada has afforded constitutional status to the right to privacy. In recognizing this right, the Supreme Court noted that privacy lies at the "heart of liberty in a modern state" and that it is based "on the notion of the dignity and integrity of the individual."[57] As a result, the rules governing admissibility of evidence must be reconciled with the victim's *Charter* rights.

In ***R*** v. ***Mills***,[58] accused challenged restrictions under the *Criminal Code* limiting access to a complainant's personal records, arguing that the procedure breached his *Charter* rights.[59] He had attempted to obtain access to a complainant's psychiatric counseling records for the purposes of discrediting her version of events. The Supreme Court upheld the constitutionality of the *Criminal Code* provisions requiring the accused to establish a basis for requesting the therapeutic records.

The procedure consists of the following steps:

(1) The accused does not simply have access to the records on purely speculative grounds. He is required to adduce some evidence of the likely relevance of the records sought;
(2) If successful, the requested records are not automatically produced. They are first reviewed by the judge alone to determine if there is any potentially relevant evidence in the records;
(3) If found to have potential relevance, the records are produced to the accused.

In finding that this law properly balanced the rights of those accused of sexual offences and the rights of victims, the Supreme Court was well aware of the improper use to which these records had sometimes been put. As was stated in an earlier case by L'Heureux-Dubé, J.:

> *This Court has recognized the pernicious role that past evidentiary rules in both the Criminal Code and the common law, now regarded as discriminatory, once played in our legal system ... We must be careful not to*

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[56] ***R. v. Seaboyer*** [1991] 2 S.C.R. 577, ***R. v. Osolin*** [1993] 4 S.C.R. 595.
[57] ***R. v. Dyment*** [1988] 2 S.C.R. 417 at 430.
[58] ***R v. Mills*** [1999] 3 S.C.R. 668
[59] Sections 278.1 – 278.9 of the *Criminal Code* set out this procedure. Parliament adopted this procedure at least partially in response to the Supreme Court's decision in ***R v. O'Connor*** [1995] 4 S.C.R. 411. The procedure ultimately adopted by Parliament was considered and rejected by the majority of the court in ***O'Connor*** as not sufficiently respectful of the rights of the accused; the dissenting judges in ***O'Connor*** disagreed.

permit such practices to reappear under the guise of extensive and unwarranted inquiries into the past histories and private lives of complainants of sexual assault. We must not allow the defence to do indirectly what it cannot do directly under s. 276 of the Code. This would close one discriminatory door only to open another.[60]

The *Code* provisions apply not only to medical records, but to any record for which there is a "reasonable expectation of privacy". This includes therefore a woman's personal diaries and journals,[61] adoption and social services records, education and employment records, and generally any other record that contains personal information.[62]

These laws, along with the rape shield laws, are two examples of Parliament's successful attempts to balance the complainant's equality rights (including her right not to have personal records used for discriminatory purposes) with the accused's due process rights. In both cases, the Supreme Court of Canada has affirmed the constitutional validity of the resulting legislation.

(iv) Protecting vulnerable witnesses

Parliament has recognized the need to adopt special procedural steps to accommodate vulnerable witnesses, especially victims under the age of 18 in trials of sexual offences. In such cases, the child witness/victim may be allowed to testify from behind a screen or from another room by way of video-conference.[63] The objective of these vehicles is to facilitate the testimony of young persons, and encourage disclosure of sexual abuse.

The governing *Criminal Code* provision was challenged on the basis that it infringed an accused's right to a fair trial. This argument rested on the proposition that an accused had a right to "face" his accuser; therefore, allowing the complainant to testify behind a screen denied him the opportunity to make full answer and defence. The Supreme Court disagreed. In upholding the constitutionality of this law, it held that the methods available do not limit an accused's ability to cross-examine a witness, and further, the goal of encouraging the testimony of young witnesses in sexual assault trials is of vital significance.[64]

Recent amendments to the *Criminal Code* also provide for the use of a support person to be

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[60] ***R v. O'Connor***, [1995] 4 S.C.R. 411 at 488

[61] ***R. v. Shearing*** [2002] S.C.J. No. 59. In this case, entries in the diary were admissible to challenge credibility as there were no entries regarding sexual abuse the complainant said occurred.

[62] *Criminal Code,* s.278.1.

[63] *Criminal Code of Canada* s. 486(2.1).

[64] ***R. v. Levogiannis*** [1993] 2 S.C.R. 475. An additional similar protection is afforded to victims (both adults and young persons) by section 486(3) of the Code, which states that with respect to sexual offences, a victim may ask the court for a ban on publication of the victim's identity and of any information that might reveal the victim's identity. This protection is offered in spite of the section 11(d) right to a public hearing. When a young person, under the age of eighteen is charged with an offence or is the victim of an offence, the *Young Offenders Act* (R.S.C. c.Y-1, s. 38) automatically imposes a ban on the publication of the identity of both the accused and victims (again, seeming to limit the "public" nature of the trial).

present while a child under the age of 14 or a person who has a mental or physical disability testifies.[65]

- **Domestic Violence**

> *[T]here has been a growing awareness in recent years that no man has a right to abuse any woman under any circumstances. Legislative initiatives designed to educate police, judicial officers and the public, as well as more aggressive investigation and charging policies all signal a concerted effort by the criminal justice system to take spousal abuse seriously.*[66]

(i) Removing the marital rape exemption

An equality-based approach to the criminal law recognizes that the right to sexual autonomy is a fundamental human right and it is one which applies to women as well as to men.

At common law, a husband could not rape his wife. It was not until 1983 that sexual assault by a husband against his wife became a crime in Canada.[67] Many opposed to this change in the law claimed that to do away with the marital rape exemption would ruin the institution of marriage or expose men to charges of marital rape from vengeful ex-wives. However, rape is rape whether it is perpetrated by a husband or a stranger.[68]

In addition, international conventions to which Canada is a party clearly identify marital rape as violence against women, including the ***Convention on the Elimination of Discrimination Against Women.***[69] Therefore, to allow a man, whether married to a woman or not, to force sexual intercourse or other sexual activity upon her, denies women the dignity and sexual autonomy demanded by international human rights law, not to mention their constitutionally

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[65] *Criminal Code of Canada*, s. 486 (1.2) to (1.4)

[66] ***R. v. Lavallee*** [1990] 1 S.C.R. 852 at paragraph 34.

[67] Section 278 of the *Criminal Code* provides: "A husband or wife may be charged with an offence [of sexual assault] in respect of his or her spouse, whether or not the spouses were living together at the time the activity that forms the subject matter of the charge occurred."

[68] When the Canadian Parliament was debating the proposed amendments to the *Criminal Code* that would do away with the marital rape exemption, the then Minister of Justice (and now the Prime Minister of Canada) said the following: "I want to underline that 'spousal immunity' is being eliminated by this bill. Women are not the chattels of their husbands, and sex without the consent of both parties is as unacceptable within marriage as it is outside of marriage." *House of Commons Debates* (4, August 1982) at 20042 (Hon. J. Chrétien).

[69] Article 16 provides: States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

> (a) The same right to enter into marriage;
> (b) The same right to freely choose a spouse and to enter into marriage only with their free and full consent;
> (c) The same rights and responsibilities during marriage and at its dissolution; ...
> (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; ...

entrenched equality rights. This principle is now universally accepted in Canada and the baggage of the past firmly discarded.

The following comments about Canada's now-repealed marital rape exemption clearly explain why it cannot survive under an equality-based approach to human rights and the criminal law:[70]

> *The marital rape exemption is a blatant example of a gender biased law which condoned and contributed to women's sexual subordination by directly excluding certain women from fundamental legal protection.... It represents a nearly perfect microcosm of many of the gender biased ideas at the foundation of the criminal law on sexual offences. It encapsulates the type of thinking which makes it so difficult to secure convictions with appropriate sentences for sexually violent crimes. In a clear manner, it states the view of gender hierarchy, which underlies so many of our laws and much of the mythology around rape.*[71]

England, which was responsible for entrenching the marital rape exemption in countries around the world, did away with the marital rape exemption a decade ago. But this was accomplished by the courts and not by Parliament.[72] Thus, husbands can now be convicted of marital rape in England.[73] Explaining why the Court considered it appropriate to act to remove what it called an anachronistic and offensive common law fiction, Lord Lane stated:

> *We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.*[74]

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[70] Sheilah Martin, *"Sexual Assault and the Marital Rape Exemption"* (Western Association of Provincial Court Judges, Lake Louise, 17 May 1990 [unpublished]. This article is an excellent analytical study of the marital rape exemption and the implications of its existence and repeal. It cross-references a wealth of information in this area.

[71] An explanation for the longevity of the marital rape exemption was offered by G. Geis, *"Rape in Marriage: Law and Law Reform in England, The United States and Sweden"* (1978) 6 Adelaide L. Rev. 284 at 294. It has been suggested that this explanation may serve to explain the apparent reluctance on the part of legislators to deal with gender bias still reflected in this area of the criminal law:

> But as was true for rape law reform in Britain there also seems to be an element of self-concern behind legislative inaction: the matter may be too close for personal comfort for the well placed married males who make up the vast majority of the membership of American state legislatures. It may take only a little imagination for them to create a scenario in which, in their worst forebodings, they are cast as the protagonist in a Kafka-like performance.

[72] ***Reg v. R.,*** [1992] 1 A.C. 599 (H.L.)

[73] England has not codified this in their criminal law, but the House of Lords' decision ***Reg. v. R.,*** [1992] 1 A.C. 599 (H.L.), did away with the common law marital rape exemption.

[74] ***Reg. v. R.*** *(C.A.)*, [1992] 1 A.C. 599 at 611. This decision of the Court of Appeal (Criminal Division) was upheld by the House of Lords: See [1992] 1 A.C. 599 at 614.

Recently, the Supreme Court of Nepal declared the marital rape exemption in Nepal unconstitutional and directed Parliament to draft a new law.[75]

These cases may have particular application in Sri Lanka where, despite the 1995 amendments to the Penal Code, a husband can be convicted of marital rape only where the parties are judicially separated. Further, although Canada amended the *Criminal Code*[76] to delete the codified marital rape exemption, there is no doubt that had this not been done, the courts would have declared the marital rape exemption unconstitutional and in breach of women's equality rights.[77] In fact, this amendment, as with others, was made to bring Canadian law into conformity with *Charter* equality guarantees.

(ii) Relaxing rules on use of prior inconsistent statements

In cases of domestic violence (including sexual violence), the offender (often the husband or male partner) uses his position of authority and control to degrade, humiliate, and instill fear, guilt and remorse in his partner. In many of these situations, the woman is powerless. She may be dependent on her abuser for financial support for herself and her children; she may fear repercussions if she speaks out or attempts to leave; or she may be experiencing symptoms of battered woman's syndrome.

Even if she complains to the police, she may later recant. Under new rules designed to bring a more principled approach to the admission of hearsay evidence, a prior inconsistent statement may in fact be admitted for its truth rather than only being used to challenge the witness' credibility. The recanted statement can be admitted if:

- *it is necessary because the victim has recanted or is unable to testify; and*
- *the statement meets certain standards of reliability.*[78]

This allows police to take statements from complainants under oath at an early stage and this videotaped statement can then be used to assist in the prosecution of the offence even if the complainant later recants. Put simply, the theory is that the evidence ought not to be held "hostage" especially where the offender has put pressure on the complainant to recant.

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[75] ***Meera Dhungana** v. **Nepal** (Law, Justice and Parliamentary Affairs)*, (Writ # 55 of 2058 Date of Decision 19 Baisakh 2059). See also ***People v. Liberta***, 474 N.E. 2d 567 (N.Y.C.A. 1984), in which the New York Court of Appeal found that there was no basis for distinguishing between marital rape and non-marital rape, and struck down the provisions of New York State's *Penal Law* that contained the exemption as being unconstitutional.

[76] Prior to 1983, the offence of rape was defined under s.143 of the *Criminal Code* to mean in part sexual intercourse by a male with female person "who is not his wife".

[77] The equality rights guarantees under the *Charter* came into effect in 1985. The *Charter* came into full force and effect on April 17, 1982 except for the equality rights which did not come into full force and effect till three years later on April 17, 1985.

[78] ***R** v. **K.G.B.*** [1993] 1 S.C.R. 740

(iii) Treating spousal abuse as an aggravating factor in sentence

Canadian sentencing practices no longer reflect a tolerance for spousal abuse. Parliament has added a section in the *Criminal Code* providing that in determining fitness of sentence, evidence that the offender abused the offender's spouse or common-law partner is an aggravating factor which allows for an increased sentence.[79]

(iv) Adopting a zero tolerance policy

In 1982, Parliament adopted what is known as a zero tolerance policy to domestic violence. The policy required "all Canadian police forces to establish a practice of having the police regularly lay charges in instances of wife beating, as they are inclined to do with any other case of common assault".[80] This mandatory arrest policy took away victims' discretion to pursue complaints of abuse.

This is important because of the imbalance of power that often exists between men and women. A woman who is victimized by her husband often experiences feelings of guilt and remorse and may blame herself for the abuse. Or she may be pressured by her husband or his or her family not to press charges. Indeed, the woman may well be dependent on her abusive spouse for financial support and thus reluctant to press charges out of fear for her financial future and that of her children. Through a zero tolerance policy and the provision of other support services to abused partners barriers to justice are reduced.

(v) Issuing peace bonds

The *Criminal Code* provides for the issuance of a "peace bond". This means that if a woman is able to show reasonable grounds to believe that her spouse will cause personal injury to her or her children, such as threats or previous violent behaviour, she can obtain a court order. The court is empowered to direct that the spouse enter into a recognizance to keep the peace and comply with certain conditions or face imprisonment for up to 12 months.[81] What is important about these bonds is that they can be issued before violence – or further violence – is perpetrated.

The conditions imposed under a peace bond are usually designed to limit contact between the parties. Thus, typically, they include a prohibition on communicating with the victim or attending her place of work or residence.[82]

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[79] *Criminal Code of Canada*, s. 718.2.

[80] *House of Commons Debates* (8 July 1982) at 19119-20, as cited by K. Roach, *Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999) at 159.

[81] *Criminal Code*, s. 810

[82] N. Bala, *"Legal Responses to Domestic Violence in Canada and the Role of Health Care Professionals"* (Materials from Faculty of Health Sciences Program on Care & Assessment of Women in Abusive Relationships, Queen's University, 24 October 1999) at para. 61, but see also D. Ginn, *"Wife Assault, the Justice System and Professional Responsibility"* (1998) 33 Alta. L. Rev. 908 at 918.

(vi) Emergency Protection Orders

Under the threat of family violence, a woman can apply to a court for an emergency protection order.[83] This is a civil remedy and as long as reasonable grounds exist to believe that family violence **will occur**, a judge may issue an order.

Provincial legislation provides for generous powers to protect the spouse and children, including the power to

(1) restrain the abuser from attending a specified place regularly attended by the victim or family members,
(2) restrain the abuser from communicating with her or the children,
(3) order exclusive occupation of the residence,
(4) direct a peace officer to remove the respondent from the residence,
(5) make any provision that is necessary "to provide for the immediate protection" of the victim.[84]

However, even though the order is not made under the *Criminal Code*, if the abuser does not comply with the order, the police can arrest him for breach of the order. This early intervention approach to domestic violence attempts to protect the wife and children before further abuse occurs in keeping with their *Charter* rights to security of the person.

(vii) Safe Houses

Safe houses or women's shelters are an essential component in Canada's efforts to protect women from domestic violence.

These examples all underscore the extent to which the equality rights of all Canadians have affected every level of our criminal justice process: constitutional norms; legislative statements; judicial interpretation; common law principles; rules of evidence; assessment of

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[83] See for example the *Protection Against Family Violence Act*, RSA 2000, c. P-27. The legislation defines family violence as:

1(e) "family violence" includes

(i) any intentional or reckless act or omission that causes injury or property damage, the purpose of which is to intimidate or harm a family member,
(ii) any act or threatened act that causes a reasonable fear of injury or property damage, the purpose of which is to intimidate or harm a family member,
(iii) forced confinement, and
(iv) sexual abuse,

But it is not to be construed so as to limit a parent or a person standing in the place of a parent from using force by way of correction toward a child who is under the care of the parent or person if the force does not exceed what is reasonable under the circumstances....

[84] *Protection Against Family Violence Act*, RSA 2000, c. P, – 27, s. 2 (3)

"relevance"; what qualifies as legal argument; what is accepted as "evidence", and even something as supposedly objective as assessment of credibility. The use of a human rights approach to the criminal law is a particularly useful instrument both in exposing existing inequalities and in rectifying them. When remedial action is required, Parliament and the courts are inevitably called on to balance competing rights and values. Striking that balance and maintaining public respect for the criminal justice system continues to be a challenge for both.

4. Legal Rights under the *Charter*

This section will focus on the legal rights guaranteed under the *Charter* in order to provide an overview of the scope of due process rights available to an accused in Canada. In doing so, reference is made to instances in which those rights have been shaped by competing rights. An attempt is also made to identify the right under the Sri Lankan Constitution (whether the 1978 one or the 2000 draft or, if applicable, both), which most closely conforms to the identified Canadian legal right and the aspect of it under discussion. As will be seen, however, the fit is not always a neat one and the protected right in Sri Lanka may differ considerably from its Canadian counterpart.

4.1 Rights During the Investigative Stage

(i) Right to Silence/Non-Cooperation

Canadian Charter

Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Sri Lankan Constitution (2000 draft) Article 8: Every person has an inherent right to life and no person shall be intentionally or arbitrarily deprived of his life.

In criminal law, the s.7 guarantee means that the criminal process must conform to the principles of fundamental justice which are to be "found in the basic tenets of our legal system".[85]

One of the most encompassing principles of fundamental justice is the requirement that the state respect an individual's right to silence throughout the entire investigatory process.[86] In

[85] *Reference Re Section 94(2) B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 at 503.

[86] ***R. v. Hebert*** [1990] 2 S.C.R. 151. This right has precluded the prosecution from arguing that because the accused said nothing when allegations were made against him at the investigation stage, an adverse inference should be drawn against the accused at trial. The adverse inference would be based on the proposition that an innocent person, when offered an opportunity to account for their actions or their whereabouts in the face of allegations of criminal activity, would do so. Section 11(c) of the *Charter*, discussed below, guarantees the right to silence at the trial stage of the process.

Canada, this means that an individual need not cooperate with any police investigations nor answer any questions and that person's failure to do so cannot be held against them. In contrast, in Britain, the country from which we inherited the right to silence at common law, that right has continued to evolve, but in a different direction from Canada.

In the U.K, on arrest, an accused is cautioned and advised that he or she need not say anything but if they say nothing, an adverse inference may be drawn against them at trial.[87] In addition, in the U.K. where, under questioning at the investigatory stage of proceedings, an accused does not mention certain facts, and yet at the trial attempts to rely on those facts, an adverse inference may be drawn on the basis that the accused did not mention those facts when given an opportunity to do so.[88] The rationale for allowing this inference is to counter the possibility that the accused will simply use the time before trial to concoct an exculpatory version of events.

(ii) Right to Disclosure

Canadian Charter

Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Sri Lankan Constitution (1978)
Article 13(3): Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

Sri Lankan Constitution (2000 draft)

Article 10(10): Any person charged with an offence shall be entitled to be tried –

(b) at a fair trial;

The principles of fundamental justice have also been interpreted to require that the state disclose to the accused in advance of trial all the evidence in the state's possession that forms part of the case against the accused.[89]

Until recently, there was no obligation on the part of the defence to disclose any information about the defence. This led to complaints of trial by ambush especially when the Crown had completed its case and heard for the first time during trial that the defence was raising an insanity plea or alternatively, an argument that the defendant was an automaton, because of drinks, drugs, a blow to the head, etc. during the time of commission of the offence.

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[87] per s 36, *Criminal Justice and Public Order Act,* 1994.
[88] per s. 34 *Criminal Justice and Public Order Act* ,1994.
[89] ***R v. Stinchcombe*** [1991] 3 S.C.R. 326

As a result of amendments to the *Criminal Code* earlier this year, the defence is now required to give advance notice of its intent to call expert witnesses in fields such as forensics or psychiatry thirty days before trial and to provide a copy of the expert's report on summary of the expert opinion before the close of the Crown's case.[90] But this is the extent of required defence disclosure. Thus, the accused is under no obligation to alert the state about any other type of evidence the accused intends to rely on at trial, nor what the nature of his or her defence will be, i.e. alibi, consent, mistaken identity.[91]

Again, by contrast, a greater duty of disclosure is imposed on the accused in both the U.S. and in the U.K. In the U.K., where the accused applies for disclosure, the prosecution is entitled to request similar disclosure from the accused, at least concerning the basic structure of the defence the accused intends to raise, including whether and on what grounds the accused will raise an alibi.[92]

In the U.S., with respect to federal criminal procedure and the law in at least the two largest states, California and New York, there is a broader reciprocal disclosure requirement on the accused. The defence is required to provide the prosecution with all evidence that is to be raised in defence of the accused, including real evidence and any statements intended to be relied upon.[93]

While victims' Bills of Rights provide for disclosure of certain information to victims, the legislation typically does not confer any enforceable right. Arguments have been raised that s. 7 provides a victim with the right to be consulted by the prosecutor concerning the case involving the victim and any proposed plea bargain. To date, this argument has failed.[94] Further, when a victim is consulted, the victim's views are not binding on the prosecutor.[95]

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[90] *An Act to Amend the Criminal Code*, S.C. 2002, c. 13 s. 62; amending s. 657.3 of the *Criminal Code*. The defence must notify the Crown of its intention to call expert evidence at least 30 days prior to the trial. It must also provide the expert's name, area of expertise and qualifications as an expert. Prior to the close of the Crown's case, the defence must also provide to the Crown any reports prepared by the witness, or, if no report has been prepared, a summary of the opinion evidence to be provided by the expert.

[91] It is possible where the alibi is not provided at any early stage for the court to draw an adverse inference gainst the accused, but this is an exceptional right on the state's part: ***R. v. Letourneau and Tremblay*** (1994) 87 C.C.C. (3d) 481, (B.C.C.A.), leave to appeal to S.C.C. refused; confirmed by the Supreme Court of Canada in ***R. v. Cleghorn*** [1995] 3 S.C.R. 175. Further, it should be noted that the Supreme Court has left open the possibility that there may be an obligation on the accused to disclose relevant information, stating in ***R. v. Stinchcombe***, [1991] 3 S.C.R. 326 at 333 that "[t]he suggestion that the duty should be reciprocal may deserve consideration by this court in the future but is not a valid reason for absolving the Crown of its duty."

[92] In the U.K. this reciprocal disclosure is provided for in s 5, *Criminal Procedure and Investigations Act, 1996.*

[93] Rules 12 and 16 of the *Federal Rules of Criminal Procedure* in the United States provide for reciprocal disclosure at the federal level. See also, Chapter 10, Title 6, Part II of the *California Penal Code* and Part II, Title 1, Article 240 of the *New York Code of Criminal Procedure*.

[94] See, ***Vanscoy v Ontario*** [1999] O.J. No. 1661 (Q.L.) (Ont.Sup Ct.)

[95] ***R v. Tkachuk*** (2001) 159 C.C.C. (3rd) 434 (Alta. C.A.)

(iii) Right to Privacy and Freedom from Unreasonable Search and Seizure

Canadian Charter

Section 8: Everyone has the right to be secure against unreasonable search or seizure.

Sri Lankan Constitution (2000 draft)

Article 14(1): Every person has the right to respect for his private and family life, his home and his correspondence and communications and shall not be subjected to unlawful attacks on his honour and reputation.

This right does not provide a blanket guarantee against any search and seizure, only unreasonable search and seizure. The purpose of this section is to protect an individual's reasonable expectation of privacy and to prevent searches or seizures that unreasonably infringe that expectation.[96]

The key questions raised by this section are these: what is "unreasonable" about a search or seizure, and what actually constitutes a "search" or a "seizure"?

A search is an examination by agents of the state of a person's property or their person (body) or of information about the person without the person's consent.[97] Entering a home and looking for evidence is a search, as is frisking someone or requesting that they empty their pockets.

Canadian courts have gone much further than this however. A search has been held to include circumstances where the police enter onto a property and look in the window,[98] where the police contact an electricity provider to obtain information about the electricity consumption at a particular residence[99] and where the police obtain information about an individual's blood alcohol level from hospital records.[100] In addition, the unauthorized video or audio taping of an individual has been found to be a search even when done by a third party who consents to the recording.[101] None of this is allowed without a warrant or other authorization.

But public information or evidence in plain view or from an ordinary vantage point is not caught by this right.[102] For example, if a police officer stops a car for speeding and while writing the ticket notices contraband on the passenger seat of the vehicle, the police officer's knowledge of the contraband is not the result of a search. Thus, it is admissible in evidence

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[96] ***Hunter v. Southam*** [1984] 2.S.C.R. 145 at 159
[97] P. W. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 1997) at 1122.
[98] ***R. v. Kokesch*** [1990] 3 S.C.R. 3.
[99] ***R. v. Plant*** [1993] 3 S.C.R. 281.
[100] ***R. v. Dersch*** [1993] 3 S.C.R. 678.
[101] ***R. v. Wong*** [1990] 3 S.C.R. 36.
[102] ***R. v. Mellenthin*** [1992] 3 S.C.R. 615.

without a warrant having been used to locate it. If the officer were to ask the driver of the stopped vehicle to open the glove compartment, that would be a search.

A seizure is the "taking by state officials of an item in which the citizen has a reasonable expectation of privacy."[103] The taking of items from an individual's home, from the trunk of an individual's car, from an individual's clothing or from a place of business is obviously a seizure. The taking of blood, saliva, hair or skin samples from an individual is also a seizure.[104]

This means that when someone is involved in an accident and alcohol is suspected, because of the smell on the person's breath, if that person is injured and taken to a hospital, the police may not be able to complete the necessary documentation or may not have sufficient grounds to secure a blood sample within sufficient time following the accident to be of any assistance in the prosecution. These steps must be taken within the limited time frame provided under the *Criminal Code* for this purpose.[105]

On the other hand, if an individual has abandoned an item, then in most circumstances, the taking of that item will not be a seizure.[106] For example, taking discarded tissues and cigarette butts and analyzing them for DNA, has been held not to be a seizure.[107]

For a search or seizure to breach the individual's *Charter* rights, it must be unreasonable. Generally, a search will be unreasonable unless the police have met these requirements: obtained a warrant for the search or seizure from an impartial body after having placed before the impartial body sworn evidence establishing reasonable and probable grounds that a crime had been committed and that evidence is to be found in the place sought to be searched.[108] If these requirements cannot be met, then a warrant cannot be issued.[109] What this all means is that random searches are not permitted.

The Supreme Court of Canada has recognized that there are circumstances where it is not feasible to obtain a warrant prior to conducting a search.[110] Where there is a risk that the evidence will disappear, or be concealed, or disposed of in the time that it might take to obtain a search warrant, a warrantless search or seizure might well be considered reasonable,

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[103] ***R. v. Arp*** [1998] 3 S.C.R. 339 at 386.
[104] ***R. v. Stillman*** [1997] 1 S.C.R. 607.
[105] *Criminal Code*, s. 254(3). A peace officer may demand a breath sample or, if it is impractical, a blood sample from a person when the peace officer has reasonable and probable grounds to believe that the person has committed an "operating while impaired" offence, as a result of alcohol consumption, within the preceding three hours. For the demand to be valid, the peace officer *must form his belief* within three hours of the time he believes the offence was committed. The actual demand and taking of the sample need not occur within the three hour window. See ***R. v. Deruelle***, [1992] 2 S.C.R. 663.
[106] ***R. v. Stillman*** [1997] 1 S.C.R. 607.
[107] ***R. v. Love*** (1995) 102 C.C.C. (3d) 393 (Alta. C.A.), ***R. v. Arp*** [1998] 3 S.C.R. 339. It must be remembered however, that an accused in custody who has declined to volunteer any samples to the police is not taken to have abandoned tissues thrown in the garbage or the like: ***R. v. Stillman*** [1997] 1 S.C.R. 607 at 646-648
[108] ***Hunter v. Southam*** [1984] 2 S.C.R. 145 at 160.
[109] *Criminal Code of Canada* s. 487.
[110] ***Hunter v. Southam*** [1984] 2. S.C.R. 145 at 161.

provided that there are reasonable and probable grounds to believe that an offence has been committed and that evidence is to be found in the place sought to be searched.[111] In the case of any warrantless search however, the search will be presumed to be unreasonable and the state will have to establish that it was reasonable.

It is almost always necessary to obtain a warrant to enter a person's dwelling to execute an arrest. Police may only enter a home without a warrant when in "hot pursuit" or in another emergency circumstance. However, there still remains a question as to what is meant by "hot pursuit." In the Supreme Court case which first expounded this rule, "hot pursuit" was defined as "continuous pursuit conducted with reasonable diligence so that the pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction."[112]

In a later decision, ***R. v. Feeney***,[113] an investigation began immediately after police learned of a body in a home. It took only a few hours before the police narrowed the suspect to one person and arrived at his home, entering without a warrant. However, in these circumstances, a majority of the Supreme Court found that this was not a "hot pursuit", despite the fact the police suspected the murderer would be covered in blood given the severity of the crime and also feared that the evidence would be quickly destroyed. As a result, the recovered evidence, bloody clothing, was ruled inadmissible.

Because of the public controversy over this decision, and the perceived negative impact it had on police ability to successfully investigate crimes, Parliament added a section to the *Criminal Code* stating police may enter a dwelling house for an arrest without a warrant if there are "exigent circumstances."[114] Presumably, this subsumes and arguably expands the "hot pursuit" exception.

The *Criminal Code* has recently been amended to specifically authorize the taking of hair, DNA and other samples from an accused.[115] Canada was many years behind both the U.K. and the U.S. and a number of European countries in adopting legislation authorizing the taking and use of DNA evidence.[116] Since DNA can be as exculpatory as it is inculpatory, it has a very important role to play in convicting the guilty and ensuring that the innocent are not wrongly convicted.

Another section of the *Criminal Code*, permitting police seizure of documents from a lawyer's office with a warrant, was recently declared unconstitutional by the Supreme Court

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[111] ***Hunter v. Southam*** [1984] 2 S.C.R. 145 and ***R. v. Mellenthin*** [1992] 3 S.C.R. 615.
[112] ***R. v. Macooh***, [1993] 2 S.C.R. 802.
[113] ***R. v. Feeney*** [1997] 2 S.C.R. 13.
[114] *Criminal Code*, s.529.3
[115] *Criminal Code of Canada* ss. 487.04 - 487.09
[116] In the U.K., for example, this was provided for in the *Police and Criminal Evidence Act* 1984, as amended by the *Criminal Justice and Public Order Act* 1994.

of Canada.[117] It was held that the procedure, which included permission for the state to examine the material to determine if it should be considered privileged as between the solicitor and client, impaired solicitor - client privilege. Ensuring that information between a client and lawyer remains private is an important principle of fundamental justice and the taking of documents in this fashion violates this principle.

(iv) Right Not to be Arbitrarily Detained or Imprisoned

Canadian Charter

Section 9: Everyone has the right not to be arbitrarily detained or imprisoned.

Sri Lankan Constitution (1978)

Article 13(1): No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

(2): Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

Sri Lankan Constitution (2000 draft)

Article 10(1): No person shall be imprisoned or otherwise physically restrained except in accordance with procedure prescribed by law.

(2): No person shall be arrested except by an authorized officer acting in accordance with procedure prescribed by law under a warrant issued by a judicial officer causing such person to be apprehended and brought before a competent court:

Provided that any person authorised so to do by any law may, in the manner, and in the circumstances, prescribed by law, arrest any person without such a warrant.

The right under Canadian law is not to be **arbitrarily** detained or imprisoned.

A person will be said to be detained when a state official restrains the person's liberty including cases where the person reasonably perceives that they are not free to come and go

[117] ***Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*** [2002] S.C.J. No. 61 (Q.L.).

as they please,[118] as for example where a person is asked to attend a police interview and does so.[119]

Detention under s.9 has been considered in the context of random roadside inspections of vehicles. The Supreme Court has found that stopping vehicles to inquire whether the driver had been drinking or to investigate the vehicle's compliance with highway traffic laws was a detention.[120]

Stopping and questioning drivers during a roadside checkstop will be arbitrary "if there are no criteria, express or implied, which govern its exercise."[121] In the case of motor vehicle stops, the Supreme Court held that because there were no criteria that the police were to use to select the vehicles they stopped and because the decision as to which vehicles to stop was in the absolute discretion of the police officer, those detentions were arbitrary and in breach of the drivers' section 9 right.[122] However, this legislation was upheld on the basis that roadside checkstops were saved under s.1; they were reasonable limits in a free and democratic society having regard to the harm caused by impaired driving. This is an example of how society's interest in taking impaired drivers off the road trumps an individual's due process right not to be arbitrarily detained.

(v) Right to Be Informed of Reason for Arrest or Detention

Canadian Charter

Section 10: Everyone has the right on arrest or detention
(a) to be informed promptly of the reason therefore;

Section 11: Any person charged with an offence has the right
(a) to be informed without unreasonable delay of the specific offence;

Sri Lankan Constitution (1978)

Article 13(1): No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

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[118] See ***R. v. Therens*** [1985] 1 S.C.R. 613 and ***R. v. Thomsen*** [1988] 1 S.C.R. 640.

[119] ***R. v. Moran*** (1987) 3 C.C.C. (3d) 225 (Ont. C.A.). The Ontario Court of Appeal in Moran set out a number of factors to be considered in determining when an individual has been detained in such circumstances. This definition of detention, as with most of the considerations of this term, arose in the context of section 10 of the *Charter* which will be discussed below. It is arguable however, that detention for the purposes of section 10, will be identical to detention for the purposes of section 9.

[120] ***R. v. Hufsky*** [1988] 1 S.C.R. 621 and ***R. v. Ladouceur*** [1990] 1 S.C.R. 1257

[121] ***R. v. Hufsky*** [1988] 1 S.C.R. 621 at 633.

[122] The breach of section 9 was found to be justified in both *Hufsky* and *Ladouceur* as a reasonable limit under section 1, considering the importance of maintaining safe highways and deterring impaired driving.

Sri Lankan Constitution (2000 draft)

Article 10 (3): Any person arrested shall at the time of arrest be informed, in a language which he appears to understand, of the reason for his arrest and of his rights under paragraphs (4) and (5) of this Article.

The courts have found that it is necessary that a person know the reasons for their detention in order to obtain proper legal advice. In addition, that person has the right to an interpreter to ensure that all information, including the reason for the arrest, is provided in a language the person understands.[123]

If this is not done, and the person makes a statement without fully appreciating the jeopardy they are in, that statement may be found to have been given in breach of the individual's *Charter* rights and it may therefore be inadmissible.

The right to be informed of the reason for detention has been held to include the right to be told if there are multiple reasons for arrest or detention, rather than just a single one[124] and the right to be told if the nature of the offence the accused has been arrested for has changed (because a victim has died, for example or because the police obtain further information about other offences).[125] The point has been made that it is unfair to place this burden on the state given the fact that the accused is in the best position to know what he or she did or did not do. Further, it has been argued that the fact that the police investigations have not uncovered the entire web of criminal activity should not preclude their using information garnered during investigation of one part of the criminal activity.

(vi) Right to Counsel

Canadian Charter

Section 10: Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay and to be informed of that right;

Sri Lanka Constitution (1978)

Article 13(3): Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

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[123] *Charter*, s. 14 states:

> A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

[124] ***R. v. Borden*** [1994] 3 S.C.R. 145.

[125] ***R. v. Smith*** [1991] 1 S.C.R. 714, *R. v. Black* [1989] 2 S.C.R. 138 and ***R. v. Evans*** [1991] 1 S.C.R. 869.

Sri Lankan Constitution (2000 draft)

Article 10 (4): Any person arrested shall have the right to communicate with any relative or friend of his choice, and, if he so requests, such person shall be afforded means of communicating with such relative or friend.

(5): Any person arrested shall have the right to consult and retain an Attorney-at-Law shall be afforded all reasonable facilities by the State.

This section is the one that has received the most attention from Canadian courts. The right to counsel in section 10 has been held to impose three main obligations on the state when an individual is arrested or detained.

First, the individual has to be told:

- that they have the right to retain and instruct counsel;
- that legal aid is available;
- that the individual may have access immediately to duty counsel for free and immediate preliminary legal advice.[126]

Second, upon expressing a desire to contact a lawyer:

- the individual must be provided with the opportunity to do so;
- this includes access to a telephone (in private), a telephone book and a list of telephone numbers for free duty counsel.[127]

Third, once an individual has expressed a desire to contact a lawyer:

- the police must stop questioning or attempting to elicit information from the individual until the individual has had a meaningful opportunity to contact a lawyer;[128]

- while an individual may waive the right to contact a lawyer and to have the police hold off on their questioning, this waiver must be fully informed and clear.[129]

Section 10 places a heavy burden on the state to ensure that an individual is aware of and is given an opportunity to exercise his or her right to counsel. If this is not done, and evidence is secured as a result of the breach of the right to counsel, then that evidence will generally be excluded from the trial especially if it is "conscriptive evidence," i.e. a confession or inculpatory statement.

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[126] ***R. v. Brydges*** [1990] 1 S.C.R. 190 and ***R. v. Pozniak*** [1994] 3 S.C.R. 310
[127] ***R. v. Brydges*** [1990] 1 S.C.R. 190 and see ***R. v. Mckane*** (1987) 35 C.C.C. (3d) 481 (Ont. C.A.)
[128] ***R. v. Prosper*** [1994] 3 S.C.R. 236 and ***R. v. Whitford*** (1997) 196 A.R. 97 (C.A.).
[129] ***R. v. Prosper*** [1994] 3 S.C.R. 236.

Not only will the evidence be excluded from the trial, but in Canada, we have gone much further than the U.S. If a person then chooses to testify at his or her trial and gives evidence inconsistent with that statement, the accused cannot be cross-examined on the statement even for purposes of challenging the accused's credibility.[130] American courts have taken the opposite view. Even though the state cannot use the statement against the accused, they do allow the accused to be cross-examined on the statement for credibility purposes on the grounds that to fail to do so may make the court complicit in the accused's perjury.[131]

To date, under the criminal law regime, generally only those accused of crimes have a right to counsel.[132] However, two provinces, British Columbia and Manitoba, have provided victims with a statutory right to legal representation in their victims' bill of rights.[133] This is a significant right since victims may not be aware of the rights that they do have or may be unable to assert them without legal representation.[134] Further, a lawyer for a victim would also be helpful in situations in which the victim, or his or her family, wishes to seek a ban on publishing certain information.[135]

(vii) Right to Challenge Detention

Canadian Charter

Section 10: Everyone has the right on arrest or detention

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

Sri Lankan Constitution (1978)

Article 13(2): Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

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[130] ***R. v. Calder*** [1996] 1 S.C.R. 660.

[131] See ***Walder v. U.S.*** 347 U.S. 62 (1954) and ***Harris v. New York*** 401 U.S. 222 (1971)

[132] There is an ability to access legal aid for civil law purposes and indeed, it is clear that for some cases, the state must provide legal counsel. See for example, ***New Brunswick*** *(Minister of Health and Community Services) v.* ***G.(J.)*** [1999] 3 S.C.R. 46

[133] *Victims of Crime Act*, S.B.C. 1996, c. 478, s. 3; *The Victims' Rights and Consequential Amendments Act*, S.M. 1998, c. 44, s 4(2).

[134] Joan Barrett, *Balancing Charter Interests: Victims' Rights and Third Party Remedies,* looseleaf (Toronto: Carwell, 2001) at 6-2.

[135] See, for example, ***R. v. Bernardo*** [1995] O.J. 246, and, ***R. v. Bernardo*** [1995] O.J. No.1472, in which the deceased victims' families, along with another victim, had lawyers participate in the trial to argue that videotapes of the accused raping and torturing the victims should not be shown in open court.

Sri Lankan Constitution (2000 draft)

Article 10(6): Any person arrested shall not be detained in custody or confined for a longer period than under all the circumstances of the case is reasonable, and shall, in every case be brought before the judge of a competent court within twenty-four hours of the arrest, exclusive of the time necessary for the journey from the place of arrest to such judge, and no person shall be detained in custody beyond such period except upon, and in terms of the order of such judge.

This section guarantees a detained person the right to challenge their detention. Within 24 hours of arrest, for example, a person must be brought before a judge where the person can challenge the basis of their detention or arrest.[136]

(viii) Right to Fair Bail

Canadian Charter

Section 11: Everyone has the right
(e) not to be denied reasonable bail without just cause;

Sri Lankan Constitution (1978)

Article 13(2): Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

Sri Lankan Constitution (2000 draft)

Article 10(7)(a): Any person detained in custody or confined who is entitled, under the provisions of any law, to be released on bail or on his executing a bond, shall be so released.
Article 10(7)(b): The amount of bail and the amount of every such bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.

Bail in Canada tends to be set at extremely reasonable levels compared to what typically occurs in, for example, the U.S. Also, it is fair to say that bail is commonly given unless there are sound and compelling reasons to deny bail, as for example, in the case of a person who has prior convictions for failing to appear.[137]

When considering whether an accused should be released on bail, the safety of both the

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[136] *Criminal Code*, s. 503(1). Where a justice is available within 24 hours of a person's arrest, that person shall be taken before the justice without unreasonable delay and, in any event, within 24 hours. If a justice is not available, the person shall be taken before a justice as soon as possible.
[137] See ***R. v. Morales*** [1992] 3 S.C.R. 711.

victim and society must be considered as well as the necessity of public confidence in the administration of justice.[138] If it is felt that the accused may continue to be a danger to society or the victim if released, bail can be denied or the accused may be released with conditions including that the accused abstain from communicating with the victim.[139]

The Supreme Court of Canada very recently upheld the constitutionality of these limits on bail and concluded that bail could be denied even if the only purpose was to maintain public confidence in the administration of justice. Because of the sensationalism of the crime in question and the public concern it created, the Supreme Court concluded that it was necessary to detain the accused to maintain public confidence in the criminal justice system.[140]

4.2 Rights During Trial

(i) Right to a Fair Trial and to Make Full Answer and Defence

Canadian Charter

Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Sri Lankan Constitution (1978)

Article 13(3): Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

Sri Lankan Constitution (2000 draft)

Article 10(9): Any person charged with an offence shall be entitled to be heard in person or by an Attorney-at-Law of his own choosing and shall be so informed by the judge.
(10): Any person charged with an offence shall be entitled to be tried –

(b) at a fair trial;
(c) by a competent court;

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[138] *Criminal Code*. s. 515 (10) states:

> For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
> (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
> (c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

[139] See sections 497, 498, 499, 503 and 515 of the *Criminal Code*.

[140] ***R. v. Hall*** [2002] S.C.J. No. 65 (Q.L.). Hall was arrested for a horrific murder of a woman. The woman was stabbed 37 times and it appeared as though attempts were made to sever her head from her body.

The right under s.7 not to be deprived of liberty except in accordance with the principles of fundamental justice has been held to entitle the accused to a fair trial. As part of that trial, the accused must be able to make "full answer and defence" to the charges against him or her.

On this basis, rules of evidence that limit the accused's ability to introduce evidence or question witnesses have been successfully challenged.[141] However, in two instances where the Supreme Court found rules unconstitutional, Parliament took steps, as part of its on-going dialogue with the courts, to adopt new laws to overcome the Supreme Court's objections. These new laws have now been upheld as constitutional.[142]

Criticism has arisen about just how far the accused's rights go. Generally, there are no restrictions on the defence's attacking the character of a complainant while the reverse is not permitted so long as the accused has not placed his or her good character in issue. Attacking the complainant's character occurs most often in sexual assault cases and has led to the criticism that the right to a fair trial does not mean the right to a fixed trial under which the accused seeks to introduce evidence about the victim of the crime which play on public myths and stereotypes; for example, those relating to women who complain of having been sexually assaulted. Critics point out that the state too is entitled to a fair trial. In an effort to avoid discriminatory treatment of women and children under the criminal justice system, Parliament has adopted a number of significant changes to the criminal law and procedure, including, for example, rape shield laws.

(ii) Right to be Tried within a Reasonable Time

Canadian Charter

Section 11: Any person charged with an offence has the right

(b) to be tried within a reasonable time;

Sri Lankan Constitution (2000 draft)

Article 10(10): Any person charged with an offence shall be entitled to be tried -

(a) without undue delay;

This is one of the most frequently invoked of all *Charter* rights, likely because the remedy for an infringement of the right is a judicially directed stay of proceedings, meaning that the charges against the accused are not pursued.[143]

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[141] ***R. v. Seaboyer*** [1990] 2 S.C.R. 577, *R. v. O'Connor* [1995] 4 S.C.R. 411.
[142] ***R. v. Darrach***, [2000] 2 S.C.R. 443, *R. v. Mills*, [1999] 3 S.C.R. 668.
[143] P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 1997) at 1173.

The purpose of this section is to minimize the amount of time an accused spends in pre-trial custody or under restrictive bail conditions, to minimize the mental stress or pre-trial anxiety of an accused and to minimize the possible deterioration of evidence during the pre-trial period.[144]

This is the theory, but critics of a liberal interpretation of this section point out that for many accused and their counsel, the axiom "Never tried; never convicted" is as relevant today as it always has been. When the Supreme Court issued its main decision on trial within a reasonable time, called ***Askov***, it led to thousands of criminal cases being thrown out by the courts and to significant public criticism from the resulting fallout.[145]

Victims point out that they too must wait lengthy periods of time, often as a result of calculated attempts to delay proceedings by an accused, before having their cases heard in court. In other words, delay is not a one way street.

In considering what is a reasonable time, the courts will take into consideration the length of the delay, the explanation for the delay, whether the accused has waived the delay and whether the accused has suffered any prejudice as a result of the delay.[146] There is no absolute limit for what is a reasonable length of pre-trial delay, but each case must be considered on its own facts. Where an accused or his lawyer instigates pre-trial motions which lengthen the pre-trial delay, this time does not count against the Crown.

A further complaint by victims of crime is that the combined effect of the ***Askov*** decision and the accused's right to disclosure has led to an increase in plea bargains. Victims do not presently need to be consulted regarding a plea bargain. Therefore, when one is made, they may feel left out and ignored by the system. A number of victims would prefer having the small part that they play at trial and sentencing.[147]

(iii) Right Against Self-Incrimination; Right to Silence at Trial

Canadian Charter

Section 11: Any person charged with an offence has the right
(c) not to be compelled to be a witness against that person in respect of the offence;

Sri Lankan Constitution (1978)

Article 13(3): Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.
Sri Lankan Constitution (2000 draft)

Article 10(12): No person shall be compelled to testify against himself or to confess guilt.

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[144] ***R. v. CIP*** [1992] 1 S.C.R. 843 at 855-859.
[145] ***R. v. Askov*** [1990] 2 S.C.R. 1199.
[146] ***R. v. Smith*** [1989] 2 S.C.R. 1120 at 1131.
[147] See, for example, Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 97-99.

This section confers the right not to have to give evidence at one's own trial. This right is related to the right to silence, that is the right not to be compelled to give evidence against oneself at any stage of the proceeding discussed earlier.

However, if an accused elects to give evidence at his/her trial, he/she cannot then refuse to answer some incriminating question – this is not a right that may be exercised selectively by an accused only when it suits him/her.

Related to section 11(c) is a provision in the *Canada Evidence Act*[148] that prohibits the judge or the Crown from making any comment to a jury about the fact that an accused did not testify.[149]

On the other hand, many victims would like to have the right to speak at trial and to tell their story in their words. But as a general rule, in criminal cases, victims do not have a right to "their day in court."[150] Currently, the only opportunity they have to speak at trial is if they are called by the prosecution to be a witness, or during sentencing, or if they claim that their rights have been violated.[151] That would include for example a situation in which an accused is seeking access to a victim's personal records.[152]

Although there is no general right on the part of the victim to participate in the trial proceedings, *Charter* challenges have opened the door slightly for parties other than the accused to gain standing on occasion. For example, the Supreme Court of Canada has held that the media may have standing to challenge a proposed publication ban.[153]

However, regardless of whether a victim has a right to be heard separately during court proceedings against an accused that does not mean that the victim's rights are ignored. As noted earlier, there have been a number of circumstances in which Canadian courts have had to balance the rights of victims and the accused. These conflicting rights have arisen most

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[148] R.S.C. 1985, c. C-5.

[149] *Canada Evidence Act* R.S.C. 1985 c. C-5, s.4(6).

[150] Some argue that the victims' day in court may be in a civil proceeding since victims can file a civil suit against the accused in an attempt to receive a damages award.

[151] Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 100-101.

[152] ***L.L.A. v. A.B.***, [1995] 4 S.C.R. 536.

[153] ***Dagenais v. C.B.C.***, [1994] 3 S.C.R. 835. In that same case, the Court developed a test to determine when a publication ban should be ordered by balancing freedom of expression and the right to a fair trial. This test was recently reconfigured to include a consideration of other rights besides the freedom of expression. The Court stated that a publication ban should only be ordered when:

> (a) the order is necessary to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and,
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice: ***R. v. Mentuck*** 2001 SCC 76 at paragraph 32.

often in sexual assault trials especially in the context of the type of evidence that will be admitted. The victims' rights implicated in these situations are the right to equality and the right to privacy.

(iv) Right to be Presumed Innocent

Canadian Charter

Section 11: Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Sri Lankan Constitution (1978)

Article 13(3): Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

(5): Every person shall be presumed innocent until he is proved guilty:
Provided that the burden of proving particular facts may, by law, be placed on an accused person.

Sri Lankan Constitution (2000 draft)

Article 10(10): Any person charged with an offence shall be entitled to be tried –

(b) at a fair trial;

(c) by a competent court;

(11): Every person shall be presumed innocent until he is proved guilty.

The presumption of innocence lies at the heart of the criminal law and protects the fundamental liberty and human dignity of any person accused of an offence.[154] The fact that the state must prove the guilt of an accused beyond a reasonable doubt flows from the presumption of innocence in section 11(d) of the *Charter*.

This right has led to the Courts striking down sections of the criminal legislation, which had imposed reverse onus provisions on accused. For example, the *Narcotics Control Act* used to provide that persons in possession of an illegal drug were presumed to be in possession for the purpose of trafficking – a more serious offence. Hence, the accused had an onus to disprove that they were in possession for the purpose of trafficking. The Supreme Court found that this "reverse onus" offended section 11(d) of the *Charter* because it would make it "possible for a conviction to occur despite the existence of a reasonable doubt."[155]

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[154] ***R. v. Oakes*** [1986] 1 S.C.R. 103 at 119.
[155] ***R. v. Oakes*** [1986] 1 S.C.R. 103 at 132.

Section 11(d) also guarantees a fair and public hearing before an independent and impartial tribunal. Independence and impartiality have been found to have independent constitutional protection outside the protection offered by section 11(d).[156] Under section 11(d), the independence requirement has been held to guarantee an accused the right to a trial before a judge who is independent. The Supreme of Canada has determined that the three core requirements of judicial independence are (1) security of tenure; (2) financial security; and (3) administrative independence.[157]

The Court has also confirmed that judicial independence has two dimensions: the *individual independence* of a judge and the *institutional independence* of the court of which that judge is a member.[158] Individual independence ensures that a judge is free to decide a case on its merits, without interference from anyone. Institutional independence is required because if the court itself is not independent of government, then the judge is not, and will not be perceived as, independent.[159] Therefore, both aspects of judicial independence must exist.

(v) Right to Trial by Jury

Canadian Charter

Section 11: Any person charged with an offence has the right

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

Canada is currently in the process of attempting to standardize jury charges to some extent. Unlike the U.S., pattern jury charges do not exist. This leads to a relatively high reversal rate for jury trials which can be a costly burden to all parties involved, the accused, the victim and the state.

Also, to date, no case has decided that jurors should receive hard copies of the charge to the jury. Thus, we have cases where jurors are expected to try to absorb dense and lengthy jury charges, some of which can take as long as a day, if not more, to deliver. The implications of this for a jury attempting to comprehend the instructions are self-evident. And yet, trial by jury remains one of the most valued aspects of our criminal justice system.

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[156] *Provincial Court Judges Reference* [1997] 3 S.C.R. 3.

[157] Judicial independence is both a "status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions." ***Valente v. The Queen*** [1985] 2 S.C.R. 673 at 689.

[158] ***The Queen v. Beauregard*** (1986) 30 D.L.R. (4th) 481 at 491 (S.C.C.)

[159] ***Valente v. The Queen*** [1985] 2 S.C.R. 673 at 687

(vi) Right not to be Convicted without "Guilty Mind"

Canadian Charter

Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Sri Lankan Constitution (1978)

Article 13(3): Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

Sri Lankan Constitution (2000 draft)

Article 10(10): Any person charged with an offence shall be entitled to be tried –

(b) at a fair trial;
(c) by a competent court;

The principles of fundamental justice and the right not to be deprived of liberty except in accordance with them have been held to require that criminal laws be sufficiently precise to create an intelligible standard of conduct[160] and that they not be overly broad so as to criminalize more behaviour than is necessary to address the issue at which they are directed.[161]

Most importantly, though, the state must prove that the accused had a sufficiently culpable level of guilty intent (*mens rea*) to obtain a criminal conviction. In other words, for an accused to be convicted of an offence punishable by imprisonment, the Crown must prove a guilty mind.[162]

The Court has also held that the more serious the offence, the higher the degree of intention or forseeability will be. For example, the *Criminal Code* provision stipulating that an accused who had caused the death of another person during the commission of a serious offence was guilty of murder, regardless of the accused's intent, was challenged. The Supreme Court found that this provision was in violation of the principles of fundamental justice because this

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[160] See, ***Re ss. 193 and 195 (1) of Criminal Code*** [1990] 1 S.C.R. 1123, ***United Nurses of Alberta v. Alberta*** [1992] 1 S.C.R. 901, ***R. v. Nova Scotia Pharmaceutical Society*** [1992] 2 S.C.R. 606. While none of the challenges based on vagueness were successful in these cases, the Supreme Court acknowledged that such a challenge was possible in theory. In ***R. v. Morales*** [1992] 3 S.C.R. 711, the Court found that the criminal code provision that allowed a prisoner to be denied bail on the basis that allowing it would not be in the "public interest" was void because it was too vague and provided no guidance for determining when bail should or should not be granted. Section 11(e) of the *Charter* which guarantees the right "not to be denied reasonable bail without just cause" was also relied upon by the Court in this case.

[161] ***R. v. Heywood*** [1994] 3 S.C.R. 761.

[162] ***Reference Re Section 94(2) B.C. Motor Vehicle Act*** [1985] 2 S.C.R. 486.

most serious of crimes, murder, required that the state prove that the accused had actually intended to cause the death or had foreseen that death would likely have resulted from his actions.[163]

(vii) Right to Understand the Proceedings

Canadian Charter

Section 14: A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Sri Lankan Constitution (1978)

Article 13(3): Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

Sri Lankan Constitution (2000 draft)

Article 10(10): Any person charged with an offence shall be entitled to be tried –
(b) at a fair trial;

The import of this section is clear. The accused and witnesses must be able to understand the proceedings. The ability to understand the proceedings is relevant to an accused's right to a fair trial.[164]

The need for an interpreter to properly instruct counsel does not fall within this section but constitutes part of the right to counsel, right to a fair trial and the right to make full answer and defence.[165]

4.3 Post-Trial Rights

(i) Rights of the Accused in Sentencing

Canadian Charter

Section 12: Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

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[163] ***R. v. Vaillancourt*** [1987] 2 S.C.R. 636 and ***R. v. Martineau*** [1990] 2 S.C.R. 633.
[164] ***R. v. Tran*** [1994] 2 S.C.R. 951.
[165] ***R. v. R.*** (A.L.) (1999) 141 C.C.C. (3d) 151 (Man.C.A.).

Sri Lankan Constitution (1978)

Article 11: No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Sri Lankan Constitution (2000 draft)

Article 9(1): No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
(2): No restriction shall be placed on the right declared and recognized by this article.

Canadian Charter

Section 11: Any person charged with an offence has the right
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Sri Lankan Constitution (1978)

Article 13(6): No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Sri Lankan Constitution (2000 draft)

Article 10(13): No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time when such offence was committed:

Provided that nothing in this Article shall prejudice the trial and punishment of any person for any act or omission, which at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Upon finding an accused guilty, a court must then impose a sentence. The *Criminal Code* generally only specifies the maximum sentences for offences (and a few minimum sentences), leaving a great deal of discretion in the hands of the trial judge. Sentencing is

based upon considerations of deterrence, denunciation, proportionality and rehabilitation.[166] Parliament has also stated that a person convicted of an offence should not be imprisoned where less restrictive measures might be appropriate.[167] A popular sentencing option not involving imprisonment is a fine.

The *Criminal Code* also provides for the imposition of "conditional sentences", where the convicted person would serve the sentence in the community and not in a jail, with certain conditions placed on their behaviour for the term of the sentence.[168] For example, a person may be required to maintain a curfew, to stay at their home except for certain specified reasons at certain specified times and they may be required to have their location electronically monitored by corrections officials.[169]

The conditional sentencing regime only came into effect in Canada in 1996.[170] Since then there have been many thousands of conditional sentences imposed in Canada. Recently, there have been increasing public concerns about the use of conditional sentences for certain offences. One Minister of Justice has challenged the appropriateness of imposing conditional sentences for serious personal injury offences and called for immediate legislative reforms.[171]

A punishment will be cruel and unusual if it is so excessive as to outrage standards of decency.[172] Generally, this requires proportionality between the punishment imposed and the offence. For example, a minimum punishment of seven years for importing narcotics into Canada was found to be a cruel and unusual punishment because it could apply to both serious narcotics importers and a one time importer of a very small amount of narcotic.[173]

On the other hand, the Supreme Court has found that the provision for minimum sentences of life imprisonment without eligibility for parole for certain types of murders does not offend section 12 of the *Charter*.[174]

(ii) Victims' Rights in Sentencing

Victims or their representatives have been given the right to participate at the sentencing stage of the criminal process. Once a verdict has been reached, the victim of a crime is entitled to provide a statement to the court about the effects of the crime on his or her life.[175]

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[166] These considerations, and others, have been codified in s.718 of the *Criminal Code*.
[167] Section 718.2(d) of the *Criminal Code*.
[168] Section 742 of the *Criminal Code*.
[169] Electronic monitoring has been widely used in the United States and in at least one province in Canada, British Columbia, its use is growing.
[170] An Act to amend *Criminal Code* (sentencing), S.C. 1995, c. 22 (came into force 3 September 1996).
[171] Alberta Justice, News Release 02-034, "Topics to be discussed at meeting of Ministers responsible for justice" (21 October 2002).
[172] ***R. v. Smith*** [1987] 1 S.C.R. 1045.
[173] ***R. v. Smith*** [1987] 1 S.C.R. 1045.
[174] ***R. v. Luxton*** [1990] 2 S.C.R. 711.
[175] Section 722 of the *Criminal Code of Canada* provides for the use of a victim impact statement at the sentencing stage of the criminal proceeding.

This victim impact statement is designed to give the victim's rights and interests due consideration in the sentencing process. Indeed, one of the objectives of sentencing is "to provide reparations for harm done to victims or to the community."[176]

Critics of involving the victim at this stage claim that the justice system was never intended to heal the suffering of victims of crime. On this theory, the effect of the crime on the victim is irrelevant. However, the purpose of victim impact statements is more than an attempt to respond to victims' concerns. The purposes include demonstrating to the offender the effect of the crime on the victim, bringing home to the offender the consequences of his or her act, building respect for the criminal justice process, and ensuring that the effects of crime on victims are understood by those in the justice system.[177]

As part of the sentence, a judge may order restitution to the victim to compensate for loss of property plus pecuniary damages, including loss of income or support incurred as a result of bodily harm. Funeral expenses have been awarded to families of those who lost a loved one as a result of a crime. Also, if the victim lived in the same home as the offender, restitution can be ordered for moving expenses along with temporary housing, food, child care and transportation expenses incurred during the move.[178]

Once an offender has been sentenced, victims may request information regarding the offender's sentence such as eligibility for parole, temporary releases to the public and release date so they may keep track of the offender's status.[179]

(iii) Right to Parole

Upon serving a specified portion of their sentence, and meeting certain conditions (good behaviour while in prison, for example), an offender may be granted a form of conditional release known as parole.[180] There is no constitutional right to parole, but it is an important component of Canada's criminal justice and corrections systems.[181]

At the victim's request, the victim may attend the offender's parole hearing and submit a victim impact statement, thereby providing victims a voice at the hearing.

(iv) Right to Appeal

At the post-trial stage of criminal proceedings, perhaps the most important right for someone who has been found guilty of an offence, is the right to appeal that finding. In Canada, a

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[176] S. 718(e) of the *Criminal Code*.
[177] ***R v. Gabriel*** (1999) 137 C.C.C.(3d) 1 (Ont. S.C.) at 11-12.
[178] *Criminal Code of Canada*, s. 738.
[179] *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 26.
[180] Parole is provided for in the *Corrections and Conditional Release Act* S.C. 1992 c.20.
[181] Section 100 of the *Corrections and Conditional Release Act* provides that the purpose of conditional release is "to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law abiding citizens."

person convicted of an offence can appeal the conviction, the sentence imposed upon conviction, or both.[182] An appeal is not a re-hearing of the trial and only certain aspects of the trial decision may be appealed. Generally, this is limited to situations where the trial judge made an error in the application of the law, but findings of fact may be addressed on appeal, though not for the purposes of retrying the case. In particular, an accused has a right of appeal on the basis that the finding of guilt was unreasonable in the circumstances or cannot be supported on the evidence. The test is whether the verdict is one which a properly instructed jury, acting reasonably, could have rendered.[183]

The appeal court will generally base its appeal decision on the evidence given at the trial and only in exceptional cases will a party be allowed to refer to new evidence not already entered at the trial of the matter.[184]

The state too has a right of appeal against a decision acquitting the accused but only on a point of law. In addition, the state can appeal the sentence imposed on an offender.

Victims and third parties are not usually parties to an appeal. However, there is one notable exception to this general statement. In constitutional cases, standing is often given to interveners who will frequently file written submissions on the policy issues confronting the court. Especially in constitutional cases, at both the Supreme Court of Canada level and appellate court level, third parties may seek to intervene. A number of groups exist in Canada whose mandate includes public interest litigation on constitutional issues. In fact, the federal government has set up a Court Challenges Program under which it offers financial assistance for important court cases that advance language and equality rights under the Constitution.[185]

(v) Right not to have Evidence given at one Trial used in Another

Canadian Charter

Section 13: A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury for the giving of contradictory evidence.

Sri Lankan Constitution (2000 draft)

Article 10(12): No person shall be compelled to testify against himself or to confess guilt.

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[182] Sections 673-696 of the *Criminal Code of Canada* provide for appeals from convictions for indictable (more serious) offences and sections 812-839 provide for appeals from summary (less serious) convictions. While there are some differences between the nature of appeals for indictable and summary offences, those will not be discussed here.

[183] ***R. v. Yebes***, [1987] 2 S.C.R. 171.

[184] Section 683 of the *Criminal Code* provides for the possibility of the introduction of "fresh evidence" in certain circumstances.

[185] See About Court Challenges at http://www.ccppcj.ca/e/info.html

The purpose of this section is rooted in the desire to respect an accused's right to remain silent. This section prevents the state from calling a person as a witness in one proceeding, asking them questions that they are bound to answer and then using that testimony in a proceeding where the witness is accused of a crime, thereby indirectly compelling the accused to give evidence against themselves contrary to section 11(c).[186] In addition to precluding the use of evidence given in an entirely different proceeding, this section has been held to preclude the use of evidence from an earlier trial, where, on appeal, a new trial has been ordered.[187]

In the past, it was understood that an accused could be cross-examined on any earlier inconsistent evidence for credibility purposes.[188] However, the Supreme Court of Canada has recently decided that cross-examination may only be permitted for the purposes of challenging credibility if there is no realistic chance that the earlier evidence could be used to incriminate the accused.

> *When an accused testifies at trial, he cannot be cross-examined on the basis of a prior testimony unless the trial judge is satisfied that there is no realistic danger that his prior testimony could be used to incriminate him. The danger of incrimination will vary with the nature of the prior evidence and the circumstances of the case including the efficacy of an adequate instruction to the jury. When, as here, the prior evidence was highly incriminating, no limiting instruction to the jury could overcome the danger of incrimination and the cross-examination should not be permitted.*[189]

It has also been found that physical evidence that could not have been obtained, but for an accused's prior testimony as a witness in another proceeding, can be excluded from the accused's trial as having been obtained in a manner that infringes section 13 of the *Charter*.[190]

(vi) The Right against Retroactivity of Criminal Law

Canadian Charter

Section 11: Any person charged with an offence has the right
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

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[186] ***R. v. Noel***, [2002] S.C.J. No. 68
[187] ***R. v. Mannion*** [1986] 2 S.C.R. 272.
[188] ***R. v. Kuldip*** [1990] 3 S.C.R. 618.
[189] ***R. v. Noel***, [2002] S.C.J. No. 68.
[190] ***R. v. S.(R.J)*** [1995] 1 S.C.R. 451.

Sri Lankan Constitution (1978)

Article 13(6): No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Sri Lankan Constitution (2000 draft)

Article 10(13): No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time when such offence was committed:

Provided that nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

This prohibition on the creation of retroactive offences does not generally interfere with the ability of Parliament to create offences for war crimes. The language in section 11(g) and the status of most war crimes as offensive to international law or to the general principles of law recognized by the community of nations has been held to authorize the creation and domestic prosecution of crimes committed during World War II.[191]

(vii) The Right Against Double Jeopardy

Canadian Charter

Section 11: Any person charged with an offence has the right (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;

[191] ***R. v. Finta,*** [1994] 1 S.C.R. 701. In ***Finta,*** the accused was charged with several offences as war crimes and crimes against humanity under the Canadian *Criminal Code.* He was acquitted at trial by a jury. The Ontario Court of Appeal dismissed the Crown's appeal, and the Crown appealed to the Supreme Court of Canada on jurisdictional questions and alleged errors of law. The accused cross-appealed on constitutional grounds, arguing *inter alia* that the provisions of the *Code* under which he was charged infringed s. 11(g) of the *Charter.* A majority of the Court held that the rule against retroactivity of laws was a principle of justice. However, the majority held that the retroactivity of the impugned provisions was not incompatible with justice since, while not criminal at the time they were committed, the offences at issue were clearly contrary to international law and the accused knew of their immoral character.

Sri Lankan Constitution (2000 draft)

Article 10(14): Any person who has once been tried by a competent court for an offence and convicted or acquitted of such offence shall not be liable to be tried for the same offence.

5. Considering National Security: A Look to the Future

One challenge Canada shares with other countries around the world is how to balance national security interests with civil liberties and human rights in the face of terrorism. Canada's Anti - Terrorism Act (*Act*) passed in response to the horrific events of September 11, 2001[192] may provide a peak into the future. Under the *Act,* Parliament shifted the balance between the state and those accused of terrorism for the purpose of permitting police and other state agencies to better investigate, prevent and prosecute actual or planned terrorist attacks.

The *Act* enacts new crimes (for example, financing of terrorism), and extends jurisdiction to prosecute acts committed extra-territorially, which had they been committed in Canada, would be a crime. A number of provisions appear unremarkable and consonant with existing principles of criminal law. However, there are others which some members of the bar and human rights activists contend unduly violate citizens' fundamental rights.[193] Concerns expressed include the following.

- To be found guilty of any new offences, the accused must be a member of a "terrorist group" as defined by the *Act.* Proof of such membership does not need to be established beyond a reasonable doubt.[194] The concern expressed is that this provision violates the presumption of innocence because the prosecution is excused from proving two significant elements, namely that the group listed engages in terror and that the accused is engaged in terrorist activity. It is contended that ultimately an accused can be convicted on the basis of a reasonable belief on each of these elements.[195]

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[192] *Anti -Terrorism Act*, S.C. 2001, c. 41.

[193] Trevor Farrow, *"Courts, Terrorists, Protesters & Police: September 11th, Judicial Deference & The Rule of Law"* (Presentation to Judges of the Alberta Court of Appeal and Court of Queen's Bench, 10 October 2002) [unpublished].

[194] *Anti-Terrorism Act*, S.C. 2001, c. 41, s.4. This section amends the *Criminal Code* to add, among other things the definition of "terrorist group" which means:

> (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or
> (b) a listed entity, and includes an association of such entities.

[195] David Paciocco, *"Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act"* (Criminal Law Seminar, Vancouver, 20-22 March 2002) [unpublished]

- Individuals thought to have information relevant to an ongoing investigation of a terrorist crime can be required, upon approval of the Attorney General, to appear before a judge and to provide information. If a person does not attend the "investigative hearing" or does not remain at the hearing, this is a crime and an arrest warrant can be issued.[196]

- A witness appearing before an investigative hearing receives testimonial immunity, which properly protects a breach of the right to silence and the right against self-incrimination. However, the immunity given is only against criminal prosecution. It is argued that this leaves the door open for the testimony to be used in a civil proceeding and exposes the witness to retaliation from the terrorist group when the individual might have preferred to remain silent and be sanctioned for that.

- It has been argued that compelling testimony prior to any charge being laid could be a violation of the *Charter* right to life, liberty and security of the person.[197] Since the witness is compelled to answer to the state prior to a charge being laid, and since there is a possibility that a charge may never be laid and a conclusion reached, the stigma attached to a witness involved in a terrorism investigation could be so great as to violate his or her dignity. In the United States, though, witnesses have been compelled to answer to a grand jury for years.

- Another concern is that it may compromise judicial impartiality and independence. The concern expressed is that the government is co-opting judges to become participants in the investigative arm of the state.[198]

- Suspected terrorists can face a "preventive arrest" to forestall terrorist activity. If there are reasonable grounds to suspect a person is about to commit a terrorist act, a police officer can arrest the subject and bring that person before a judge. The judge can then impose supervisory conditions or detain the suspect for 48 hours. An arrest warrant in this situation is required unless there are exigent circumstances.[199] This raises a number of red flags, including concerns about arbitrary detention or imprisonment and breach of the presumption of innocence.

Critics have argued that these provisions are too broad and inappropriately impair the rights that form the foundation of Canada's legal system.[200] Another concern is that these measures

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[196] *Anti-Terrorism Act* S.C. c. 41 ,adding s. 83.28 to the *Criminal Code of Canada.*
[197] Jeremy Millard, *"Investigative Hearings Under the Anti-Terrorism Act"* (2002) 60(1) U.T. Fac. L. Rev. 79.
[198] David Paciocco, *"Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act"* (Criminal Law Seminar, Vancouver, 20-22 March 2002) [unpublished].
[199] *Anti-Terrorism Act*, S.C. 2001, c. 41, s.4, adding s. 83.3 to the *Criminal Code of Canada.*
[200] See, for example, Canadian Bar Association, *Submission on Bill C-36, Anti-Terrorism Act* (Ottawa: Canadian Bar Association, 2001); and, David Paciocco, *"Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act"* (Criminal Law Seminar, Vancouver, 20-22 March 2002) [unpublished].

may "creep' into the criminal law generally, leading to the crumbling of many constitutional rights. This risk is one that the Deputy Minister of Justice has addressed in this way:

> *We need to carefully scrutinize any future proposals that might blur the distinction between investigation of threats to security of Canada and the investigation of traditional crimes*[201]

The *Act* does contain a number of important safeguards:

- there must be reasonable grounds to believe a person has information and reasonable attempts to obtain that information by other means must be exhausted prior to holding an investigative hearing;
- Reasonable grounds to suspect a terrorist act will occur must be shown before making a preventive arrest;
- Those detained have a right to counsel;
- Legitimate political activism and protests are protected through the precise definition of terrorist activities;
- The Attorney-General's consent is required to prosecute all new terrorism offences creating governmental accountability;
- An annual report to Parliament on the use of preventive arrest and investigative hearing provisions is required;
- A sunset clause has been added requiring that the *Act* be reviewed in five years.

It is clear that the courts in Canada have the jurisdiction to review the *Act* and consequential state action for constitutional compliance. Nothing in the *Act* limits judicial review. Further, those sections of the *Act* limiting certain due process rights involve amendments to the *Criminal Code*, a federal piece of legislation, subject in its own right to court scrutiny.[202]

The Supreme Court of Canada has recognized that rights will vary depending on the context - national security versus traditional crime.[203] It recently had occasion to consider a case in which the Minister of Citizenship and Immigration had determined to deport a refugee on the basis the person constituted a danger to security in Canada. The Court discussed the need to

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[201] Morris Rosenberg, Deputy Minister of Justice (Canada), *"An Effective Canadian Legal Framework To Meet Emerging Threats To National Security"* (Speech given to The Canadian Association for Intelligence and Security Studies, Ottawa, Ontario, 26 September) at 8 [Unpublished]

[202] It is noted that the Sri Lankan Constitution expressly declares the Supreme Court to be the "highest and final superior court" and grants to it "jurisdiction in respect of constitutional matters and the protection of fundamental rights": Article 118, *Constitution of the Democratic Socialist Republic of Sri Lanka* (Certified 31 August 1978). I also note that the preamble of the *Prevention of Terrorism Act* recognizes the rule of law and that "grievances should be redressed by constitutional methods:" Statutes of Sri Lanka 1979, c.30.

[203] ***Hunter v. Southam*** [1984] 2 S.C.R. 145; and, ***Suresh v. Canada (Minister of Citizenship and Immigration)*** [2002] S.C.J. No. 3.

strike an appropriate balance between rights and national security:

> *On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.*
>
> *On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society - liberty, the rule of law, and the principles of fundamental justice - values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values.*[204]

However, the Supreme Court has also stated that when dealing with the "security of Canada", it should take "a broad and flexible approach to national security and...a deferential standard of judicial review. Provided the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister's decision..."[205]

Terrorism raises complex legal issues. A delicate balancing act must be performed by both the legislative and judicial branches of government. When the threat of terrorism is real and pressing, the test justifying a restriction of a right may result in a tilting away from individual rights and

freedoms in favour of a country's collective security interests.[206] However, even then, it remains necessary to respect the rule of law and ensure that the state's power is not wielded in an arbitrary or disproportionate manner.[207] There is a fine line between restricting rights and protecting national security on the one hand and defeating democracy on the other.

6. Conclusion

To be effective and to continue to enjoy the respect and support of the public, a criminal justice system must meet the needs of all its citizens. The *Charter* and Canada's commitment

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[204] ***Suresh v. Canada (Minister of Citizenship and Immigration)*** [2002] S.C.J. No. 3 at paragraphs 3 & 4.
[205] ***Suresh v. Canada (Minister of Citizenship and Immigration)*** [2002] S.C.J. No. 3 at paragraph 94.
[206] Under the *Charter*, infringement of a right must be a proportionate response to a pressing and substantial need. The law must be rationally connected to its objective; minimally impair the right or freedom in question; and properly balance the objective of the legislation with the severity of its effects: ***R. v. Oakes***, [1986] 1 S.C.R. 103.
[207] See, for example, David Paciocco, *"Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act"* (Criminal Law Seminar, Vancouver, 20-22 March 2002) [unpublished]; and, Trevor Farrow, *"Courts, Terrorists, Protesters & Police: September 11th, Judicial Deference & The Rule of Law"* (Presentation to Judges of the Alberta Court of Appeal and Court of Queen's Bench, 10 October 2002) [unpublished].

to human rights have transformed our criminal justice system, making it a far more inclusive and fair one. As part of that process, the judiciary, in the exercise of its assigned constitutional role, has attempted to strike an appropriate balance between the due process rights of the accused and the human rights of others, including victims of crime and their equality rights. Doing so may sometimes attract controversy. But if the judiciary is not prepared to risk controversy in defence of constitutional values and human rights, then who will protect citizens against unfair actions by the state and the majority? Judges have judicial independence for a reason – to protect the constitutional rights of all our citizens.

Catherine Anne Fraser was appointed Chief Justice of Alberta in 1992. Born in Campbellton, New Brunswick in 1947, she graduated from the University of Alberta, Faculty of Law in 1970 as the Silver Medallist and received her Master of Laws from the London School of Economics in 1972.

She practiced law in Edmonton, concentrating on corporate and commercial law. In 1983, she was appointed Chair of the Public Service Employees Relation Board, a labour tribunal which governed the public sector in Alberta. That same year, she was appointed Queen's Counsel..

Chief Justice Fraser's judicial career began when she was appointed to the Queen's Bench in 1989. She was elevated to the Court of Appeal in 1991 and was appointed Chief Justice of Alberta the following year.

Chief Justice Fraser has been actively involved in judicial education, both nationally and internationally. As Chair from 1995 to 1998 of the Education Committee of the Canadian Judicial Council, which consists of all the Chief Justices of Canada, she strongly supported, and continues to support, efforts to provide continuing judicial education on social justice issues including gender equality, racial equity, and Aboriginal justice. She has lectured internationally on topics ranging from human rights, judicial awareness training for judges, judicial independence, the judicial appointments process, the application of international treaties and covenants to domestic laws, the evolution of equality jurisprudence, and family law.

An Overview of International Trends and Emerging Issues for the Administration of Juvenile Justice

Nikhil Roy[*]

Definition of juvenile justice

A narrow definition of what constitutes the subject matter of juvenile justice is the treatment of children (girls and boys under the age of 18) in conflict with the law.

A wider definition for juvenile justice would include not only treatment from the point at which children come into conflict with the law but also the root causes as to why children come into conflict with law in the first place.

In other words, a proper definition for juvenile justice must not only include, the treatment of children from the point at which they come into conflict with the law (the issue of protection) but also issues relating to the prevention of such behaviour in the first place.

The Convention on the Rights of the Child (CRC): Articles 40 and 37

The Convention on the Rights of the Child (CRC) provides the starting point for any discussion about the proper administration of juvenile justice. Adopted in 1990, the CRC provides a wide-ranging framework for the protection of children's rights.

Article 40 of the CRC deals specifically with the issue of the administration of juvenile justice.

It covers the rights of all children alleged as, accused of or recognised as having infringed the penal law. Thus, it covers treatment from the moment an allegation is made, through investigation, arrest, charge, any pre-trial period, trial and sentence. The article requires States to promote a distinctive system of juvenile justice for children with specific positive rather than punitive aims.

Article 40 details a list of minimum guarantees for the child and it requires States Parties to set a minimum age of criminal responsibility, to provide measures for dealing with children who may have infringed the penal law without resorting to judicial proceedings and to provide a variety of alternative dispositions to institutional care.

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[*] Juvenile Justice Consultant, London

In addition to Article 40, Article 37 of the CRC states very clearly that the deprivation of liberty for a child "shall be used only as a measure of last resort and for the shortest appropriate period of time."

The international framework for juvenile justice

In addition to the CRC, and supplementing and elaborating on the provisions of Articles 40 and 37, a number of international documents and guidelines are in place which taken together provide a comprehensive framework for the care, protection and treatment of children coming into conflict with or at risk of coming into conflict with the law. These include:

- United Nations (UN) Minimum Rules for the Administration of Juvenile Justice: The Beijing Rules (1985);

- UN Guidelines for the Prevention of Juvenile Delinquency: The Riyadh Guidelines (1990);

- UN Rules for the Protection of Juveniles Deprived of their Liberty: JDLs (1990).

These three sets of rules can be seen as guidance for a three stage process: firstly, social policies to be applied to prevent and protect young people from offending (The Riyadh Guidelines); secondly, establishing a progressive justice system for young persons in conflict with the law (The Beijing Rules); and finally safeguarding fundamental rights and establishing measures for social re-integration of young people deprived of their liberty, whether in prison or other institutions (The JDL Rules).

Two other international documents worth mentioning here are:

1. The Standard Minimum Rules for the Treatment of Prisoners (1955), which first established the principle of separation of young people from adults in custodial facilities;

2. UN Minimum Rules for Non-Custodial Measures: The Tokyo Rules (1990), which are intended to promote "greater community involvement in the management of criminal justice, specifically in the treatment of offenders" and to "promote among offenders a sense of responsibility towards society". The rules cover pre-trial, diversion, sentencing and post-trial issues.

Finally it should be remembered that the entire framework for the protection of children's rights is set against the wider context of the protection human rights as embodied in the Universal Declaration of Human Rights (UDHR) of 1950 and the protection framework established subsequently by the UN.

Mechanism for enforcement

The Committee on the Rights of the Child is the body given the responsibility for ensuring compliance of governments with the provisions of the CRC. As regards the implementation of Article 40 the Committee has prepared extensive guidelines to help governments in reporting on progress in establishing a system of administration of juvenile justice, which protects the rights, and best interests of the child.

National realities

When it comes to national realities however, a big gap exists between the elaborate international framework and reality on the ground, with regards to the issue of the administration of juvenile justice, in most countries around the world.

A recent analysis of the responsibilities of governments in relation to the administration of juvenile justice concludes: "juvenile justice is the unwanted child of the UN system."[1]

Various reasons are given as to why governments are not doing enough in this area, including:

- Lack of adequate data
- Problem of overlapping systems
- Public perceptions of crime
- Lack of knowledge about alternatives
- Problems of resources
- Juvenile Justice being classified as a low priority area

[1] *"Juvenile Justice: 'the Unwanted Child' of State Responsibilities – An Analysis of the Concluding Observations of the UN Committee on the Rights of the Child in regard to Juvenile Justice 1993 – 2000"* International Network on Juvenile Justice/Defence for Children International, January (2000)

Core areas for juvenile justice work

The core areas of work in relation to juvenile justice include the following:

- **Law Reform including a focus on eliminating status offences and increasing age of criminal responsibility**

Legislation provides the framework for practice in juvenile justice. However in many countries the legal framework does not reflect international standards in this regard. There is a general need for countries not having done so to review existing legislation and bring it in line with international standards.

In doing this two issues in particular are worth bearing in mind:

1. Status Offences: in many countries, certain acts constitute offences, when committed by children, but are not considered such when perpetrated by adults. In other words, the conflict with the law stems from the status of the offender – child – rather than from the nature of the act itself. The Riyadh Guidelines make it clear that "legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is NOT considered an offence and not penalized if committed by a young person."

2. Age of Criminal Responsibility: there is no clear international standard regarding the age at which criminal responsibility can be reasonably imputed to a juvenile. The CRC simply enjoins governments to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law." The Beijing Rules add to this the principle that "the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity." There is a wide variation in ages of criminal responsibility set around the world; it is worth mentioning however that the Committee on the Rights of the Child emphasises the desirability of setting the highest possible minimum age.

- **Alternatives to the formal criminal justice system including diversion schemes based on restorative justice principles**

It is now increasingly recognised that the process of going through the formal criminal justice system can be deeply disturbing for children. The CRC and the UN Rules governing juvenile justice state that every effort should be made to keep young people out of the criminal justice system.

This is called "diverting" young people from the formal justice system. Research shows that young people who are diverted from the formal court processes have a much lower re-offending rate. This means that fewer of them commit crimes again, after diversion, than those who go to court.

The reason is that once young persons have been branded criminals, they are more likely to remain criminals by going through the formal process.

The diversion process works particularly well with first offenders (young people who have not committed crimes before). Examples of diversion measures include: cautions by the police including formal warnings; mediation, using trained mediators or traditional practices or processes such as family group conferencing (particularly successful in New Zealand); counselling by social workers and provision of life skills courses.

It should be noted here that diversion programs often use community based informal and traditional mechanisms for conflict resolution, where these exist, and are in conformity with international human rights standards.

The role of informal and traditional mechanisms, for conflict resolution, is increasingly being recognised and used in many countries. The family group conferencing method used in New Zealand (mentioned above) draws heavily upon traditional Maori practices.

In many countries, Africa and South Asia for example traditional mediation for resolving disputes involving juveniles is often used, making use of the skills and wisdom of village elders and invoking restorative principles to repair damage done to the community through the offending behaviour of the young person.

Such diversion programs draw upon the principles of restorative justice which emphasise the restoration of damage done rather than focus on simply punishing the offender. Restorative justice gives a central role to the victim and allows both victim and offender to find mutually acceptable ways to repair the damage and help heal the harm caused by conflict.

Diversion programs based on restorative justice principles and working to deal with children outside of the formal criminal justice system are increasingly recognised today as a better way of dealing with children in conflict with the law.

- **Reform of the formal criminal justice system to make it more child friendly**

A very important aspect of juvenile justice work is to reform the formal criminal justice system by working closely with personnel within the system. These include the police, the judiciary and prison authorities and social welfare agencies. The work involves training in child friendly techniques for dealing with children in conflict with the law as well as specific programs aimed at, for example:

- Creating special child protection units within the police force;
- Exploring the setting up of juvenile courts;
- Introducing and using alternative sentencing options;
- Improving conditions in prisons and other places of detention.

In this context it is worth looking more closely at the issue of non- custodial sentencing measures as an effective way of reforming the formal criminal justice system.

The use of custody for all but the most serious of offences is widely seen as extremely damaging for children (and it may be added for adults as well). Custodial sentences often used include prisons, correction houses, disciplinary centres and other institutional forms for deprivation of liberty.

The CRC and the Beijing Rules provide that recourse to deprivation of liberty as a sentence should be a last resort and for the shortest possible time. The Beijing Rules specify the following non-custodial sentencing options:

- care, guidance and supervision orders;
- probation;
- community service orders;
- financial penalties, compensations and restitution;
- intermediate treatment and other treatment orders;
- orders to participate in group counselling and other similar activities.

These options need to be fully explored, introduced and utilised to ensure that a child friendly juvenile justice system is established.

- **Prevention measures including education and awareness programmes**

Prevention programs form a major element within the juvenile justice work. Such programs need to address issues relating to public opinion and the media, work in schools and with

parents and addressing root causes of poverty including unemployment, lack of education and lack of skills.

Issues needing special attention

In addition to the issues highlighted already, it is important to focus on three particularly crucial issues which are seen as very important in emerging discussions about best practice with regards to juvenile justice administration. These are:

First, treatment of girls in conflict with the law: although girls make up a small proportion of the total number of children coming into conflict with the law, they need special attention as they have special needs.

Second, information gathering, research and documentation: there is an urgent need for proper research with a view to gathering adequate data, facts and figures to enable the work on juvenile justice to go ahead successfully.

Finally, and perhaps most importantly, is the issue of involving children to ensure their voices are heard in discussions relating to reform of the juvenile justice system. Children are too often left out in discussions on criminal justice system reform and this means their views are not taken into account in proposals for reform. This has to change and the voices of the children need to be listened to seriously in these discussions.

Child Combatants: Victims of Circumstance

Lakmini Seneviratne[*]

1. Introduction

Sri Lanka, as a nation that has been engulfed in armed battle for nearly two decades has paid its price in much more than military terms. With prospects of peace in the horizon, the country has yet to heal the many wounds that have been caused and continue to be caused by a cankerous war – of which the issue of child combatants is just one.

The plight of children within a war situation is of two dimensions – either as civilians or combatants. The former deals with situations where children become passive victims of armed conflict as members of civilian populations; while the latter deals with situations where children become active participants in war, particularly as combatants.[2] In either situation, the underlying phenomenon is their vulnerability. Because, although militarily armed with necessary gear and the required knowledge to operate them, the low level of maturity that is characteristic of childhood deprives children of the ability to make sound judgements in a given situation, even in conditions of perfect normalcy. More so during an armed conflict where circumstances are anything but 'normal', with prevailing conditions of uncertainty and danger. Thus, in actual fact the plight of children in either situation explained above – as civilians or as combatants – is that of victims of war. This is due to the fact that, a child combatant who is trained to be a threat to the enemy, is simultaneously a threat to him/herself.

With the emergence of new and advanced types of armed conflicts today, the issue of child combatants assumes high priority requiring immediate and concerted action. This paper seeks to discuss, though not exhaustively, the international legal framework governing the issue of child combatants and its relevance to Sri Lanka taking into consideration the prevalent situation in Sri Lanka where child conscription continues to be a problem despite the formulation of a ceasefire agreement and the subsequent 'peace process.'

2. The Situation in Sri Lanka

The issue of child combatants in Sri Lanka is a phenomenon that continues to persist despite the effect of the ceasefire in the context of an internal armed conflict that has disrupted the

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[2] Children can be direct or indirect participants in war situations. The former is where they act as combatants and the latter is where they act as supporters of the war cause by performing the role of 'assistants' to combatants eg. as food suppliers, carriers, cleaners etc.

socio-economic development of the country for more than two decades. Before the ceasefire in May 1998, taking into consideration the seriousness of the issue of forcible conscription of children into their ranks by the LTTE, Mr. Olara Otunu, the United Nations Secretary General's Special Representative for Children in Armed Conflict made a country visit to Sri Lanka. The purpose of his visit was to obtain first hand information with regard to the phenomenon of child combatants ie. the different modes of forcible recruitment and the consequent effect etc, and also to persuade through discussions with the LTTE to put an end to these unlawful actions. Consequently, the Special Representative succeeded in obtaining a commitment from the LTTE that, it would not use children under the age of 18 in combat and would not recruit anyone under the age of 17. However, as early as November 1998, Amnesty International noted incidents of child conscription by the LTTE of boys some as young as 14 years, in blatant disregard to its undertaking to the United Nations Special Representative only a few months earlier.

Over the years, the reason behind the 'drive' of large numbers of young children who join the LTTE, have differed. In June 1990, the year when the Indian Peace Keeping Force (IPKF) left the North and East of Sri Lanka, the then Government in power was supposedly 'pampering' the LTTE with money and luxuries. As reports reveal, large numbers of children clamoured to join the LTTE because, "(t)o them, sporting a gun and uniform grown-up-like and joining the carnival, where coca cola flowed freely, seemed irresistible."[3] A little over a decade later, the 'hunt' by the LTTE for child conscription has taken a turn. As the Sri Lankan country profile in Amnesty International's latest Annual Report for the year 2001 reports:

> *The organisation has received disturbing reports of an intensive recruitment drive in areas controlled by the LTTE in the north and east of Sri Lanka. In Batticaloa district, hundreds of people have been recruited over the last month or so in the divisions of Vakarai, Vavunativu, Pattipalai, Porativu, Eravurpattu and Koralaipattu. There have also been reports of intensified recruitment in the Vanni, the area to the south of the Jaffna peninsula largely controlled by the LTTE. Several reports also indicate that many families in the Batticaloa area were coerced with threats into letting their children be recruited. Other families who refused were forced to leave their homes and have now taken shelter with relatives in Batticaloa town.*[4]

As far as the methods of recruitment are concerned, the LTTE has been strategic and opportunistic. It is reported that children who get killed during live firing exercises are

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[3] http://www.island.lk/2001/10/22/featur03.html

[4] http://www.amnestyusa.org/news/2001/srilanka10112001.html on 04.02.2003

conferred the status of '*martyrs*' – the highest tribute awarded to an LTTE cadre for having served their cause, which in turn acts as an incentive or motivation for children to join their movement. On the other hand, attempts to escape by these involuntary recruits result in brutal punishment, sometimes ending in death. This on the one hand has the effect of binding those who have been recruited, though involuntarily under coercion, into an irrevocable bond which could only be revoked at the cost of their lives, and possibly of their loved ones.

Recent reports have revealed that[5] the propaganda leaders of the LTTE in the East have called upon the people to return to the glorious 'Sangam Age' – the classical age of Tamil literature (1st –2nd centuries AD), by drawing their attention to a verse from the collection '*Puranaanooru*' that romanticises mothers taking pride in anointing their sons and sending them to win glory or honourable death in war. As the report observes "(t)he crucial aspect is (thereby) conveniently suppressed." Understandably, the attitude of the young recruits so enlisted, towards the LTTE has been resentful with feelings of being cheated, humiliated and deprived. Faced with local resentment, the strategy of the LTTE has been to inaugurate a special technique of recruitment in these areas eg. rural Batticaloa, with rash pledges praising the people in the locality for upholding the *Puranaanooru* traditions and for being the 'trend setters' for the people in the other districts who will in turn be following them.

As Amnesty International reports, although the total number of children recruited is difficult to establish, it is estimated to be several hundred. Furthermore, it is reported that the pamphlets calling for such recruitment are worded in such a way that no age criterion is being observed, as has been increasingly evident in practise as well. The age limits currently applied in Batticaloa district are reported to be between 15 to 45 years. However, children as young as 14 have been reported to be among those recruited.[6]

2.1 The Effect of the Ceasefire Agreement

In the more recent development of the agreement on a ceasefire between the government of Sri Lanka and the LTTE, the Memorandum of Understanding (MoU) makes a vague reference to the issue of child combatants and their forced conscription by the LTTE. Accordingly, Article 1.1 of the MoU prohibits the engagement of either party in any offensive military operation requiring the total cessation of all military action by the banning of activities *inter alia* of "(a) ..... abductions.....". Five months into the ceasefire agreement which came into effect in February 2002, the Sri Lanka Monitoring Mission (SLMM) reported that, by July the same year they had received 44 complaints of the LTTE

[5] *Supra* note 2
[6] *Supra* note 3

forcibly conscripting or recruiting children into their ranks.[7] It was claimed to be the most common complaint received by the SLMM with at least two complaints recorded daily.

The University Teachers for Human Rights (UTHR), a group founded by teachers in Jaffna in 1998, that keeps track of the human rights situation in the North and East of Sri Lanka, observes that there are two obvious reasons for the continuous violation of commitments by the LTTE to both the Government of Sri Lanka as well as the international community. On the one hand, the ceasefire has widened the access of the LTTE to areas which were previously inaccessible. Their position is strengthened further by the provisions under the truce agreement which do not give the Monitors any authority to take any action in the event of a breach of the provisions of the agreement, including incidents of forcible conscription of children in to armed forces/ groups.[8]

It is worth mentioning at this point that, the phenomenon of child combatants persists and indeed seems to worsen despite a host of international obligations undertaken by Sri Lanka, which includes the four Geneva Conventions of August 12, 1949[9] (GCs), the 1989 Convention on the Rights of the Child[10] (CRC) and its Optional Protocol on the involvement of children in armed conflicts. [11]

Following is a brief discussion on the relevant articles enacted in these international instruments pertaining to the issue of children in armed conflict.

3. International Legal Framework

Until the time of World War II, children did not play an active part in war, except as members of resistant movements, particularly in Europe.[12] Since the active participants were primarily regular troops, codifications of legal principles governing situations of armed conflict, had little or no reference to the protection of children in armed conflicts – whether as civilian members or as combatants. However, the promulgation of the GCs at the end of the Second World War that was spearheaded by the International Committee of the Red Cross (ICRC) marked a substantial step forward in providing protection for children in times of war. This was strengthened further by the provisions on child conscription that were

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[7] " *Truce monitors admonish Tamil Tigers over recruitment of child soldiers",* http://www.utlr.org/SpecialReports/ on 17.11.2002

[8] "*Sri Lanka's Tamil rebels accused of recruiting children as soldiers amid truce",* http:/ www.uthr.org/SpecialReports/

[9] Ratified by Sri Lanka on the 28th of February 1959

[10] Ratified on the 12th of July 1991

[11] Ratified by Sri Lanka on the 6th of September 2002

[12] Balachandran, M. K. AND Varghese, R. (eds), Introduction to International Humanitarian Law, Indian Centre for Humanitarian Law and Research, New Delhi, (1997) p 216

included in the two Additional Protocols to the GCs promulgated in1977, at the time of which the issue of child combatants was gathering global momentum as a cause of major concern.

More than a decade later, the CRC which was adopted by the United Nations General Assembly, addressed this phenomenon substantially.[13] At the dawn of the new millennium, the issue was brought into the focus of the international community with added significance by the promulgation of an Optional Protocol to the CRC on the involvement of children in armed conflicts.[14]

3.1 Definition of 'Child Combatant' under the Law

Neither the GCs nor the Additional Protocols provide a precise definition as to who a child is within the ambit of the GCs/Protocols. However, the articles refer to 'persons below the age of 15 years', when dealing with protection afforded to children. Hence, 'a child' within the ambit of the GCs and the Protocols, would be all persons below 15 years.

Although the CRC, defines a child as 'every human being below the age of eighteen years...'[15], the provision dealing with protection of children at times of armed conflict[16] refers to 'persons who have not attained the age of 15 years' for the purposes of providing protection from armed conflicts. The position has been remedied to a certain extent in the Optional Protocol to the CRC, where Article 3 (1) imposes an obligation on states parties to,

> *"... raise the minimum age for the voluntary recruitment of persons in to their national armed forces from that set out in article 38, paragraph 3 of the CRC taking account of the principles contained in that article and recognising that under the Convention persons under the age of 18 years are entitled to special protection."*

However, the binding nature of this obligation seems to have been diluted by the subsequent subsections where it is enacted that states parties are permitted *voluntary* recruitment, though not *compulsory* recruitment[17] into their national armed forces under the age of 18 years, provided they maintain the necessary minimum safeguards as enumerated in the Optional Protocol to the CRC.[18] The better proposition would be that, whether the recruitment is forced or not, children should have no role to play in war. In this regard, a progressive feature

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[13] Article 38 of the CRC
[14] A/RES/54/263 of 25 May 2002
[15] Article 1 of CRC
[16] Article 38 of CRC
[17] Article 2 of the Optional Protocol has prohibited the compulsory recruitment of persons who have not attained the age of 18 years. Note that this demarcation of compulsory and voluntary recruitment has neither been made in the CRC nor the Additional Protocols to the GCs.
[18] Article 3 (3) of the Optional Protocol to the CRC

of the Optional Protocol gas been the categorical prohibition imposed on organised armed groups as distinct from the armed forces of a state, against the recruitment or use in hostilities of persons under the age of 18 years, 'under any circumstances'.[19] Furthermore, the Optional Protocol moves a step further and imposes an obligation on the states parties to "...take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practices".[20] Thus it can be seen that the Optional Protocol to the CRC attempts to remedy the loop holes created in the CRC as well as the Protocols to the GCs though a categorical ban on both states parties and the armed groups could have achieved better results.

With all these enactments in place, one is faced with the question as to which takes precedence over the others. A reading of Article 41 of the CRC and Article 5 of the Optional Protocol to the CRC suggests that the provisions that are more conducive to the realisation of the rights of the child would apply. It should be noted that according to Article 41, these provisions should be contained in the law of the state party or in international law that is in force for that state; whereas Article 5 refers to "provisions in the law of a State Party or in international instruments and international humanitarian law that are *more conducive to the realisation of the rights of the child.*"[21]

Thus the former seems to require ratification or accession to the relevant international instruments as a precondition for their application, whereas the latter does not seem to do so. However, in view of the fact that most provisions in these international instruments mentioned above are being unanimously agreed with and applied by states parties, it could be concluded that they are at least of persuasive authority if not of a binding nature.

3.2 Right not to Take Part in Hostilities

One of the most important developments in the Protocols is the recognition that children under 15 years have a right not to take part in hostilities. Article 77 (2) of Protocol I dealing with international armed conflicts enacts:

> *"The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them to their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest"*

[19] Article 4 (1) of the Optional Protocol to the CRC
[20] Article 4 (2) of the Optional Protocol to the CRC
[21] Emphasis added

What is notable is the inclusion of the word 'direct' part in hostilities, which leaves room for 'indirect' participation of children in armed conflicts eg as carriers, assistants, messengers etc. Thus the obligation cast upon Parties to the conflict to protect children in armed conflict is less onerous than that which is imposed under Protocol II. By virtue of the provisions in Protocol II, this loophole has conscientiously been avoided as far as internal armed conflict situations are concerned. The provision states that[22]

> *" Children shall be provided with the care and aid they require, and in particular,*
>
> *(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;"*

As can be seen, not only does the provision expressly prohibit recruitment of children in to war, but also provides for the prevention of children taking part in hostilities- directly or indirectly. Therefore, children caught up in situations of internal armed conflicts enjoy better protection from the effects of war, than those who are within an international armed conflict.

The position under the CRC[23] is identical to that of Article 77 (2) of Additional Protocol I to the GCs, and hence leaves the same loopholes. The Optional Protocol to the CRC, though it attempts to achieve a certain degree of unanimity as to the minimum age of recruitment in to armed forces, reiterates verbatim the position in the CRC with regard to taking a 'direct' part in hostilities. Therefore, the loophole created under the CRC which allows for indirect participation of children in hostilities, is left in tact by the wording in the Optional Protocol to the CRC. It should be reiterated at this point though, that the Optional Protocol to the CRC makes a demarcation between compulsory recruitment and voluntary recruitment – a novel approach not featured in the instruments that preceded it. Accordingly, though the Optional Protocol to the CRC prohibits compulsory recruitment by the states parties of persons under the age of 18 years to their armed forces, there is room for voluntary recruitment with certain conditions attached to it. Thus, it could be concluded that, though the Optional Protocol to the CRC attempts to remedy the loopholes created in the CRC as far as protection of children in armed conflicts is concerned, in the process, it has advertently or inadvertently created others.

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[22] Article 4 (3) (c) of Protocol II

[23] Article 38 (2) and (3) of CRC enacts "States Parties shall take feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities" and that they "....shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest."

It is precisely these loopholes which leave room for groups like the LTTE to continue to commit these illegal acts and to get away without any responsibility being attached to it. Because, as past experience has shown, most often when religious or political groups have confronted the LTTE with the phenomenon of forced recruitment, the instantaneous reply has been to the effect that, it is the parents of these young children who *voluntarily* enlist them to the LTTE.

It is of interest to note at this point that, the proposed ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, fails to prohibit child conscription in a satisfactory way. The Convention only prohibits "forced or compulsory recruitment of children for use in armed conflicts." A Convention on the worst forms of child labour should ideally protect *all* children from their participation in armed conflict, irrespective of whether the recruitment is forced, compulsory or voluntary. The effect of the ILO Convention would be the same as that of the Optional Protocol to the CRC, which in effect would leave room for recruitment of young children into war under the guise of 'voluntariness.'

3.3.1 Child Prisoners of War in the Context of International Armed Conflicts

In the context of international armed conflict, when combatants fall in to the power of the enemy by way of surrender or capture, they are conferred the status of Prisoners of War (PoW) and are thereby entitled to certain guarantees and protections.[24] The provisions in paragraph 1 of Article 4 of the GC Relative to the treatment of Prisoners of War (Third GC) read together with Article 16 of the same Convention seems to suggest that, combatants between the ages 15-18 years who are enrolled in the armed forces or who take part in a mass uprising of the people (levé en masse) are, if captured, ipso facto entitled to the status of PoW and are thereby entitled to privileged treatment which may be accorded to them by reason of their age.

The protection granted to child combatants in times of international armed conflicts is enhanced in Protocol I where it is enacted that, despite the prohibition imposed against child conscription, if in exceptional situations children under 15 years of age do take a direct part in hostilities and fall in to the power of an adverse party, ".... they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war".[25]

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[24] Article 4 of the (Third) Geneva Convention Relative to the Treatment of Prisoners of War
[25] Article 77 (3) of Protocol I

The 'special protection' and 'privileged treatment' that child PoWs are entitled to, is afforded in several contexts, the compliance with which is monitored by the ICRC in terms of its mandate under Article 126 of the Third GC. Firstly, both the Third GC as well as Protocol I provide for the situation of detainment or internment of child PoWs. Children who take part in hostilities but are not 'combatants' within the meaning of International Humanitarian Law (IHL) are protected under the domestic legislation of their country of nationality. If they are captured by the enemy and are thereby considered as falling within the definition of 'protected persons' under the GC Relative to the Protection of Civilian Persons in time of War (Fourth GC), they are treated as 'child internees' and are entitled to the protection guaranteed under the Fourth GC.[26] All these provisions primarily concern the physical and psychological well being of the child in relation to the conditions of internment. For example, children are to be interned in quarters which are separate from the quarters of the adults except where families are accommodated in family units.[27]

3.3.1(a) Imposing Responsibility on Child PoWs for Breaches of IHL

It should be noted that, a child combatant under the age of 15 years who is captured by the enemy, cannot be prosecuted for having borne arms. Because, the prohibitions imposed under Article 77 (2) of Protocol I against child conscription are addressed to the Parties to the conflict, the breach of which entails criminal responsibility. Mere participation of child combatants in hostilities as a result of their being recruited or enrolled in to the armed forces of the state /armed groups does not constitute a breach of IHL on the part of child combatants. It should equally be noted that the status of a PoW does not act as a shield which prevents combatants including child combatants from taking responsibility for serious breaches of IHL or for offences against the legislation of the detaining power, that are committed by them.

However, there are certain guarantees that have been recognised in the GCs and the Protocols, which should be complied with in imposing such responsibility on child soldiers or child PoWs. It has been recommended that, whenever possible, the competent authorities (Detaining Power) impose disciplinary rather than judicial measures against PoWs and that the age of the offender shall also be taken in to account in evaluating the degree of responsibility.[28] Although there is provision made for penal sanctions to be imposed on child offenders where there is a necessity to do so, both the GCs and the Protocols make

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[26] Articles 50, 51, 76, 82, 85, 89 and 94 of the Fourth GC; Articles 75 (5) and 77 (4) of Protocol I

[27] Article 77 (4) of Protocol I

[28] Article 38 (2) and (3) of CRC enacts "States Parties shall take feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities" and "....shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest."

categorical statements against the imposition of the death penalty on persons under 18 years of age. Thus, the Fourth GC[29] prohibits the *pronouncement* of the death penalty on persons who were under 18 years of age at the time of the commission of the alleged offence; whereas the wording in Protocol I[30] prohibit its *execution* which seems to allow the *pronouncement* of the death penalty though not its *execution*.

In this context, it is useful to look at the legal provisions in other international instruments than the GCs and the Protocols. Established under the Rome Statute of the International Criminal Court in 1998, the International Criminal Court (ICC) came in to force in July 2002. The purpose of its establishment was to provide a permanent judicial tribunal with global jurisdiction to prosecute persons for 'the most serious crimes of international concern'[31], which shall be complementary to (ie. Apply concurrently with) national criminal jurisdictions. The Court's jurisdiction is exercised over war crimes, the crime of genocide, crimes against humanity and the crime of aggression.[32] The Statute of the ICC expressly recognises the "conscription or enlisting children under the age of 15 years in to armed forces or groups or using them to participate ***actively***[33] in hostilities" as a serious violation of the laws and customs applicable in both international and non – international armed conflicts, which falls within the ambit of war crimes recognised in the ICC Statute entailing individual criminal responsibility.[34] However, Article 26 of the ICC Statute makes a categorical statement that the "court shall have no jurisdiction over any person who was under the age of 18 years at the time of the alleged commission of the crime." Therefore, it may be concluded that, though the ICC may intervene or exercise its jurisdiction in instances where children are victimised by armed conflict, it will not adjudicate upon matters concerning juvenile offenders of the law.

Apart from the special protection that child combatants are entitled to as child PoWs, according to Article 77 (3) of Protocol I (mentioned above), if in exceptional circumstances children below the age of 15 years do take a direct part in hostilities and fall in to the hands of the adverse party, "they shall continue to benefit from the special protection accorded by this Article, **whether or not they are prisoners of war**".[35] Whereby, child combatants *below the age of 15 years* are entitled to benefit from the special protection measures recognised under Article 77 of Protocol I. Taking in to account the position of child combatants who do not fall within either of these groups - child PoWs or child combatants below 15 years who may or may not be child PoWs – for example those between the ages of 15-18 years, Article 45

[29] Article 68 of the Fourth GC
[30] Article 77 (5) of Protocol I
[31] Article 1 of the ICC Statute
[32] Articles 5 – 8 of the ICC Statute
[33] Emphasis added
[34] Articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the ICC Statute
[35] Emphasis added

(3) of Protocol I guarantees a minimum level of protection to any person who has taken part in hostilities, who is not entitled to PoW status and who does not benefit from more favourable treatment contemplated under the Fourth GC. Thus, any person – man, woman or child – falling within this category is entitled as of right at all times to the protection under Article 75 of Protocol I which spells out some of the fundamental humanitarian rules and guarantees available to such individuals affected by international armed conflict.

3.3.2 Situation in the Context of Internal Armed Conflicts

In the context of non-international armed conflicts, it should be noted at the outset that the status of 'combatant' does not exist; and consequently that of a PoW. Therefore, while imposing a ban against conscription of children in to armed forces or groups or their taking part in hostilities[36], Protocol II which is applicable in non-international armed conflict situations guarantees blanket protection to children who have not attained the age of 15 years, who despite the prohibitions imposed by law take a direct part in hostilities and are captured by the enemy.[37] It is important to note at this point that many of the states that ratified the GCs of 1949 refrained from ratifying the Protocols, particularly Protocol II which is applicable in the context of non-international armed conflicts, for reasons mainly based on possible encroaching in to the principle of state sovereignty and state recognition of armed groups. This deprived the potential victim of non-international armed conflicts of benefiting from some of the most important rules of IHL which are expressly recognised in Protocol II.

However, Common Article 3 to the GCs of 1949 recognises certain basic guarantees that each party to a non-international armed conflict should be bound to apply *as a minimum*[38], which also leaves room for the addition of other measures where the parties are willing to do so. Significantly, it has been judicially recognised by the International Court of Justice (ICJ) in the case of ***Nicaragua v. U.S.A***[39] that, Common Article 3 to the GCs is 'declaratory of Customary International Law', which consequently means that every state whether it be a party to the GCs or not, is bound to apply the provisions of Common Article 3, since it forms part of Customary International Law (CIL). Consequently, child combatants captured during internal armed conflict shall also benefit from the minimum guarantees of protection available to persons who do not take an active part or those who no longer take an active part in hostilities, under Common Article 3 to the GCs.

In the event of breaches of IHL committed by such child combatants, they will be subject to the national criminal legislation in place at the time; and in imposing responsibility, special

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[36] Article 4 (3) (c) of Protocol II
[37] Article 4 (3) (d) of Protocol II
[38] Emphasis added
[39] ICJ Reports, 1984, p.392

consideration is to be given to the offender's age and his/her level of maturity. In such circumstances, similar to the position in international armed conflicts, disciplinary measures will be preferred over penal sanctions. As far as the death penalty is concerned, Protocol II reiterates the position under the Fourth GC by enacting that "(t)he death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence..."[40]

Interestingly, the status of the two ad hoc tribunals for *Yugoslavia* and *Rwanda* established under UN Security Council Resolution No. 808 of 1993 and UN Security Council Resolution No. 955 of 1994 respectively, do not make any reference to the issue of conscription of children in to armed forces or groups. Although the two tribunals have jurisdiction over a host of crimes eg. grave breaches of the GCs of 1949, crimes against humanity and genocide, which gives them the authority to try offences where there may be victims of armed conflict, the Statutes do not make any express reference to the phenomenon of child combatants or to offences committed by them.

In an era where conscription of children into armed forces and groups has become a common and convenient means of war resorted to by both states and non state parties in international and non-international armed conflicts, it is a failure as well as a grave injustice on the part of the framers of the statutes concerned to have not recognised the competence of these tribunals to prosecute persons responsible for committing such serious violations of IHL.

3.4 Repatriation

Neither the GCs nor the Protocol I addresses the issue of repatriation of children. Hence, the general provisions on repatriation are applicable to them. Repatriation can take place in two different contexts.

1. During hostilities
2. At the cessation of hostilities

The treaties make no reference to repatriation of child PoWs during hostilities. However, Article 132 of the Fourth GC urges parties to the conflict to endeavour during hostilities " to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees", which includes *inter alia* children.[41] Therefore, this mechanism that is available to child combatants who have become civilian internees can be extended by analogy to child PoWs. In this situation, the Third GC

[40] Article 6 (4) of Protocol II

[41] It should also be noted at this point that, Article 111of the Third GC authorises the Detaining Power together with the agreement of the Power of Origin and a neutral power to conclude agreements, which would enable PoWs to be interned in the territory of such neutral power, until the cessation of hostilities.

imposes an obligation upon the Detaining Power to ensure that a prisoner shall not be repatriated against his/her will during hostilities which might in certain circumstances, depending on the child's age and level of maturity necessitate the obtaining of the required consent from him/her.[42] A very important measure of protection which may even be called a pre-condition to repatriation during hostilities is guaranteed in Article 117 of the Third GC in the form of a categorical ban against a repatriated person being employed on active military service. This could be recognised as both a necessary safeguard against the risk of a repatriated child being re-enrolled or conscribed into the armed forces of the Power of Origin and a reasonable justification for repatriation during hostilities.

As far as repatriation at the cessation of hostilities is concerned, it is expressly recognised in the GCs that both child PoWs and child internees shall be released and repatriated without delay after the cessation of active hostilities.[43] The only exception is for those PoWs or internees against whom criminal proceedings are pending. It is important at this point to note the role of the ICRC in both these situations, as an impartial intermediary whose primary concern in this issue is (or should be) the safe repatriation of such children and their reunion with their families. However, as far as the situation in Sri Lanka is concerned, reports have re-iterated the fact that, "(t)he priority of the international agencies appears to be to somehow maintain contact with the LTTE and avoid confrontation, so that, technically at least, their work can go on."[44]

3.5 Rehabilitation

Moving a step further from the protection guaranteed to child combatants *during* war, the CRC and also the Optional Protocol to the CRC recognises the significance of continuing such protection and assistance to child victims of war once (s)he is no longer in a position to be adversely affected by the war situation, to recover from the effects of war already felt and to reintegrate into society. Thus, Article 39 of the CRC imposes a mandatory obligation on the states parties "to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of armed conflict." The Convention also recognises the importance of implementing such measures in an environment that fosters the health, self-respect and dignity of the child. The Optional Protocol to the CRC while imposing a mandatory obligation on states parties to "take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilised or otherwise released from service" reiterates the position in the main treaty, of the necessity to assist such child victim in the physical and psychological

[42] Artcle 109 (3) of the Third GC
[43] Articles 118 & 119 of the Third GC and Article 133 of the Fourth GC
[44] http://www.island.lk/2001/10/23/featur03.html

recovery and social reintegration.[45] Furthermore, the Optional Protocol, while recognising the importance of international co-operation *inter alia* through technical and financial assistance in implementing the provisions of the Optional Protocol including those relating to rehabilitation and social reintegration, goes on to suggest ways and means of doing so eg. through existing bi-lateral and multi-lateral agreements/programs or through the establishment of a voluntary fund.[46]

Poverty has been identified as one of the main causes that drove hundreds of young children to take-up arms in the North and East of Sri Lanka. Secondly, the coercion exercised by the armed groups directly on the children in recruitment and also indirectly via the threats imposed on their parents, has been a persistent evil.

International aid agencies operating in the North and East of Sri Lanka have reported increasing incidents in the number of child soldiers being freed by the LTTE since the ceasefire agreement in February 2002. Considering the reasons that drove children to join the war cause, the challenge as regards demobilisation and reintegration would firstly be to facilitate the safe return of the child soldiers to their parents or guardians and secondly, to ensure that the circumstances that led to such a phenomenon would be alleviated, preventing its recurrence. It has been reported that, "a 'working group' consisting of international humanitarian agencies and the authorities was finalising minimum standards and conditions for reintegrating child soldiers into society".[47] Furthermore, pledges amounting to US $ 70 million have been secured from international donors, as a result of the appeals made by both the government of Sri Lanka and the LTTE in relation to the consolidation of the peace process. However, it remains to be seen as to what extent the recommendations of the working group or the allocations from the financial aids obtained, would be utilised in reintegrating these young victims of unfortunate circumstances back into society. As was rightly pointed out by Ted Chaiban, the representative of UNICEF in Sri Lanka, "... education (is) the key to address the problem of children in a post-conflict situation and also to help consolidate the peace process."[48]

4. The Graça Machel Report

Following the Recommendation of the United Nations Committee on the Rights of the Child and the consequent request of the General Assembly in 1993, the United Nations Security Council appointed an Expert to study the impact of armed conflict on children. Graça Machel, the Expert so appointed conducted extensive research in the area and submitted a

[45] Article 6 (3) of Optional Protocol to the CRC
[46] Article 7 of the Optional Protocol to CRC
[47] quickstart.clari.net/qs_se/webnews/wed/dt/Qnorway-srilanka-children.RemQ_CD6.html
[48] *Ibid*

report to the 1996 Session of the General Assembly titled, "Impact of Armed Conflict on Children"[49]- more popularly known as the 'Graça Machel Report.' The report explores the numerous ways in which children are involved in war and the consequent impact upon them, of which the phenomenon of child soldiers invariably is addressed as "one of the most alarming trends relating to children and armed conflicts...."[50] The report which is primarily aimed at raising awareness at all levels, advocates the fundamental premise that children should have no part in warfare. The Report also makes recommendations for necessary action that are aimed at Governments, inter-governmental organisations, civil society groups and also individuals. Among these actions, the Report strongly recommends the eradication of the use of children under 18 years as soldiers *inter alia* through the support of the United Nations organisations, by raising the age of recruitment to 18 years etc, and the immediate demobilisation and reintegration of child soldiers into society.

5. Conclusion

More than 300,000 children under the age of 18 years are currently fighting in conflicts around the world.[51] In Sri Lanka alone, several thousand children have become prey to forcible conscription, mainly by the LTTE. As is described in detail in the Graça Machel Report, the impact of war on a child is felt both physically and psychologically, not merely in the short term but also in the long term, often with irreparable consequences. It attacks and destroys the very life of a child – psychologically, if not physically, thereby depriving his/her right to a healthy childhood, which in turn is the foundation upon which the life of a human being is built.

Although there are numerous domestic and international instruments in place, as was described above, to protect children caught up in situations of armed conflict, most of which have received international recognition and acceptance in the form of state ratifications, the responsibility to observe and uphold these principles rests on the will of the parties to the conflict, especially the state actors. The primary obligation of respecting these norms and ensuring respect for them lies with the state parties, who should through the involvement of civil society and the co-operation of the adverse party, endeavour to abide by its international legal obligations. Then it would necessarily be the secondary obligation on a party adverse to such state to co-operate with such state party whose *bona fides* has been displayed by taking the initiative to eradicate the phenomenon of forced conscription of children into war. Since it is undeniable that, although children are forcibly conscripted into armed forces or groups to

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[49] A/51/306 & Add.1

[50] Impact of Armed Conflict on Children, *Report of Graça Machel, Expert of the Secretary General of the UN* (Selected Highlights), UN Department of Public Information and the UN Children's Fund, New York (1996), p 28

[51] http://www.amnestyusa.org/news/2001/10/23/featur03/html

serve as combatants as a convenient method of maintaining the numerical strength of an armed group, the ground reality is that there is more destruction than gain in terms of military strength, in view of the vulnerable and immature nature of children who lack the capacity to make balanced and calculated decisions especially in a tense environment as that in a war situation.

Thus, in an era pregnant with opportunity and means, with the ceasefire agreement in force and peace talks progressing with a human rights dimension, it is in deed the time for us Sri Lankans to unite in a bid to protect the children from this disastrous yet avoidable phenomenon. As was aptly stated in the report of Graça Machel,[52]

> *"Let us take this opportunity to recapture our instinct to nourish and protect children. Let us transform our moral outrage into concrete action. Our children have a right to peace. Peace is every child's right."*

[52] *Supra* note 49