LST REVIEW

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Death in Custody

Plea Bargaining

Offer & Acceptance

Protection of Natural Resources

LAW & SOCIETY TRUST

CONTENTS

Law & Society Trust,
3, Kynsey Terrace, Colombo 8
Sri Lanka.
Tel: 691228, 684845 Telefax: 686843
e-mail:lst@eureka.lk
Website: http://www.lawandsocietytrust.org

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Editor's note .....

This Issue of the LST Review carries an assortment of articles on different yet interesting and topical issues.

In this issue of the LST Review, we include the presentations made at a seminar on **'Deaths in Custody'**, which was organised by the Law & Society Trust on 10th June 2003 at the BMICH. The first article carries the presentation made by ***Mr. V. S. Ganesalingam,*** in which he discusses the facts that contribute to the phenomenon of deaths in custody, in the light of several inhuman incidents of torture and death in custody, that had taken place in the recent past. The second article caries the presentation made by ***Mr. Palitha Fernando,*** wherein he discusses some of the difficulties that are encountered by the law enforcement officials, particularly the Attorney General's Department and the Police, in carrying out investigations. He discusses how these difficulties may or may not contribute to the incidents of torture or death in custody, and the need to amend of refine the criminal justice system in order to make it more effective in preventing such incidents.

The Issue also carries the **Supreme Court Judgement** of ***Kotabadu Durage Sriyani Silva*** v. ***Chanaka Iddamalgoda and Others,*** wherein the Supreme Court extended the principle of *locus standi* in a fundamental rights case, to allow the spouse of a deceased victim to file action in courts, alleging the violation of his fundamental rights on his behalf. The case was also referred to by the speakers in order to bring out the relevance of this judgement to the topic under discussion.

Also contributing to the LST Review is an article by ***Dr. B. Buvanasundaram,*** in which she discusses the advantages and disadvantages involved in the process of **Plea bargaining.** As the writer points out, the process contains certain attractive advantages such as reducing the workload of the judiciary, providing the prosecutor and the accused some level of control over the result, speedy dispensement of cases, being less costly and less time consuming, providing psychological relief to the accused etc,. But at the same time, as the author rightly brings to light, the process *'does have its dark side.'* For eg. it is coercive,

it excludes the victim and it subverts the values of the criminal justice system by making *'an administrative determination of the offender's guilt.'* Hence, the writer concludes by saying that if the advantages of plea bargaining are to form an essential part of a criminal justice system, reforms to mitigate the disadvantages of the process, inturn become a *sine qua non.*

An overview of the position under the **Indian Contract Act** in relation to communication of offer and acceptance has been provided by ***Mr. Abhayraj Naik,*** in his contribution to this Issue. The article, while dealing with a comprehensive analysis of the provisions in the Indian law governing the communication of offer and acceptance in contractual relations in the phase of technological advances, also provides a brief comparative study with the American and British legal systems. Finally, the writer recommends that in the phase of rapid technological advances in the means of communication in contractual dealings.

> *"... domestic statutes must necessarily embody some clearly defined principles so as to prevent confusion over what constitutes an after, what an acceptance, where the contract was created, time up creation of contract, etc,..."*

On a completely different topic, ***Ms. Avanthi Weerasinghe*** has contributed to the Issue with an article on **"The Effectiveness of Law in Protecting Coral Reefs."** The article contains a detailed analysis of the provisions in the existing laws on the protection of natural resources which includes coral reefs. In the process, the author also points out some of the glaring lacunaes existing in the laws which have the effect of diluting the deterrent effect of these laws. The article concludes with several important recommendations to over come the gaps, in order to protect and preserve this natural resource for the generations that are yet unborn.

SEMINAR

ON

DEATH IN CUSTODY

9th June 2003

at the

B.M.I.C.H.

"SOME INHUMAN CASES OF DEATH IN CUSTODY AND AN ANALYSIS OF FACTORS CONTRIBUTING TOWARD IT"

V. S. Ganesalingam
Director-Legal,
Home for Human Rights

"DEATH IN CUSTODY AND CRIMINAL INVESTIGATION"

Palitha Fernando
Deputy Solicitor General,
Attorney General's Department of Sri Lanka

LAW & SOCIETY TRUST
03, Kynsey Terrace
Colombo 8

Some Inhuman Cases of Death in Custody and an Analysis of Factors Contributing Toward It

V. S. Ganesalingam[*]

Deaths in custody has been prevalent in our country since the nineteen eighties and it has taken place in police stations, jails and army camps. There are several reported cases of torture and death in custody at the hands of para military groups working with the forces and also by armed groups opposed to the government, who maintain their own centres of detention. There has been massacres of groups at places of custody and there are numerous individual cases, some which were never reported.

Following is an account of several inhumane reported cases of death in custody.

- The earliest recorded gruesome custodial death was that of K. Navaratnarajah, a young farmer from Trincomalee district who was arrested on 27 March 1983 and died on 10thApril 1983 at the Gurunagar army camp in Jaffna. The medical examination disclosed 25 external and 10 internal injuries. It was reported that he was hung upside down from the ceiling fan and was allowed to rotate.

- Wijayadasa Liyanarachchi, a lawyer arrested by Tangalle Police died in custody in September 1988 and well over 100 injuries were identified on his body.

- In early 1990, 32 schoolboys and others from Embilipitiya who were taken to the Sevana army camp were never seen thereafter.

- In June 1995 out of the several Tamils who were taken into custody in and around Colombo, bodies of 25 were found floating in the Bolgoda lake.

- In 1997, 3 Tamil detainees were killed in Kalutara Prison in a clash with prison officials.

- On 6th, 7th January 2000, 2 inmates both Tamils died in Kalutara Prison, one of gun shot injury and the other by clubbing.

- On 25 October 2000, at the Bindunuwewa Rehabilitation Center, 28 out of the 41 inmates, all of whom are Tamil children detained for Rehabilitation, were killed and reportedly 13 others were injured.

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[*] Director-Legal, Home for Human Rights.

- On 19 December 2000, 8 villagers from Mirusivil in Jaffna who went to see their houses which they had vacated following military occupation, were taken into custody by the army and later found dead in a grave.

- During 2001, there were 4 reported cases of custodial death.

- During 2002, 6 cases of death in police custody were reported.

- In the recent time the most inhuman and gruesome death in custody was the massacre of 53 Tamil prisoners detained in Welikade prison in 2 separate incidents. In the 1st attack that took place on 25th July 1983, 35 persons and in the 2nd attack after 2 days 18 persons were hacked to death.

There is another category of deaths in custody commonly referred to as **disappearances.** The 'disappeared' are in fact those taken into custody and *said* to have disappeared, because the authorities who are alleged to have arrested them deny such arrest and consequently their bodies are not to be found. The obvious reason for these disappearances is that the arrested have been shot or tortured to death. This has come to light through the evidence recorded from those who manage to escape from such custody.

Following is an account of several such cases of disappearances in groups.

- On 5 September 1990, 159 Tamils between the ages 16 and 40 were taken away from the Eastern University Refugee Camp in Batticaloa in five vehicles brought by the army.

- On 9 September 1990, 160 villagers from Sathurukondan, Panichayadi, Pillayaradi and Kokuvil in Batticaloa, who went to the Boys Town Army Camp on the orders of the army, never returned. Among them were 68 children, and according to one survivor who spoke to the Presidential Commission on Disappearance, all of them were hacked to death and trees were put on them and burnt.

- In July- September 1996, after the army took over Jaffna, well over 300 persons disappeared consequent to arrests. According to Lance Corporal Rajapakse, who gave evidence in Court as one of those charged in the case of ***Krishanthi Kumarasamy***, "almost every evening dead bodies were brought and the soldiers were asked to bury them" at Chemmani and he estimated that approximately 300-400 were buried in that manner.

This not a comprehensive list of deaths in custody or disappearances, and further details and information may be obtained from the reports of Amnesty International, University Teachers for Human Rights etc,.

Death in custody is perhaps one of the worst kinds of crimes in a civilized society governed by the rule of law. It is a serious threat to an orderly, civilized society. These incidents take place when the victim is within the four walls of a police station or an army camp, having been deprived of his liberty and completely at the mercy of the authorities. Therefore, the responsibility of the state cannot be denied. The phenomenon of custodial violence is not peculiar to our country; it is widespread and has been the concern of the international community. In an attempt to meet this challenge which is almost global, the United Nations has taken several significant steps. For instance, Article 10 of the International Covenant on Civil and Political rights states:

> *"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of human person."*
>
> *In addition, U N has adopted following instruments to secure protection for persons subjected to detention or imprisonment.*
>
> *(1) Standard Minimum rules for the Treatment of Prisoners.*
>
> *(2) Body Principles for the Protection of all Persons under any form of detention or imprisonment.*
>
> *(3) United Nations Rules for the Protection of Juveniles Deprived of their liberty.*

Impunity

Despite repeated statements of commitment made by successive governments, about prosecuting members of the security forces who are responsible for human rights violations, there are few signs that those undertakings are being implemented. Impunity remains a major problem and is a contributing factor for the continuance of gross human rights violations. It is only in a few selected high profile cases, that the perpetrators were prosecuted. Reference is made below to several cases where investigations were not carried out and the perpetrators were left unpunished as a consequence. Out of the 16,742 cases of disappearances identified by the three Zonal Presidential Commissions of Inquiry into Disappearances and 4473 cases of disappearances confirmed by the All Island Commission on Disappearances, government

claimed that criminal proceedings were initiated against 486 persons in relation to 270 disappearances. However, legal action has not been initiated for disappearances in the North and East which were identified by the Disappearance Commission and the Welikade Massacre. The Board of Inquiry appointed to inquire into disappearances in Jaffna in 1996 confirmed that there was evidence for 134 disappearances; yet no follow up action was taken. Even in the case of bodies found in the Bolgoda Lake, the case was abandoned in the Magistrate Court for the reason that there were no prosecutors in Court and the case was thereby struck out of the rolls.

What is disturbing is that the State has failed to acknowledge the fact that the safety and security of persons in its custody is its paramount responsibility. On the other hand, it has created an atmosphere where, persons who have political protection feel that they can break the law with impunity. It appears that there is no political will to punish offenders but only to condone those unlawful actions. This was made evident by a circular issued by the Inspector General of Police in January 2001 by which he approved the reinstatement of all officers who had been interdicted following inquiries conducted by the Disappearances Investigation Unit and were charged in courts but were subsequently bailed out in connection with cases of disappearances.

Even in cases where the alleged perpetrators were charged, it was only those in the lower rung of the command who were indicted and not others higher up in the chain of command on whom responsibility for the violation could be attributed either by compliance or by omission. This fact finds support in the evidence of Lance Corporal Rajapakse in the ***Krishanthi Kumaraswamy*** case and in the response of the government in a communication made to the Human Rights Committee regarding a complaint of disappearance. In the said communication, the author complained to the United Nations Human Rights Committee that his son who was arrested by the army at Anpuvalipuram in the Trincomalee District in 1990 in an army round had since 'disappeared'. The government, while admitting the army round and maintaining that the arrest and detention had been conducted in accordance with the provisions of the law, stated that the disappearance was caused by one Corporal Sarath, who was infact a member of the army group but whose conduct was unknown even to the officers of the army. Therefore, they alleged that the abduction was distinctly separate and independent from the operations carried out by the army. Subsequent to this communication, it was only the said Corporal Sarath who was indicted for abduction and illegal detention. These violations, especially attacks on places of detention and disappearances after mass arrests, require intense coordination and planning at the highest level and the responsibility of high officials is undeniable.

Another important aspect of this problem is that successive governments have tended to use unjustified arguments in order to cast various impressions about these unfortunate victims. Very often we find official statements stating that persons unlawfully killed at the hands of the government authorities were suspected "murderers" "terrorists" "subversives" etc, thereby suggesting to the public that such persons do not merit protection of life and limb once they fall into the hands of state authority. Several examples of such incidence follow.

- When the Welikade massacre took place an official report described the victims as Tamil Tigers. Whereas, in fact there were 72 Tamil political prisoners out of whom only 6 were convicted prisoners.

- In the case of Wijayadasa Liyanarachi the government promptly claimed that he was a leading member of the Janatha Vimukthi Peramuna (JVP) who was responsible for certain political killings.

- It is reported that a high official of the Army then in Batticaloa told the Citizen's Committee leaders that all those disappeared from the Eastern University Refugee Camp were 'criminals.'

- Regarding the Embilipitiya disappearances the then Minister of Parliamentary Affairs and Environment told Parliament in June 1992, that there was no information that the Army had taken the victims into custody and that the investigations revealed that the abductions were carried out by armed thugs.

- As regards the disappearances in Jaffna in 1996, the Army claimed that several persons who were claimed as having disappeared had in fact left the country or had joined the LTTE. Interestingly, the Board of Inquiry of the Ministry of Defence appointed to inquire into these disappearances also stated that it could not come to a definite conclusion as to what the fate of these disappeared persons was for the reason, among others that, several of them may have voluntarily joined the terrorists or may have been conscripted by political parties like EPDP, PLOTE etc. There was no response to the request to carry out an independent Commission of Inquiry.

- In the Bindunuwewa massacre, a serious attempt was made by the government to implicate the villagers for the attack.

Simultaneously, there has been a tendency to destroy or suppress evidence and to divert investigations as could be judged by the manner in which the investigations for Welikade and

Bindunuwewa massacres were handled by the prosecutors. The second attack in the Welikade Prisons was aimed at destroying available evidence and eyewitnesses. Meanwhile, the Prosecution was trying to show that it was an indoor issue without outside participation. It was alleged that even obvious questions were not put to the witnesses, at the inquest proceedings.

In the Bindunuwewa incident, the camp had not been secured immediately after the attack and the surviving children who were taken to the army hospital were kept hand cuffed either to a bed or each other most of the time, as if they were criminals responsible for the attack. Thus, those who could be potentially material witnesses were put through a psychological trauma. The findings of the Commission of Inquiry are yet to be published.

It was reported that, Corporal Rajapakse, who made disclosures about the mass graves in Chemmany while in remand, was put under pressure to withdraw his statement and that his family was continuously under threat.

There is another important aspect of the issue of custodial death that needs to be emphasised. Serious doubts have arisen as to the effectiveness of the existing mechanisms for dealing with complaints against police and others charged with custody of persons in relation to cases of custodial crimes.

The degree to which a citizen deprived of liberty is able to complain and obtain redress for injustice by members of the police force or security forces, is the basic test of democracy. However, the difficulty in our country has always been that, to whichever authority a person may have directed his/ her complaint, it is invariably referred ultimately for investigation to the very same police force. More recently, where several complainants lodged complaints with the UN Human Rights Committee alleging torture at the hands of the state agencies, they were inquired into by a special investigation unit of the Police Head Quarters; and on inquiry, the complainants were informed that the investigation was being conducted at the request of the Human Rights Commission of Sri Lanka which had been requested by the UN body to inquire into these matters and submit its report.

Even where investigations are carried out the follow up to the findings are inadequate. For instance in the case of ***Yogalingam Vijitha***,[1] the victim was subjected to severe inhuman torture while in police custody in June 2000. On a complaint made on her behalf to the Human Rights Commission, an officer of the said Commission recorded her statement. However, no follow up action was taken by the Commission and the Commission has even

[1] F/R Application 106/2001

ignored the directions of the Supreme Court to forward its report subsequent to the investigation.

Similarly, there are instances where the directions of the Supreme Court have not been complied with by the Attorney General as well. On 23 August 2002, the Supreme Court having held that the respondents have subjected the petitioner to inhuman torture, directed the Attorney General to take steps under the Convention Against Torture Act No. 22 of 1994 against the respondents and any others who were responsible for the illegal acts of torture. To our knowledge no action has been taken against the perpetrators so far.

In the case of Sathasivam Sanjeevan who died in police custody on 15.10.1998, after inquiry, the learned Magistrate held that the victim had been subjected to torture and died of gunshot injuries and that it was a homicide. Consequent to the investigations which were conducted on the orders of the Magistrate, the Attorney General has informed the Magistrate that the police version relating to both the arrest and the death was false and fabricated and that the available material did not provide a basis to institute criminal proceedings against one or more of the police officers. Therefore, he has recommended disciplinary action to be taken against them. There are no reports to indicate that such disciplinary action was taken.

If the custodial deaths are to be curbed, the courts also have to take a pragmatic and reasonable view in cases of complaints of custodial crimes. They should exhibit more sensitivity and adopt a realistic approach. Ignoring the ground realities of the peculiar circumstances in which custodial crimes take place often result in miscarriage of justice and the perpetrators thereby receive encouragement.

For example, in the case of ***Attorney General*** v. ***Singarasa*** the accused was convicted and sentenced to 50 years in imprison, solely on the basis of a confession alleged to have been made to the police when he was being subjected to torture while in custody for a long period. On appeal,[2] the Court of Appeal held that when it has been established that the confession is perfectly voluntary, there is a presumption as to the truth and trustworthiness of the confession. Court further held that -

> *"the accused also gave evidence at the trial and in the course of evidence, did not impugn or assail the aforesaid presumption and guarantee of testimonial trustworthiness and truth of the contents of the confession."*

[2] Case No. 208/95

In essence, the court placed the dual burden of proving that the confession was not voluntarily and also refuting the presumption of truth and trustworthiness of its contents, on the accused. This view is in conflict with the jurisprudence of the Human Rights Committee. The Committee in its Concluding Observations on the State Report submitted by Mexico (1999) stated that -

> *"The Committee is concerned that the possibility exists of placing on an accused person, the burden of proof that a confession has been obtained by coercion and the confession obtained by coercion may be used as evidence against an accused person. The state party should amend the provisions of the law as necessary to ensure that the burden of proof that a confession used in evidence has been made by an accused person of his own freewill, shall lie with the State."*

Conclusion

This paper has attempted to describe several methods by which custodial deaths occur. It is clear that this is a phenomena that is pervasive in the politics of Sri Lanka and that the criminal justice system of the state is unable to end it. One may recall that there were 6 recorded deaths in police custody as recently as the year 2002. Immediate steps must be taken to prevent custodial deaths and other custodial crimes. Further, all cases of custodial deaths must be immediately investigated into by an independent investigating body which probes into all levels of responsibility for such death, upward along the chain of command. Finally, all findings in these investigations must be adequately followed up with prosecutions and / or disciplinary actions against all those who are found responsible for these deaths.

Death in Custody and Criminal Investigation

Palitha Fernando[*]

I believe that no decent state will condone deaths in custody or torture in custody. Many complaints have been made that the attitude of the state is a contributing factor towards the increase of these incidents. This presentation will refer to some of those incidents and attempt to discuss the adequacy of the steps taken by the state and as to the ways and means by which the steps taken by the state could be made more effective.

If a person has been tortured in police custody or in the custody of the armed forces, or if the death occurs of a person in custody, it is the responsibility of the state. A cardinal principal upon which the criminal justice system operates is the presumption of innocence i.e. the suspect is innocent unless and until he is proven guilty beyond a reasonable doubt. As a prosecutor in cases of this nature, it is undeniable that the Attorney General has to perform a formidable task once (s)he receives the documents of a completed police investigation. The Attorney General has to evaluate the evidence that is placed before him in order to ascertain whether the facts merit an indictment before the high court. Once the indictment is presented before high court, the judge is also confronted with the difficult task of ascertaining whether the case is proven beyond reasonable doubt. If however, there is any doubt arising out of the material, the accused is entitled to such benefit. The benefit of the doubt can never enure to the benefit of the prosecution. As a result of this, the rates of conviction can be very low.

Let us first consider certain aspects of a police investigation. A police officer commences his investigation by creating an enemy; because, whatever he does, the accused would complain. Various kinds of pressures may be exerted on him, amidst which he is expected to perform his duties. Thus, when an allegation is made that a police officer has tortured someone or has caused some persons death during the course of an investigation, the accusing finger is pointed at the police officer. Then, the investigating machinery is activated against him. Unfortunately, when a police officer commits an offence, that too is investigated by the police. But, contrary to public opinion, those who investigate show no sympathy towards the accused police officer. Due to professional jealousy or whatever other reason, they leave no stones unturned. However, the investigation is very difficult to commence and also to proceed with. Once the investigation is over, the files are forwarded to the Attorney General, and he examines them in order to find out whether an indictment should be filed in court against the accused police officer. Though these investigations are pursued on the basis of complaints made by the *accused or a suspect* that the investigating police officer has tortured

[*] Deputy Solicitor General, Attorney General's Department of Sri Lanka.

him/her, there have been numerous instances where it has been established beyond reasonable doubt that the injuries that were found on the accused person or the person who was suspected were self inflicted injuries. I believe that there is a reason why a person would inflict injuries upon himself. Because, a confession made by an accused person to a police officer beyond the rank of Assistant Superintendent of Police (ASP) is admissible, one way in which the accused can ask the court not to admit that confession, is by showing that he had been tortured and that the confession was extracted through force. Thus, there can be instances where a false allegation is made against a police officer either to complicate matters for him or to see that his confession is not admitted as evidence in court. Therefore, prosecutors owe a duty to the police officers as well as to the person who has been injured, to analyse and evaluate the evidence in order to find out whether the available evidence is sufficient to put the accused on trial. Once a police indictment has been filed against a police officer or a member of the armed forces, it involves a huge expense for such officer and can even result in his losing his job.

The State has also played its part to discourage police officers from using force on persons who are in custody. Firstly, the Attorney General's Department has established a special unit called the Torture Unit. This Unit has filed indictments on certain occasions where police officers have been alleged to have committed torture under the Torture Act. Secondly, police officers being officers of state and the Attorney General being the Chief Legal Officer of the state, it is the duty of the Attorney General to defend police officers in court. Therefore, when it is alleged that a police officer has arrested a person illegally, counsel from the Attorney General's Department appear in court to argue that the arrest is not illegal. However, we have made it very clear to the Inspector General of Police that if an allegation has been made against a police officer that he has committed torture, and if the Supreme Court has granted leave to proceed in terms of Article 11 of the Constitution, that the Attorney General's Department will not appear for that police officer. The Inspector General of Police himself has instructed us that, if there is such an allegation against a police officer, not to appear for him in court. Under these circumstances, a police officer alleged to have committed torture will have to bear his own expenses and fight the case on his own. Additionally, he is also aware that the Attorney General might file an indictment against him in court in which case he may be convicted and a minimum sentence of seven years rigorous imprisonment be imposed on him by court order.

Even *within* the police force, the State has taken several steps to convince the police officers that torturing a person is in no way a part of the duties of a police officer. The Police Department has now taken action to interdict an officer the moment an indictment is filed against him. Therefore, it is evident that much effort has been taken to stop police officers from committing these unlawful actions. Yet, there are instances where officers are acquitted

because the charge cannot be proved beyond reasonable doubt, from the available evidence. Nevertheless, I believe that the Attorney General's Department, the Police Department and even the Supreme Court have done their duty.

According to the Constitution of Sri Lanka, where a person's fundamental rights are violated, the petitioner in a fundamental rights application could either be the person whose rights have been violated or an Attorney-at-Law on behalf of that particular person. Then, if a person dies in custody, who can file a fundamental rights application on behalf of that person? In terms of the recent majority judgement of the Supreme Court in ***Sriyani Silva*** v. ***Chanaka Iddamalgoda***[1], where a person dies, a dependant of that person (in this particular case the wife) is entitled to come before the Supreme Court and file a fundamental rights application. I believe that this is a salutary development on the part of the Supreme Court. In the previous judgement of ***Somawathee*** v. ***Weerasingha and Others***, Justice Amarasinghe pointed out that the Constitution is very clear that it is either the person whose fundamental rights have been violated or a lawyer who can file action in Court and no one else. Justice Amarasinghe also held that if there is a lapse in the Constitutional provisions, it is the Legislature and not the Judiciary that has to correct it. But now with the recent judgement, all persons who have lost a loved one in custody, are entitled to come before the Supreme Court to seek a remedy for the violation of the fundamental rights of their loved one. Thus, I believe that the judiciary of this country has taken a very bold step in order to ensure that justice is done.

It was pointed out by the previous speaker, that in certain cases like the Bindunuwewa case, the Embilipitiya case and the Liyanarachchi case, the prosecution failed, at least to some degree. This is due to the difficulty encountered in collecting evidence mainly for the reason that the investigators are not in a position to collect the items of evidence that are available. Because, the death has taken place in police custody, the death or the assault has taken place very secretively. Since some of the bystanders / witnesses are the accused persons, it is very difficult for us to get admissible evidence within the structure of the Evidence Ordinance to place before court. It is not permissible to lead inadmissible evidence, which may be logically admissible, but is not legally admissible within the Evidence Ordinance. Therefore, to overcome these difficulties, it is necessary to consider the steps that should be taken to amend the Evidence Ordinance in order to carry out police investigations more effectively. When conducting investigations, it is also important to be mindful about is the rights of the accused, ie. the right to remain silent, the right not to be tortured in order to extract information etc.

[1] SC (Application) No. 471/2000.

One allegation that is made against the Attorney General's Department is that the Department has on certain instances not taken action against errand police officers. The reasons for that can be explained as follows. It can be assured that the Attorney General's Department will not condone or suppress an illegal act whenever there is sufficient evidence to proceed with a case. However, in a fundamental rights case the onus of proof is not 'beyond reasonable doubt.' The Supreme Court would only be taking into consideration the affidavits placed before it. But in a criminal action, the degree of proof is beyond reasonable doubt. Therefore, eventhough in a fundamental rights application the court may hold on the material available that there has been a violation of the petitioner's fundamental rights, that does not mean that the evidence is sufficient to put the accused on trial before a high court where the required the degree of proof is beyond reasonable doubt. The other reason is that, if a petitioner makes a statement identifying the place and date when the alleged torturing took place, without identifying the persons who tortured him, the Supreme Court could still hold that his fundamental rights have been violated. Because, the responsibility is that of the State. If however, that is referred to the Attorney General with a direction from the Supreme Court to consider an indictment, since there is no evidence of identity, it is insufficient to indict a person on the basis of what he has committed. Because on evaluation, the evidence is found to be insufficient to file indictment in court.

Moving on to police investigations, it is fact that police officers under go many hardships when conducting investigations. The time is now ripe to opt for modern technology like DNA testing. Especially in the rural areas, the police officers lack the necessary technology and equipments, thereby making it difficult for them to conduct investigations in cases where complicated investigation is required. Therefore, modern technology is a must in order for them to be able to overcome some of the setbacks they experience.

According to the Code Of Criminal Procedure Act, a police officer is authorised to investigate within certain limits, ie. an officer can keep the accused in custody only for 24 hours, during which time he has to extract whatever information from the accused. In this circumstances, the accuseds attempt to abuse the system, eg. by surrendering themselves to the Court in order to disallow the police from recovering stolen goods from them etc. It is then, that this police officers need guidance, and the Attorney General's Department has indeed offered there services in this regard, eg. through awareness raising activities like organising seminars, distributing leaflets. Therefore, I believe that through these measures, the state has been able to bring down, at least to some degree, the incidence of death in custody in the past years.

Attention will now be drawn to a matter of interest in terms of amending the Evidence Ordinance and the Criminal Procedure Code. Just as much as deaths in custody and torture in

custody take place, incidence of sexual abuse of young children have also been on the increase. There have been several cases where young girls have committed suicide immediately after they have been sexually abused. And in many of these cases, in their dying moments, the victims make statements identifying the rapists. Now, what can be done about those persons who have been identified as being responsible for the rape of these young children? In terms of section 32 of the Evidence Ordinance, if a person makes a dying declaration ie. to a police officer or whoever, as to how he came by his death, that statement can be used against the accused in Court, and the accused can be convicted on that statement.

However, this applies only in cases of murder, if it refers to the manner in which the victim died, and not in any other case. Therefore, the fact that in these cases the children were *raped,* allows the rapists to go scott free because of the loopholes in the law.[2] It is important to take note of these gaps in the law, in order to understand the difficulties within which the law enforcement officials work. Within the existing legal structure, pertaining to the rights of the accused, the rules of admissibility etc, the officials are doing the best they can. No one, including the Attorney General's department, the police officers, condone death or torture in custody. However, one does encounter several difficulties in implementing the law. Therefore, I believe that it is the duty of every law abiding citizen, to join hands with law enforcement officials to extend the support that is necessary to make the criminal justice system of this country more effective.

[2] See ***Livera*** v. ***Abeywickrema,*** where the Court did not admit the dying declaration of a watcher, in the case of robbery.

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

In the matter of an application under Article 126 of the Constitution

Kotabadu Durage Sriyani Silva,
Pettawatta,
Gomarankanda,
Payagala

(Wife of Mulle Kandage Lasantha Jagath Kumara – now deceased)

Petitioner

v.

SC (Application) No. 471/2000

1. Chanaka Iddamalgoda,
   Officer-In-Charge,
   Police Station Payagala

2. Prasanna Wickramaratne,
   Officer-In-Charge (Crimes),
   Police Station,
   Payagala

3. Ananda,
   Police Station,
   Payagala

4. Chandrasiri,
   Police Constable (21568),
   Police Station,
   Payagala

5. Commissioner General of Prisons,
   Department of Prisons,
   Baseline Road,
   Colombo 8

6. Inspector General of Police,
   Police Headquarters,
   Colombo 1

7. Hon. Attorney General,
Attorney General's Department,
Colombo 12

Respondents

BEFORE : Sarath N. Silva, C.J.
Shirani A. Bandaranayake, J.
Edussuriya, J.

COUNSEL : J. C. Weliamuna for the petitioner
Manohara de Silva for the 1st respondent
Saliya Peiris for the 2nd and 3rd respondent
Ms. Viveka Siriwardena de Silva, SC, for the 5th–7th respondents

ARGUED ON : 29/08/2001, 29/11/2001 and 25/03/2002

WRITTEN SUBMISSIONS TENDERED ON :

for the petitioner	:	29/04/2002
for the 1st respondent	:	06/06/2002
for the 2nd and 3rd respondents	:	20/05/2002
for the 7th respondent	:	10/06/2002

DECIDED ON : 10/12/2002

SHIRANI A. BANDARANAYAKE, J.

This is an application field by the wife of a deceased detainee, praying for a declaration that her deceased husband's fundamental rights guaranteed by Articles 11, 13(1) and 13(2) of the Constitution were violated, and claiming for a sum of Rupees one million as compensation from the 1st to 4th respondents and the State.

The initial petition was filed on 18/07/2000 by an Attorney-at-Law of the Legal Aid Commission on behalf of the petitioner and was listed for support for leave to proceed on 23/08/2000. On that day, learned Counsel for the petitioner, who supported to the application moved to amend the caption to read as on behalf of the wife as the legal representative of the deceased. Learned Counsel for the petitioner submitted that the prayer to obtain compensation was for the deceased's wife and for the minor child of 2 ½ years of age. The Court allowed the petitioner to change the caption and the amended petition dated

30/08/2000, filed on 25/09/2000 was supported on 23/10/2000. On that day, this Court granted leave to proceed for the alleged infringement of Article 11, 13(2) and 17 of the Constitution.

When this matter of taken up for hearing, two preliminary objections were raised on behalf of the respondents, viz.,

i. the petitioner has no *locus standi* to make this application; and
ii. the petitioner's application is out of time.

Learned counsel for the respondents submitted that although the petitioner claims that she is entitled to continue with this application, the question of continuation does not arise in this case, as the detainee died before making any application alleging that the respondents violated his fundamental rights. The question before us therefore is, whether the wife or a third party of a deceased person, has a right to institute proceedings in this Court in terms of the provisions of the Constitution, seeking relief for the alleged infringement of a deceased person's fundamental rights.

Fundamental rights are enshrined in Chapter III of the Constitution, which contains 8 Articles, viz., Articles 10 to 17 that deal with different freedoms and rights. Article 17, which is an enabling as well as a governing provision as far as the remedy for an infringement of a fundamental right is concerned, reads as follows:

> *"Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter."*

This Article contains a clear enunciation of the entitlement of any person to apply to the Supreme Court in respect of an alleged infringement or an imminent infringement by executive or administrative action. However, the applicability of this provision is subject to the conditions and limitations enshrined in Article 126 of the Constitution. Article 126 of the Constitution deals with the fundamental rights jurisdiction of the Courts and its exercise. Article 126(2), which is directly relevant to the question under review, is in the following terms:

> *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-*

law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less that two Judges."

Learned counsel for the respondents relied heavily on Somawathie v. Weerasinghe and Others [(1990) 2 Sri L.R. 12] where an application was filed by the petitioner on behalf of her husband for violation of Articles 11 and 13 of the Constitution. In that case the majority held that Article 126(2) of the Constitution, when construed according to the ordinary, grammatical, natural and plain meaning of its language, give a right of complaint to the person affected or to his Attorney-at-law and to no other person.

I am of the view that Somawathie v. Weerasinghe and Others *(supra)* on which learned counsel for the respondents placed heavy reliance, can be distinguished, in relation to the facts of this case.

In *Somawathie's* case (supra) application was made by the wife of the virtual complainant alleging the infringement of her husband's fundamental rights guaranteed by Article 11, 13(1), 13(2), 13(5) and 13(6) of the Constitution. At the time the said application was filed, he was in Remand Prison, Mahara. The virtual complainant was named as the 4th respondent in that application.

The evidence before us in the present case, however, is different.

The deceased detainee was taken into custody on 12/06/2000 and was produced before the Magistrate on 17/06/2000 on which occasion he was handed over to the Remand Prison, Kalutara. The petitioner averred that on 18/06/2000, the mother and the sister of the deceased detainee visited the Prison, but they were not allowed to meet him. On 19/06/2000, the uncle of the deceased detainee who visited the Prison was informed that the detainee was transferred to the Magazine Remand Prison on 18/06/2000. On 21/06/2000, the Payagala Police informed the petitioner that the detainee had died on the previous night at the Magazine Remand Prison.

Several affidavits were filed along with the petition, which indicated that the detainee was severely assaulted during the time he was kept in police custody. I do not wish to venture into the details of the allegation on assault as we are only dealing with the preliminary

objections raised by the respondents at this juncture. However, I am of the view that it is necessary to refer to the post mortem report which was called by this Court at the time leave to proceed was granted on this application. This report refers to 20 injuries, which were identified on the Head, Trunk, Upper limbs and Lower limbs of the deceased and the AJMO had given the cause of death as "Acute renal failure due to muscule cutaneous injuries following blunt trauma." The detainee, and averagely built male, was 23 years of age at the time of his death.

It is to be noted that on 17/06/2000, at the time the detainee was brought to the Remand Prison, Kalutara, he made a statement to one of the Prison officials informing him that he was assaulted while he was kept at the Payagala Police Station (P6). Again on 18/06/2000 at 2.50 p.m. the detainee had made a statement informing that about 10 officers including the 2nd and 3rd respondents assaulted him at the Police Station.

Learned counsel for the 5th to 7th respondents conceded that factually the instant case could be distinguished from Somawathie's case *(supra)*. Her position was that Article 126(2) of the Constitution was given a plain grammatical meaning in Somawathie's case *(supra)* and the factual consideration should not play a role in the interpretation of the plain and ordinary words of the provision.

Considering the crux of the arguments raised by learned counsel for the respondents, according to the provisions of the Constitution, a person other than whose rights are infringed cannot make an application to vindicate the rights of another person, even if that other person on whose behalf the application is made is not among the living. Therefore a relative of a person, whose death was caused by torture, would not be able to obtain redress through the fundamental rights jurisdiction enshrined in our Constitution. I find it difficult to agree with these submissions made by learned counsel for the respondents for the following reasons.

It is to be noted that the sole object in statutory interpretation is to arrive at the intention of the legislature. Donaldson, M. R. in Corocraft v. Pan-Am ([1969] Q. B. 616 at pg. 638) said that,

> *"the duty of the Courts is to ascertain and give effect to the will of Parliament as expressed in its enactments."*

In Lyons v. Tucker (1880 6 QBD 660 at pg 664) Grove, J. stated that the golden rule of plain, literal and grammatical construction has to be read subject to the qualification that the language of statutes is not always that which a grammarian would use.

Learned counsel for the petitioner contended that Article 126(2) read with Article 17 of the Constitution provides a right for a victim to seek relief from this Court for an infringement or an imminent infringement of a fundamental right. Learned counsel drew our attention to Bindra, who had stated that,

> *"If a statute which creates a right does not prescribe a remedy for the party aggrieved by the violation of such a right, a remedy will be implied and the party aggrieved by the violation of such a right, a remedy will be implied and the party aggrieved may have relief, in an appropriate action founded upon the statute. The creation of a new duty or obligation or the prohibition of an act formally lawful carries with it by implication a corresponding remedy to assure its observance."*
>
> (Interpretation of Statutes, 7th edition, pp. 729-730)

This concept, viz., a right must have a remedy, is based on the principle which is accepted and recognized by the maxim *ubi jus ibi remedium* – "there is no right without a remedy." Thus, one cannot think of a right without a remedy as the right of a person and the remedy based on the said right would be reciprocal.

Considering the constitutional provisions, Chapter III of our Constitution, which deals with the fundamental rights, guarantees a person, *inter alia*, freedom from torture and from arbitrary arrest and detention (Articles 11, 13(1) and 13(2) of the Constitution). Consequently, the deceased detainee, who was arrested, detained and allegedly tortured, and who met with his death subsequently, had acquired a right under the Constitution to seek redress from this Court for the alleged violation of his fundamental rights. It could never be contended that the right ceased and would become ineffective due to the intervention of the death of the person, especially in circumstances where the death in itself is the consequence of injuries that constitutes the infringement. If such an interpretation is not given it would result in a preposterous situation in which a person who is tortured and survives could vindicate his rights in proceedings before this Court, but if the torture is so intensive that it results in death, the right cannot be vindicated in proceedings before this Court. In my view a strict literal construction should not be resorted to where it produces such an absurd result. Law, in my view, should be interpreted to give effect to the right and to suppress the mischief. Hence, when there is a causal link between the death of a person and the process, which constitutes the infringement of such person's fundamental rights, any one having a legitimate interest could prosecute that right in a proceeding instituted in terms of Article 126(2) of the Constitution. There would be no objection *in limine* to the wife of the deceased instituting proceedings in the circumstances of this case.

The second objection taken up by the 7th respondent was that this petition was filed after the mandatory one-month period provided by Article 126(2) of the Constitution.

As pointed out earlier, the deceased detainee was taken into custody on 12/06/2000. On 21/06/2000, the Payagala Police informed the deceased detainee's father that the deceased detainee died on the previous right. Throughout this period, the deceased detainee was in the custody of the police and the remand. The Legal Aid Commission filed the initial petition on 18/07/2000. The application on behalf of the deceased detainee was therefore filed, within time, as provided by Article 126(2) of the Constitution.

For the reasons aforesaid, the preliminary objections taken by the respondents are overruled. Registrar is directed to take steps to list this application for hearing. In all the circumstances of this case, there will be no costs.

Judge of the Supreme Court

Sarath N. Silva, C.J.

I agree

Chief Justice

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

In the matter of an application in terms of Article 126 of the Constitution

Kotabadu Durage Sriyani Silva,
Pettawatta,
Gomarankanda,
Payagala

(Wife of Mulle Kandage Lasantha Jagath Kumara – now deceased)

Petitioner

v.

SC (Application) No. 471/2000

1. Chanaka Iddamalgoda,
   Officer-In-Charge,
   Police Station
   Payagala

2. Prasanna Wickramaratne, Inspector,
   Officer-In-Charge (Crimes),
   Police Station,
   Payagala

3. Ananda,
   Police Station,
   Payagala

4. Chandrasiri,
   Police Constable (21568),
   Police Station,
   Payagala

5. Commissioner General of Prisons,
   Department of Prisons,
   Baseline Road,
   Colombo 8

6. Inspector General of Police,
   Police Headquarters,
   Colombo 1

7. Hon. Attorney General,
Attorney General's Department,
Colombo 12

Respondents

BEFORE : S. N. Silva, C.J,
Ms. Bandaranayake, J. &
Edussuriya, J.

COUNSEL : J. C. Weliamuna for the Petitioner
Manohara de Silva for the 1st Respondent
Saliya Peiris for the 2nd - 4th Respondent
Ms. Viveka Siriwardena for the 7th Respondents

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for the 7th Respondent	:	10/06/2002

DECIDED ON : 10/12/2002

EDUSSURIYA, J.

At the date of filing the original application under Article 126 of the Constitution namely, 18/07/2000, the person on behalf of whom it was filed (by an Attorney-at-Law) was already dead (died on 20/06/2000) and as such there was no application which the Court could have entertained, and therefore it should necessarily have been rejected.

That application of 18/07/2000 should therefore be rejected *nunc pro tunc*. In any event, the Petitioner to that application cannot proceed with it. In the circumstance, the so called amendment dated 23/08/2000 in which an entirely different person (the widow) is the Petitioner, becomes a new application, which is time barred according to the very article (Article 126) under which the new Petitioner seeks redress, since the new Petitioner's husband had died on 20th June 2000. Then again there cannot be an amendment to an application which the Court cannot entertain.

It is settled law, that, by way of an amendment a party should not be allowed to overcome a time bar or prescription.

Further, according to Counsel Weliamuna's statement to Court on 23/08/2000, (journal entry of 23/08/2000) the Attorney-at-Law had received instructions from the widow to institute proceedings on her behalf as legal representative of the deceased. If that be so, it is a fresh application that should be presented to Court by the new Petitioner as legal representative, of the deceased.

In the circumstances, the order of this Court allowing the present Petition to be filed as an amendment was in my view made *per incuriam* for the reasons stated above.

Further, according to paragraph 36 of the so called amended petition, the present Petitioner's position is that the rights guaranteed under Articles 11, 13 and 17 of the Constitution to the deceased, devolved on the present Petitioner (widow) on the death of her husband and she, the present Petitioner is therefore entitled to continue with the first application. Once again I repeat that the first application was one which the Court could not entertain in as much as the person on whose behalf it had been presented was dead by the date of institution, and therefore there is no question of continuing with that application.

Therefore the so called amended petition now before Court is a new petition filed on 25th September 2000 though dated 30th August 2000 (*vide* the date stamped on the motion accompanying the so called amended petition) over three months after the death of the person whose fundamental rights had allegedly been infringed.

The Attorney-at-Law for the present Petitioner in fact filed an entirely new Petition on 25th September 2000 under the guise of an amendment in an endeavour to overcome the time bar.

For the above mentioned reasons I uphold the preliminary objection raised by the learned State Counsel regarding time bar, in respect of the widow's application and, consequently dismiss this application.

The next question for decision is whether the widow of a person whose fundamental rights had been infringed is entitled to make or continue with an application for redress under Article 126(2) on the basis of devolution on the widow, of the right acquired prior to death by a deceased person whose fundamental rights had been infringed to seek redress.

Article 126(2) reads as follows:

> *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed by executive or administrative action, he may by himself on by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of Court as may be in force, apply to the Supreme Court by way of Petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges."*

On a plain reading of Article 126(2) it is clear that where a person's fundamental rights have been infringed, that person by himself on by an attorney-at-law on his behalf can seek redress from the Supreme Court.

The language contained in Article 126(2) is unambiguous as it stands and in my view excludes persons other than those named therein from seeking redress. Article 126(2) does not set out the heirs or the dependants of the person whose fundamental rights have been infringed, as persons who could seek redress.

Counsel for the present Petitioner has cited the following passage from Bindra on Interpretation of Statutes in this connection.

> *"If a statute which creates a rights does not prescribe a remedy for the party aggrieved by the violation of such right, a remedy will be implied and the party aggrieved may have relief, in an appropriate action founded upon the statute. The creation of a new duty or obligation or the prohibition of an act formally carries with it by implication a corresponding remedy to assure its observance."*

There is nothing in the Constitution which implies that the widow of a person whose fundamental rights were infringed has a right to relief or redress under Article 126(2). Besides, Article 126(2) provides a remedy to the person whose fundamental rights have been violated. The right to seek redress is only given to those whose fundamental rights have been infringed. Therefore this passage in Bindra on Interpretation of Statutes – 7th Edition Page 729-730 has no applicability to the matter presently before us.

In Somawathie v. Weerasinghe and Others (1990) 2 Sri L.R. 121 wherein Amerasinghe J. stated that "... where the words are in themselves precise and unambiguous, and there is no absurdity, repugnance or inconsistency with the rest of the Constitution the words themselves do best declare that intention. No more can be necessary than to expound those words in their plain, natural, ordinary, grammatical and literal sense", and according to the majority decision a wife has no *locus standi* in a case where her husband's fundamental rights had been violated.

In that case the wife of the person whose rights had allegedly been violated presented an application complaining of the infringement of the fundamental rights of her husband and according to the majority decision, Article 126(2) only permitted those persons named therein to make such an application and accordingly held that the wife had no *locus standi* to maintain the application.

Kulatunge J. taking a dissenting view on the question of *locus standi* of the wife stated that in circumstances of grave stress or incapacity particularly where torture resulting in personal injury is alleged to have been committed, next of kin such as a parent or the spouse may be the only people able to apply to this Court in the absence of an Attorney-at-Law who is prepared to act as Petitioner; and if such application is also supported by an affidavit of the detenu either accompanying the petition or filed subsequently which would make it possible to regard it as being virtually the application of the detenu himself, this Court may entertain such application notwithstanding the failure to effect literal compliance with the requirements of Article 126(2).

In this connection I may also refer to Fundamental Rights in Sri Lanka (A Commentary) (1993) where Justice Sharvananda has stated

> *"that the injured person alone has locus standi to complain of the infringement of his fundamental rights"*
>
> (pages 408 and 410)

Bindra on Interpretation of Statutes in Chapter XI states that it is a rule of construction of Statutes that in the first instance the grammatical sense of the words is to be adhered unless there be some strong and obvious reason to the contrary and that where there is no ambiguity in the words there is no room for construction, and that the necessity for interpretation does not arise where the language is plain. Further, that if language is plain, consequences whatever they may be should be disregarded so that even if the plain meaning of the language results in an absurdity the plain meaning must be given effect to. That if the result of giving

effect to the plain meaning is unfortunate it is for the Legislature to take action to remedy the defects of the law as enacted and it is not for the Courts to usurp the functions of the Legislature and by straining the meaning, ignoring the clear terms of the law, seek to evade the consequences, which in the opinion of Court may prove illfraught. *Barru* v. *Lachhman*, 111 PR 1913 at page 417. See also *Rananjaya Singh* v. *Baijnath Singh and Others* A.I.R. 1954 S.C. 749, 752. The effect of the words is a question of law. *Chatenay* v. *Brazilian Submarine Telegraph Co.*, (1891) 1 QB 79, 85, per Lindley, L.J. I may mention that well establish rules of interpretation cannot be disregarded to give effect to reasonableness.

At page 438 Bindra states:

> *"Where the meaning of words is plain, it is not the duty of the Courts to busy themselves with supposed intention. A Court cannot stretch the language of a statutory provision to bring it in accord with the supposed legislative intention underlying it unless the words are susceptible of carrying out the intention"* (page 438).

In *Abel* v. *Lee* (1871) L.R. 6 p 365 at 371 Willes J. stated

> *"I utterly repudiate the notion that it is competent to a judge to modify the language of an Act of Parliament in order to bring it into accordance with his views as to what is right and reasonable."*

Further, it is also a golden rule of interpretation that Courts cannot fill in gaps or rectify defects when the words are unambiguous.

In this connection I may also refer to Article 30 (1) (b) and Article 30 (1) (c) of the Governments' Proposals for Constitutional Reforms of October 1997 and the Constitution of the Republic of Sri Lanka Bill August 2000 which made provision (1) for an aggrieved person who is unable or incapable of making an application under Article 17 by reason of physical, social or economic disability or other reasonable cause, an application to be made on behalf of such person by a relative or friend of such person if the person aggrieved raises no objection, and (2) also provided for an application to be made in respect of any person or persons affected, in the public interest, by any person or by any incorporated or unincorporated body of persons acting *bona fide*. So that even at that stage it was not sought to widen the scope of Article 126(2) to enable a widow or heirs of a deceased person whose fundamental rights had been violated to file an application for redress. It is therefore safe to conclude that the intention of the Legislature under Article 126 was to grant relief only to the person whose fundamental rights had been violated.

Article 17 read with Article 126 (2) provide a remedy to those whose fundamental rights have been infringed and Article 126 (2) categorically states that the person whose fundamental rights have been infringed, himself or by an attorney-at-law on his behalf should make an application for redress. There is nothing therein which even remotely suggests that a widow has such a right or that such right devolves on a widow or heirs of a person whose fundamental rights have been infringed.

In the circumstances it would be preposterous on our part to hold that the Legislature intended that the right to apply for redress should pass to the heirs or that the heirs of a deceased whose fundamental rights had been infringed were entitled to apply for relief under Article 126 (2).

In passing I may add that the laws of this country adequately provide for the widow or other dependents of a deceased person who met with his death as a result of a wrongful act of another to seek compensation based on loss of support or maintenance and such compensation has to be calculated on evidence.

Counsel for the present Petitioner has drawn the attention of Court to the fact that Sri Lanka has ratified the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and is obliged to grant redress to victims of torture and in the event of the death of a victim of torture the dependents are entitled to compensation, and as such, Article 126 should be construed accordingly.

The International Convention Against Torture was ratified by Sri Lanka in 1994 whereas the Constitution was promulgated in 1978. It certainly cannot be said that one can read into Article 126(2) of the Constitution of 1978 a Legislative intention in 1978, to grant relief to a widow of a person whose fundamental rights have been infringed because Sri Lanka ratified the International Convention Against Torture sixteen years later in 1994, containing a provision to grant relief to dependants of victims of torture in the event the death of a victim as a result of torture.

By this application the widow of the person whose fundamental rights were allegedly infringed has applied for compensation on the basis that -

> *"the rights guaranteed under Articles 11, 13 and 17 of the Constitution devolved upon the Petitioner and she is entitled to "continue" with this application seeking relief ... ... "*
>
> (paragraph 36 of the "Amended Petition.")

Under Article 17 read with Article 126 of the Constitution, what are the rights that accrue to a person whose fundamental rights or language rights have been infringed or are about to be infringed?

Article 126(2) sets out that where any person alleges that a fundamental right or language right relating to him has been infringed or is about to be infringed he may by himself or by an Attorney-at-Law apply to the Supreme Court for relief or redress in respect of such infringement.

Therefore the right to relief and the right to apply for relief are vested only in the person whose fundamental rights have been infringed and are personal rights which accrue to him and him alone and therefore those rights must necessarily die with him. However, where an applicant under Article 126(2) for relief, dies after the Respondents had joined issue with the applicant, that is after *litis contestatio*, then the right to relief will pass to the legal representatives, that is to the estate of the deceased.

In *Premalal de Silva* v. *Inspector Rodrigo and Others* (1991) 2 Sri L.R. 301, the applicant Premalal de Silva disappeared subsequently and this Court directed compensation to be paid to the legal representatives of the applicant in the event of it being established that the applicant was dead.

In any event, even if the right to relief which accrued survives the death of the person whose fundamental rights were infringed as claimed by the Petitioner's Counsel, then it is the legal representative of the deceased representing the estate of the deceased who can claim relief since that right to claim relief (compensation in this instance) that has survived is an asset of the estate of the deceased. In this instance the widow has not filed her petition in this Court as the legal representative of the deceased (*vide* caption), although counsel Weliamuna had stated on 23rd August 2000 (*vide* journal entry 23/08/2000) that he moves to amend the caption to read "on behalf of K. A. Sriyani as the legal representative of M. K. L. Jagath Kumara the deceased", and for that reason too the present Petitioner cannot maintain this application.

For the above mentioned reasons, I uphold the objection raised by the learned State Counsel that the Petitioner (widow) has no *locus standi* to maintain this application.

I therefore dismiss this application. No costs are ordered solely because the Petitioner is a widow.

JUDGE OF THE SUPREME COURT

Plea – Bargaining

B. Buvanasundaram[*]

1. Introduction

Plea Bargaining is a process by which the accused and his lawyers along with the prosecution arrive at an agreement on how the case should be disposed. It involves the accused pleading guilty to a lesser offence, or of only one count or some counts of a multi-count charge and receiving in turn a lighter sentence than what he would have received for the grave charge. The rationale behind this exercise being that since the accused has pleaded guilty and shown accountability and remorse, he is entitled to a lesser sentence. Further a plea of guilt saves time of court.

The practice of plea-bargaining has been used often. Yet this process is not entirely without criticism. Critics argue that the values embodied in criminal statutes are undermined when a defendant is allowed to bargain his way through a system without assuming full responsibility for his conduct.[1] It is argued that the accused is allowed to get away with a lesser sentence than what he deserves. Despite the disadvantages, the advantages are too good to ignore. We must promote increased use of plea-bargaining. Steps however must be taken to scrutinise the process by which the accused comes to plead guilty to a lesser charge.

2. Advantages of Plea Bargaining

The advantages of the process of plea bargaining are numerous. The state favours plea bargaining because, the work load of a criminal court is often heavy and when the criminal courts become crowded, both judges and prosecutors feel pressurised to dispose of cases quickly. Criminal trials take days, while the plea bargaining process can be completed in a few minutes. Further, however weighty the evidence for the prosecution or defence, the outcome of a trial is unpredictable for numerous reasons. Plea-bargaining provides the prosecutor and the accused with some control over the result. Since plea-bargaining is quicker and requires less work than a full trial, it is cheaper for the accused and easy on the prosecution budget. Further plea-bargaining is also an answer to overcrowded prisons. It gives the offender a shorter term of prison, or keeps offenders out of prison. Emptying

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[*] PhD, M. Phil, MA (International Criminology), LL.B (Hons), Attorney at Law.

[1] Barbara LaWall, 'Should Plea Bargaining be Banned in Prima County' http://www.ajc.alc.us/Rreports/pleafram.html, accessed on 30/06/02.

prisons has its independent merits. It saves taxpayers money; it spares the accused of the unpleasant experience of prison and saves him from the corruptive influence of prison life.

The accused favours plea-bargaining because, by this process he receives a lighter sentence. He also pays less in the way of counsel fees. It relieves him of the stress of a long wait for the trial date and the anxiety of a criminal trial. He is able to get back to his life and not waste it away languishing in prison, or he serves a shorter term in prison. If the alleged offender is in prison because he has no right to bail or cannot furnish bail, plea-bargaining may ensure he gets out of prison immediately. Further plea bargaining ensures he has fewer or less serious offences on his record. It could also result in him having a less stigmatising offence on his record. Prosecutors may reduce charges that are seen as socially offensive to less offensive charges in exchange for a guilty plea. For example the prosecutor may reduce a molestation or rape case to an assault.[2] This can have a major impact on the defendant's relationship with friends and family. Moreover sometimes defendants convicted of stigmatising offences may be at a greater risk of being harmed in prison than if they were convicted of an offence that did not carry the same stigma.[3] Plea bargaining is also a means of avoiding publicity, as it receives attention for a shorter span of time than a trial. People who depend on their reputation in the community to earn a living and people who do not want to bring further embarrassment to their families, may choose plea bargaining to keep their names out of the public eye; for rarely is a defendant's background investigated in the course of a plea bargaining to the extent it may be done at trial.[4] Finally, prosecutors may use plea bargaining to circumvent laws they disapprove of. For instance the prosecutor may not agree with laws prohibiting possession for personal use of small amounts of marijuana, so the prosecution may have a policy of giving all offenders 'offers they cannot refuse', such as a small fine and community service.[5]

3. Disadvantages of Plea Bargaining

Plea bargaining despite its advantages does have its dark side. Primarily it is coercive. The state with its extensive powers of arrest, charge and incarceration, offers the accused a bargain. The prosecutor may well say 'if you do not accept the plea bargain offered, we will prosecute you to the fullest extent of the law and you would face life imprisonment as opposed to two years imprisonment'.[6] Coercion, even psychological, is objectionable. The principle of 'equality of arms' should apply and the state should not abuse its dominant position so as to gain a substantial advantage *vis a vis* the accused. The rules of evidence and

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[2] http://www.law.emory.edu/ELJ/volume/spg98/grids.html., accessed on 30/06/02.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] http://www.lawmail.com/pleabarg/#Evis/. Accessed on 30/06/02.

procedure, which ensures a fair trial, are circumvented in the plea bargaining process. It is important therefore that the plea bargain itself should ensure fairness for the accused. Further an accused may plead guilty to what he has not done to end the nightmare quickly and get out of remand prison to his familiar surroundings. He may wish to get out of the criminal justice system quickly. Yet a plea of guilty may result in the accused now having a record. Another objection to plea bargaining is that the victim is kept out and the process is largely perceived as secretive. Victims are not necessarily vengeful. Often all they want is reparation, and this could well be included into the plea bargain. Further a plea bargain allows the victim to avoid the harrowing experience of testifying at the trial and gives an immediate sense of closure of the case and knowledge that the defendant did not go unpunished.

It has been observed that the primary concern about the process of plea-bargaining is that it subverts the values of the criminal justice system. It is in fact an administrative determination of the offender's guilt. The judiciary articulates great principles that govern the determination of guilt at trial, but then the executive branch bargains with criminals to purchase these entitlements.[7] It has been observed that the spirit of an auction had come to dominate the process of justice and that 'the plea bargain convinces criminals that the majesty of the law is a fraud, that the law is like a Turkish bazaar.'[8] Pervasive bargaining without specific guidelines, perpetuates the image that justice is for sale. 'Just as there is no moral difference between buyers and sellers, there is no moral difference between the criminal and his attorney, the prosecution, the judge and the probation officers.'[9]

4. Conclusion

Plea bargain is a good process if it is conducted according to the rule of law and is based on the careful evaluation of the evidence and the crime. It is an essential part of the criminal process. It is necessary that while encouraging plea bargaining, the criminal justice system tailors reform to mitigate the disadvantages of the process. The defendant's guilt must be decided after full investigation, on evidence and the prosecutor must consider the circumstances of the offence, the character of the offender and his previous convictions. In accordance with due process, counsel must represent a defendant during the plea bargaining process. The victim must not be excluded and the judge must review the proceedings to mitigate the coercion involved. Plea bargain contributes to the efficient administration of justice. It provides some benefit to the players in the criminal justice system and above all it has the potential for encouraging rehabilitation of the offender, which must surely be the foundation of penal theory.

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[7] Douglas D. Guidorizzi, 'Should we Really Ban Plea Bargaining? The Core Concerns of Plea Bargaining Critics', http://www.law.emory.edu/ELJ/volumes/spg98/guido.html.
[8] Cited in *ibid.*
[9] *Ibid.*

The Communication of Offer and Acceptance: An Overview of the Position under the Indian Contract Act, 1872

Abhayraj Naik[*]

I. Introduction

This paper attempts to provide an overview of the position under Indian law of the concepts of "offer" and "acceptance" with special regard to their communication in contractual relations. Apart from the perspective of Indian law, the concept of "communication of offer and acceptance" with respect to the British and American legal systems has also been very briefly examined. Moreover, various principles of English contract law, which have made their way into Indian jurisprudence are also examined. With regard to contracts, the "indication" and "assent" may take a number of forms – for example, the spoken word, a letter, a fax message, a radio signal, a telegram, an e-mail, a newspaper advertisement, etc. Therefore, both the offer and the acceptance need to be appropriately communicated to the other party (or parties) in the contract and this is the specific area that this paper seeks to analyze and explain keeping in mind the scenario under Indian law. The necessity for communication, the so-called rules of communication of offer and acceptance, the different mediums of communication of offer and acceptance, and the specific point in time when an offer or acceptance is held to be effective, have been examined. This topic assumes special significance because in the modern world, contracts are often made by much more sophisticated means of communication than by letters and post. Telexes, faxes, and e-mail are all widely used, in addition to letters and telephones, as means of communicating offers, counter-offers, acceptances and rejections. How these new means of communication affect the bargaining context of contractual relations is another important aspect of study in this paper.

II. Offer under the Law of Contracts

An offer is an intimation, by words or conduct, of a willingness to enter into a legally binding contract. Also, an offer in its terms expressly or impliedly indicates that it is to become binding on the offeror as soon as it has been accepted by an act, forbearance or return promise on the part of the person to whom it is addressed.[1]

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[*] Year II, B.A. LLB (Hons.), National Law School of India University, Bangalore. The author is grateful to Professor A. Jayagovind for his comments on an earlier version of this article.

[1] A.G. Guest (Ed.), *Anson's Law of Contract*, 26th Edition, Clarendon Press, Oxford, 1984, p. 25.

As mentioned earlier, a contract results from the acceptance of an offer or proposal. To fully understand the concept of offer, it is necessary to briefly examine the characteristics that every offer must possess, before it can become a contract on acceptance. These characteristics, of which the communication of offer is an important one, may be stated in the form of principles, as deducible from decided cases and statutory provisions. They are:

1) An offer must be one intended to give rise to legal consequences

The doctrine of intention made its way into the English law in the 19th century under the influence of continental Civil Law and Pothier's *Treatise on the Law of Obligations* translated and published in England in 1806.[2] In 1811, Lord Stowell astutely observed in ***Dalrymple*** v. ***Dalrymple***[103] that -

> *"contracts must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever."*

It is still an open question whether the requirement of "intention to contract" is applicable under The Indian Contract Act, 1872 in the way in which it has been developed in England.[4]

2) An offer must be one capable of creating legal relations[5]

In ***Balfour*** v. ***Balfour,***[6] Lord Akin observed:

> *"It is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. They are not contracts because the parties do not intend to create legal relations nor that they should be attended by legal consequences."*

3) The terms of an offer must be certain or at least be capable of being made certain.

Section 29 of The Indian Contract Act, 1872 states that "agreements, the meaning of which are not certain, or capable of being made certain, are void."[7]

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[2] T.S. Venkatesh Iyer, *The Law of Contracts*, 4th Edition, Asia Law House, Hyderabad, 1987, p. 20.
[3] (1811) 2 Hag. Con. 54, 105, cited from T.S. Venkatesh Iyer, *The Law of Contracts*, 4th Edition, Asia Law House, Hyderabad, 1987, p. 20.
[4] ***CWT*** v. ***Abdul Hussain*** (1988) 3 SCC 562, at p. 569.
[5] *Supra* note 4.
[6] [1919] 2 K.B. 571.
[7] See, ***Kandamath Cine Enterprises Pvt. Ltd.*** v. ***John Philipose*** AIR 1990 Ker 198.

Guthing v. ***Lynn***[8] is an English example where the Court held that the offer made was too loose and vague to be enforced in a Court of Law.

4) An offer must be distinguished from a quotation or an invitation to offer

It is necessary to clearly distinguish offers from statements that are merely invitations to make offers, and do business. An invitation of this nature, which is not intended to be binding is called an "invitation to treat."

A statement of fact made merely to supply information cannot be treated as an offer, and accepted, so as to create a valid contract.[9]

5) An offer may be general or specific

A general offer is not made to an ascertained person, but no contract can arise until an ascertained person has accepted it.[10]

An offer, by way of advertisement, of a reward for the rendering of certain services, addressed to the public at large, *prima facie* creates a power of acceptance in every person to whom it is made or becomes known. But a contractual obligation to pay the reward only comes into existence when an individual person performs the stipulated services, and not before.[11]

6) Every offer must be communicated

Section 3 of The Indian Contract Act, 1872 provides that the communication of the offer is deemed to be made by any act or omission of the party proposing, by which he intends to communicate such a proposal, or which has the effect of communicating it.

Further, Section 4 of The Indian Contract Act, 1872 states "the communication of a proposal is complete when it becomes to the knowledge of the person to whom it is made." Sections 3 and 4 of The Indian Contract Act, 1872 deal with the communication, acceptance, and revocation of proposals. In determining the place where a contract takes place, Section 2, the interpretation section, must be taken into account.[12]

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[8] (1831) 109 All E.R. 1130.
[9] ***Harvey*** v. ***Facey*** [1893] A.C. 552.
[10] Richard Stone, *Contract Law*, 2nd Edition, Cavendish Publishing Limited, London, 1996, p. 11.
[11] ***New Zealand Shipping Co., Ltd.*** v. ***A.M. Satterthwaite & Co., Ltd.***, [1975] A.C. 154.
[12] ***Bhagwandhas Goverdhandas Kedia*** v. ***Girdhar Lal Parshottamdas & Co.*** AIR 1966 SC 543.

Unless the acceptor knows of the offer, there can be no acceptance and consequently no contract.[13] This is true of specific as well as of general offers.[14] An offer is effective when, and not until, it is communicated to the offeree.[15] It is obvious that the communication of intentions and offers may be made in many other ways beside written, spoken, or signalled words. Each of these mediums of communication of offers has to be examined. The communication of offers will be dealt with in greater detail later in this paper.

III. Acceptance under the Law of Contracts

Section 2(b) of The Indian Contract Act, 1872 defines acceptance as follows: "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise. Acceptance of an offer is the expression, by words or conduct, of assent to the terms of the offer in the manner prescribed or indicated by the offeror."[16]

It is in many cases, therefore, enough for an acceptance to take the form of the person to whom the offer has been made simply saying 'yes, I agree.' In some situations, however, particularly where there is a course of negotiations between the parties, it may become more difficult to determine precisely the point when the parties have exchanged a matching offer and acceptance. Unless they do match exactly there can be no contract.

Section 7(1) of The Indian Contract Act, 1872 provides that for a contract to be formed, the acceptance must be absolute and unqualified. Further, Section 7(2) provides that this acceptance must be expressed in some usual and reasonable manner. Section 8 deals with acceptance by performing conditions, or by receiving consideration.

It is important to understand the nature of acceptance before proceeding to the more specific area of the communication of acceptance.

Nature of Acceptance:

Acceptance must be absolute and unqualified

In ***Haji Mohamed Haji Jiva*** v. *E.* ***Spinner,***[17] Sir Jenkins CJ said:

> *"Unless there is an absolute and unqualified acceptance, the state of negotiations has not yet passed, and no legal obligation is imposed." Also,*

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[13] See, ***The Central Bank, Yeotmal Ltd.*** v. ***Vyankatesh Bapuji*** AIR 1949 Nag 286.
[14] ***Cole*** v. ***Cottingham*** (1831) 173 All E.R 406.
[15] *Supra* note 1, at p. 30.
[16] *Supra* note 1, at p. 32.
[17] (1900) 24 Bom 510, cited from, T.S. Venkatesh Iyer, *The Law of Contracts*, 4th Edition, Asia Law House,

"any departure from the terms of the offer or any qualification vitiates the acceptance unless it is agreed to by the person from who the offer comes. In other words, an acceptance with a variation is no acceptance; it is simply a counter-proposal, which must be accepted by the original proposer before a contract is made."

Conclusiveness of Acceptances:

The kinds of difficulty, which arise in determining whether or not an acceptance is conclusive, should be examined.

Acceptance with variation of terms:

An acceptance with a variation however slight will not give rise to a contract. Where the offer was to purchase a house with possession from the 24th July, and this was followed by an acceptance that suggested possession from the 1st of August, it was held that there was no concluded contract.[18] However, a variation in the language, which does not involve any difference in substance, will not matter.[19] Similarly, when the offer is accepted with the addition of fresh terms, no contract is created, unless these terms are again agreed to by the offeror.

A purported acceptance of an offer may introduce terms at variance with or not comprised in the offer, and in such cases no contract is made, for the offeree in effect rejects the offer and makes a counter-offer of his own.

Rejection and Counter-offer:

Where parties are in negotiation, the response to an offer may be for the offeree to suggest slightly (or even substantially) different terms. Such a response will not, of course, be an acceptance, since it does not match the offer, but will be a 'counter-offer'.[20] During lengthy negotiations, many such offers and counter-offers may be put on the table. This raises the rather pertinent question of whether all these offers and counter-offers remain as they are, ready for acceptance at any stage. This issue was addressed in ***Hyde*** v. ***Wrench***.[21] The Court held that a rejection of an offer in effect destroys it and it cannot be accepted later. Moreover, the Court also held that a counter-offer operates in the same way as a rejection. Therefore, only the last offer submitted survives and is available for acceptance. All earlier offers are destroyed by rejection or counter-offer.

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[18] ***Routledge*** v. ***Grant*** (1828) 130 All E.R. 920.
[19] *Supra* note 2, at p.16.
[20] *Supra* note 8, at p.16.
[21] (1840) 49 All E.R. 132.

Communication of Acceptances:

Acceptance means, in general, communicated acceptance. What amounts to communication, and how far it is necessary that communication should reach the offeror, are matters that need to be examined. For the formation of a contract, the general rule with regard to the need for communication of acceptance is that the acceptance must in fact be communicated.[22] The general rule also is that an acceptance is not communicated until it is actually brought to the notice of the offeror: for example, an attempted oral acceptance is not communicated if it is 'drowned by an aircraft flying overhead'[23]; or if the attempted acceptance is spoken into a telephone or sent on a teleprinter or telex (or as is now likely, through e-mail) after the line has failed.[24]

Therefore, just as offers have to be communicated, acceptances in general also should be communicated, i.e. there must be some external manifestation, some outward expression, some word spoken or act done by the person to whom the offer is made which the law can regard as communication of the acceptance to the offeror.

The requirement of communication does not, however, answer all problems. In the modern world communication can take many forms; face to face conversations, telephones, letters, signals, faxes, e-mails, etc. In some of these there will be a delay between the sending of an acceptance and it's coming to the attention of the offeror. The law of contract has to have rules, therefore, to make clear what exactly is meant by 'communication.' The communication of acceptances is examined in detail later in this paper.

IV. The Communication of the Offer

It is probably a safe general rule that an offer should be communicated to the other party in order that its acceptance may constitute a contract. Thus, the unauthorised publication in the press of a resolution of a corporation that any employee of the corporation volunteering for military service should receive, during such service, the difference between his army pay and the salary he received in its employment, does not constitute communication.[25] It would also follow that there could be no acceptance in ignorance of the offer.

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[22] *Supra* note 2, at p. 34
[23] ***Entores*** v. ***Miles Far East Corpn.*** (1955) 2 All E.R. 493, at p.495, obiter per Denning LJ.
[24] *Id.*
[25] ***Wilson*** v. ***Belfast Corpn.*** (1921) 55 ILT 205.

There do exist, however, some instances in law where a contract was said to exist, even in the absence of knowledge of the offer by the offeree. In ***Wiles*** v. ***Maddison***,[26] as per Viscount Caldicote LCJ:

> *"before it can be said that anybody has made an offer, some evidence must be available to show that the offer was communicated or put on its way. I do not say that it must be proved that the offer has reached the person to whom the offer is made."*

Also, in ***Gibbons*** v. ***Proctor***,[27] a Divisional Court held that a police officer was entitled to claim a reward, offered by handbills, for information given to the superintendent of police, although it seems that he did not know of the handbills before he gave the information. The decision, as reported, is an unsatisfactory one, for the facts of the case are by no means clear. Accordingly, it cannot be considered as of compelling authority, and an American case, ***Fitch*** v. ***Snedaker***,[28] is usually cited to the contrary. In this case, it was laid down that a reward cannot be claimed by one who did not know that it had been offered. This latter decision is undoubtedly correct in principle because a person who does an act for which a reward has been offered in ignorance of the offer cannot say either that there was a meeting of minds, or that his act was done in return for the promise offered. Accordingly, in ***Lalman Shukla*** v. ***Gauri Dutt***,[29] the plaintiff was not entitled to the reward even though he had traced and found the defendant's missing nephew because he was not aware of the reward offered. If however, a person knows of the offer, but is inspired to performance by a motive other than that of claiming the reward, such a motive is immaterial.[30]

Offers with Terms Limiting or Excluding Liability:

We must note that, where the terms of the contract are contained in a ticket, receipt, or 'standard form' document, in certain circumstances it will be sufficient if the person tendering the document has done all that might reasonably be expected to give notice of the contractual terms to the class of persons to which the other party belongs.

It often happens that a document purporting to express the terms of a contract as a ticket, receipt or standard form document is delivered to one of the parties. Some of the terms may be by way of limiting or excluding the liability of the person supplying the document. Such

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[26] (1943) 1 All E.R. 315, at p.317.
[27] (1891) 64 L.T.594, cited from, Jeevan Lal Kapur (Ed.), *Pollock and Mulla on Indian Contract and Specific Relief Acts*, 10th Edition, N.M. Tripathi Private Ltd., Bombay, 1986, p.108.
[28] (1868) 38 N.Y. 248, cited from, *supra* note 1 at p. 30.
[29] (1913) 11 All LJ 489, cited from, *supra* note 2, at p.35.
[30] See, ***Williams*** v. ***Carwardine***, (1833) All E.R. 590.

terms have been regarded in some cases as defining the promisor's obligations and hence the contract must be read as a whole to ascertain what the promisor has agreed to do. This practice raises several important questions: Where an offer consists of several terms, should every term be communicated? Is it the duty of the offeror to bring the several terms to the knowledge of the acceptor in order to bind him? What if the acceptor be an illiterate or an indifferent person? Or is it the duty of the acceptor to acquaint himself with the several terms of the contract he is entering into? Is there an obligation on the part of the acceptor to read every paper that is put into his hands by the offeror?[31]

In ***Henderson*** v. ***Stevenson***,[32] Lord Cairns L.C. in decreeing the suit said:

> *"How can the contracting party be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract that is presented to him."*

Importantly, in ***Parker*** v. ***S.E.Ry. Co.***,[33] it was held that if a person, when accepting a ticket, knows that it contains conditions, they will bind him even though he does not read them. If he does not know and there is nothing to indicate that the ticket contains any writing at all, then he will not be bound. If the party tendering the document or ticket has done what is sufficient to give the other party notice that it contained conditions, the latter will be bound. Mellish, L.J. said:

> *"If what the Railway Company does is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons, on account of his exceptional ignorance or stupidity or carelessness."*

Therefore, in these cases the communication of the offer with special regard to the communication of conditions excluding liability assumes special importance.

The principle as gathered from the above cases may be stated thus: where an offer consists of several terms and a document containing all of them is handed to the acceptor, his assent is presumed in all cases where the offeror has done what is reasonably sufficient to bring those terms to the knowledge of the acceptor and where he has signed the document, he is bound in the absence of misrepresentation, whether he has read the conditions or not. The Indian law

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[31] *Supra* note 2, at p.36.
[32] (1875) L.R. 2 H.L. Sc. App. 470, cited from, *supra* note 1, at p.142.
[33] (1877) 2 CPD 416, cited from, *supra* note 8, at p.110.

on the point is the same as English law.[34] In ***Mackillican*** v. ***Compagnie Des Messageries Maritimes De France,***[35] the Calcutta High Court held that the plaintiff was bound by the conditions printed on a railway ticket because attention had been specifically drawn to them.

Battle of the forms:

The examination of the communication of offer may be concluded with the study of a relatively recent phenomenon popularly referred to as "battle of the forms." This situation is one where it becomes vital to decide whether a particular communication is a counter-offer or not. A battle of forms situation arises when two or more companies or persons are in negotiation, and as part of their exchanges they send each other standard contract forms. If the sets of forms are incompatible, as is likely to be the case, what is the result? Do the buyer's or the seller's conditions prevail in a contract for sale? There are three possibilities:

- The contract is made on the terms of the party whose form was put forward first;
- The contract is made on the terms of the party whose form was put forward last – the 'last shot' approach, i.e., the last counter-offer is the only one held to continue to exist[36];
- There is no contract at all, because the parties are not in agreement, and there is no matching offer and acceptance.

Application of the principles outlined above as regards offers, counter-offers, and their communication suggests that the third of the possibilities is the correct answer. There exist, however, two different approaches to the same issue.[37]

The traditional view:

This view relies on the traditional analysis in terms of looking for what objectively appears to be a matching offer and acceptance.

The Court of Appeal has stated, in ***Butler Machine Tool Co., Ltd.*** v. ***Ex-cell-o Corporation (England), Ltd.,***[38] that the seller's confirmation amounts to a counter-offer: this is capable of acceptance by some act on the part of the buyer, e.g. the receipt and acceptance of the goods, which indicates that he accepts the counter-offer made to him. Therefore, such an acceptance would conclude a contract subject to the seller's conditions, since it was he who fired the 'last-shot' in the battle of the forms.

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[34] *Supra* note 2, at p. 40.
[35] ILR (1880) 6 Cal 227, cited from, *supra* note 27 at p. 72.
[36] *Supra* note 8, at p. 18.
[37] Id.
[38] (1979) 1 All E.R. 965.

New Developments:

In ***Trentham Ltd.*** v. ***Archital Luxfer***,[39] Steyn LJ held that contracts do not necessarily have to be formed by a matching offer and acceptance, but can come into existence simply during performance. Because of the conduct of the parties involved, the Court held that there indeed was a contract despite the dispute as to whose terms should govern the contract.

V. The Communication of Acceptance

As mentioned earlier, the general rule is that an acceptance has no effect until it is communicated to the offeror. One reason for this rule is the difficulty of proving an un-communicated decision to accept, "for the Devil himself knows not the intent of a man".[40] But this is not the sole reason for the rule, which applies even where the fact of acceptance could be proved with perfect certainty, e.g. where a person writes his acceptance on a piece of paper which he simply keeps[41]; where a person decides to accept an offer to sell goods to him and instructs his bank to pay the seller, but neither he nor the bank gives notice of this fact to the seller,[42] etc. The main reason for this rule is that it could cause hardship to an offeror if he were contractually bound without even knowing that his offer has been accepted.[43]

Acceptance by conduct: Is there still a need for communication?

Unilateral contracts are those in which it is performance on one side that makes obligatory the promise of the other; the outstanding obligation is all on one side. Bilateral contracts are those in which each party is obliged to some act or forbearance, which, at the time of entering into the contract is future: there is outstanding obligation on both sides. Each party in a bilateral contract is both a promisor and a promisee.[44]

In unilateral contracts, the acceptance will always be by conduct – for e.g. in ***Carlill*** v. ***Carbolic Smoke Ball Co.***,[45] usage of the smoke ball amounted to acceptance of the offer of Carbolic Smoke Ball Company. Therefore, the offer itself waived the need for communication of the acceptance. The issue of acceptance by conduct in bilateral contracts is a little more complicated and was considered in ***Brogden*** v. ***Metropolitan Ry.***[46] The House

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[39] (1993) 1 Lloyd's Rep. 25, cited from, *supra* note 8, at p.40.
[40] Anon (1478) Y.B. 17 Edw. IV Pasch, f.1-pl. 2, cited from, G.H. Treitel, *Treitel – The Law of Contracts*, 9th Edition, Sweet & Maxwell, London, 1995, p.22.
[41] ***Brogden*** v. ***Metropolitan Ry.*** (1877) 2 App. Cas. 666, cited from, supra note 8, at p.40.
[42] ***Brinkibon*** v. ***Stahag Stahl und Stahlwarenhandelsgesellschaft mbH*** [1983] 2 A.C. 34.
[43] G.H. Treitel, *Treitel – The Law of Contracts*, 9th Edition, Sweet & Maxwell, London, 1995, p.22.
[44] *Supra* note 1, at p. 23.
[45] (1893) 1 QB 256.
[46] *Supra* note 40.

of Lords confirmed that it was not enough that the plaintiffs should have decided to accept: there had to be some external manifestation of acceptance. In this case, however, that was supplied by the fact that the plaintiffs had placed orders on the basis of the agreement. The defendants should therefore be taken to be bound by its terms. This decision confirms that a bilateral contract may be accepted by conduct, and there is no need for a verbal or written indication of acceptance. It does not deal, however, with the question as to whether the fact of acceptance must be communicated to the other party, and it is this specific aspect that is dealt with in the next section.

The position in India is the same as per the decision of the Calcutta High Court in ***Hindustan Co-operative Insurance Society*** v. ***Shyam Sunder***,[47] where Harris CJ says:

> *"Mere mental assent to an offer does not conclude a contract either under The Indian Contract Act or in English law. The offeror may, however, indicate the mode of communicating acceptance either expressly or by implication both in India and [in] English Law. In the case before us, it is clear from the facts that the deceased indicated clearly the mode of acceptance of his proposal"*

Since the offeree in this case did in his acceptance adhere to the mode of acceptance stipulated, a contract was created through conduct.

Acceptance by Silence: Can silence be construed to be a form of communication of the acceptance?

In some cases, the form of the offer will determine the issue. In unilateral contracts, for example, it has been recognized since ***Carlill*** v. ***Carbolic Smoke Ball Co.***,[48] that the offeror may waive the need for communication of the acceptance. The Court thought that it clearly could not have been intended that everyone who bought a smoke-ball in reliance on the Company's advertisement should be expected to tell the Company of this. It would be perfectly possible, of course, for an offeror to require such notice, but where an offer is made to the world, or where a reward is offered for the return of property or the provision of information, the intention to waive such a requirement can easily be found.[49]

In relation to bilateral contracts the position is different: The leading authority is ***Felthouse*** v. ***Bindley***,[50] in which it was held that there existed no binding contract for the sale of a horse

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[47] AIR 1952 Cal 691.
[48] *Supra* note 44.
[49] *Supra* note 8, at p. 22.
[50] (1862) 142 All E.R. 1037.

simply because the seller had not communicated his intention to accept the buyer's offer even though he intended to sell him the horse. It is true that he had taken an action that objectively could be taken to have indicated his intention to accept (he asked an auctioneer to remove that particular horse from a forthcoming auction), but because the buyer knew nothing of this at the time, it was not effective to complete the contract.

Courts have taken this principle to be well established, and in ***The Leonidas D***,[51] Robert Goff J commented:

> *"We have all been brought up to believe it to be axiomatic that acceptance of an offer cannot be inferred from silence, save in the most exceptional circumstances."*

In ***Vitol SA*** v. ***Norelf Ltd.***,[52] the silence or failure of Norelf Ltd. to communicate the acceptance of the new offer of anticipatory breach in original contract by Vitol, was the reasoning behind the ruling that no new contract was created.

Perhaps, the policy that may be said to lie behind the principle is that one potential contracting party should not be able to impose a contract on another by requiring the other to take some action in order not to be bound.

"Inertia Selling": Creation of the concept of silence as acceptance?

During the 1960's, a related problem known as "inertia selling" arose, wherein, a person who was the seller in these transactions would send to a person who was thought to be a potential buyer, an article, with a covering letter stating that unless the articles were returned within a certain time limit, the recipient would be assumed to want to keep it, and would be obliged to pay the purchase price.[53] As we have seen, on the basis of ***Felthouse*** v. ***Bindley***,[54] no binding contract could arise in this way. But, of course, many people were perhaps ignorant of their rights under contract law, and were led in this way to pay for items that they did not really want. In order to remedy this phenomenon of inertia selling in England, the Unsolicited Goods and Services Act, 1971 was passed, which allows the recipient of unsolicited goods, in circumstances such as those outlined above, to treat them as an unconditional gift, with all the rights of the sender being extinguished.

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[51] [1985] 1 W.L.R. 925, cited from, *supra* note 8, at p. 23.
[52] [1995] 3 W.L.R. 549, cited from, Steve Hedley, "Acceptance of Anticipatory Breach", 1996 *C.L.J.* 14.
[53] *Supra* note 1, at p. 38.
[54] *Supra* note 49.

The basic rule therefore, as derived from the above legislation and cases, is that acceptance, whether by words or by action, must be communicated to the offeror.

Acceptances by Post (including telegrams):

As stated earlier, the general rule of acceptances is that an acceptance has no effect until it is communicated to the offeror.

If no particular method of communication is prescribed and the parties are not, to all intents and purposes, in each others presence, the rule just laid down – that an acceptance speaks only when it is received by the offeror – may be impracticable or inconvenient.[55] Generally speaking, there will be a delay of at least 12 to 18 hours between the sending of an acceptance by post, and its receipt by the addressee. Does the sender of the acceptance have to wait until it is certain that the letter has arrived before being sure that a contract has been made? The question as to what in these circumstances is an adequate communication of acceptance arose as early as 1818 in the case of ***Adams*** v. ***Lindsell***.[56] The Court decided that to require a posted acceptance to arrive at its destination before it could be effective would be impractical, and inefficient. The acceptor would not be able to take any action on the contract until it had been confirmed that the acceptance had arrived. The Court felt that this might result in each side waiting for confirmation of receipt of the last communication *ad infinitum*. This would not promote business efficacy and therefore, it would be much better if, as soon as the letter was posted, the acceptor could proceed on the basis that a contract had been made, and take action accordingly. This rule is often called the "postal rule" or the "mailbox rule." The same rule is applied to telegrams, where a similar, though shorter delay occurs.[57]

A letter of acceptance may be misdirected or lost or delayed because it bears a wrong, or an incomplete address. Normally, such misdirection will be due to the carelessness of the offeree. Although there is no authority precisely in point, it is submitted that the posting rule should not apply to such cases. Even if the offeror can be said to take the risk of accidents in post, it would be unreasonable to impose on him the further risk of the offeree's carelessness with regard to the sending of the acceptance.[58]

For the purposes of the postal rule, a letter is posted when it is in the control of the Post Office, or one of its employees authorised to receive letters[59]; handing a letter to a postman

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[55] M.P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, 13th Edition, Butterworths, London,
[56] (1818) 106 All E.R. 250.
[57] *Supra* note 8, at p. 25.
[58] *Supra* note 42, at p. 26.
[59] *Ibid*, at p. 23.

outside the course of his duties is not posting, nor will such a letter be assumed to be in the lawful custody of the Post Office as soon as the postman enters the office.[60]

The principle that a letter of acceptance, when posted, concludes the contract, may be supported on the ground that the offeror has expressly authorized the acceptor to send his acceptance by post and consequently the contract comes into existence the moment the acceptor posts his letter. The posting of the letter has in law the same effect as if the acceptor handed the letter personally into the hands of the offeror through the offeror's agent – the post office.[61] This may be justified on the well-known principle that -

> "*whenever one of two innocent parties* (the offeror or the acceptor) *must suffer by the act of a third* (the postal authorities), *he* (offeror) *who has enabled such third persons to occasion the loss must sustain it.*"[62]

Therefore, the post office acts as the offeror's agent in a contractual relationship.

Limitations of the postal rule:

1. The postal rule applies only to acceptances, and not to any other type of communication that may pass between potential contracting partners. Offers, counter-offers, revocation of offers, etc must all be properly communicated even if sent through the post, or by telegram.[63]

2. It only applies where it was reasonable to send the acceptance by post. As Lord Herschell put it in ***Henthorn*** v. ***Fraser***[64]:

   > "*Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.*"

   Clearly, where the offer was made by post, then, in the absence of any indication from the offeror to the contrary, it will be reasonable to reply in the same form, and the postal rule will operate.[65]

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[60] ***Re London & Northern Bank*** [1900] 1 Ch. 220, cited from, *supra* note 42, at p. 23.
[61] *Supra* note 2, at p. 44.i
[62] *Per* ASHURT J, in ***Lickbarrow*** v. ***Mason*** (1787) 102 All E.R. 1192.
[63] *Byrne* v. ***Van Tienhoven*** (1880) 5 CPD 344, cited from, *supra* note 8, at p. 25.
[64] (1891-4) All E.R. Rep 908.
[65] See, ***Protap Chandra Koyal*** v. ***Kali Charan Acharjya*** AIR 1952 Cal 32.

3. The final limitation of the postal rule is that it can always be displaced by the offeror. The offer itself may expressly, or possibly impliedly, require the acceptance to take a particular form. In ***Quenerduaine*** v. ***Cole***[66], for example, it was held that an offer that was made by a telegram impliedly required an equally speedy reply. A reply by post, therefore, would not take effect on posting.

Difference between English and Indian Law:

Section 4 of The Indian Contract Act, 1872 reads:

"4. Communication when complete –

The communication of a proposal is complete when it becomes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete –

> as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor;
> as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete –

> as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;
>
> as against the person to whom it is made, when it comes to his knowledge."

Therefore, one difference that can be inferred from this section when compared with contract law in England is in the position of the acceptor. In England when a letter of acceptance is posted, both the offeror and the acceptor become irrevocably bound as and when the letter of acceptance is posted.[67] In India, however, the acceptor does not become bound as soon as he has posted his acceptance. He becomes bound only when his acceptance "comes to the knowledge of the proposer." The gap of time between the posting and the delivery of the acceptance to the proposer, can be utilised by the acceptor for revoking his acceptance by a speedier communication, which will overtake the earlier acceptance.[68]

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[66] (1883) 32 WR 185, cited from, *supra* note 8, at p. 26.
[67] *Supra* note 1, at pp. 50-51.
[68] Section 5, *Indian Contract Act*, 1872.

Acceptance by electronic communication:

In the modern world, contracts may be made by much more sophisticated means of communication than the post. Telexes, faxes, telephonic calls, and e-mails are widely used as means of transmitting offers, counter-offers, acceptances, and revocations.

The starting point regarding the law in the area of acceptances through electronic communication is the case of ***Entores*** v. ***Miles Far East Corpn.***[69] This case was concerned with communication by telex machine. The primary issue before the court was the question of where the acceptance took effect, if it was sent from a telex machine in one country to a telex machine in another country. The leading judgement in the case was given by Lord Denning, and the court held that in contracts, by means of communications which are instantaneous or virtually instantaneous, there would be no contract unless and until the acceptance was heard by the offeror. On this basis, regarding telex as falling into the instantaneous category, the court held that acceptance by telex took place where it was received, rather than where it was sent. The same answer may be presumed to apply to all other forms of more sophisticated electronic communication, which can be said to be instantaneous in their effect. They will all take effect at the place where they are received.

The principle of the ***Entores*** case has been endorsed by the Indian Supreme Court in ***Bhagwandhas Goverdhandas Kedia*** v. ***Girdhar Lal Parshottamdas & Co.***[70] A majority of the judges preferred to follow the English rule as laid down in the *Entores case* and they saw no reason for extending the postal rule to telephonic communications.

The reason why the postal rule does not apply to acceptances made by instantaneous modes of communication is that the acceptor will often know at once that his attempt to communicate was unsuccessful, so it is up to him to make a proper communication.[71]

Fax messages seem to occupy an intermediate position. The sender will know at once if his message has not been received at all, and where this is the position, the message should not amount to an effective acceptance. But if the message is received in such a form that it is wholly or partly illegible, the sender is unlikely to know this at once, and it is suggested an acceptance sent by fax might well be effective in such circumstances.[72] Therefore, faxes may be treated similarly to telexes insofar as that the acceptance takes effect at the moment the fax communicating the acceptance reaches the offeror.

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[69] Section 5, *Indian Contract Act*, 1872.
[70] *Supra* note 10.
[71] *Supra* note 42, at p. 25.
[72] Sally Woodward, "Contracts and Communication", 1982 *C.L.J* 236.

Electronic - mail: Same principle of communication of acceptance as telexes and faxes?

One view is that the same above principle governing faxes and telexes should apply to other forms of instantaneous communications such as E-mail and electronic data interchange: here again the effects of unsuccessful attempts to communicate should depend on whether the sender of the message knows (or has the means of knowing) at once of any failure in communication.[73] In ***Brinkibon*** v. ***Stahag Stahl und Stahlwarenhandelsgesellschaft mbH,***[74] Lord Wilberforce said:

> *"No universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgement where the risks should lie."*

The Wilberforce approach suggests that there may be variations according to the type of communication system being used. While there does not seem to be any reason for treating faxes differently from telex, but electronic mail, sent to an electronic 'post-box' or 'inbox' which will only be checked once or twice a day, might well be said only to be communicated once the expected time for checking has passed. A similar approach might need to be used in relation to messages left on a telephone answering machine. That is, the message should only be regarded as communicated once a reasonable time has elapsed to allow it to be heard by the offeror. If this line is to be taken, it is clearly to the advantage of the acceptor, in that it allows an acceptance to be treated as effective although the offeror may be unaware of it (as is the case under the postal rule).

VI. Position of American Law:

It is necessary to briefly examine the position that the communication of offer and acceptance hold in the American legal system for a complete understanding of these concepts.

As regards the communication of offers discussed, the American position is similar to the Indian and English principles governing the communication of offer.[75]

However, there exist considerable changes in the American legal system with regard to the communication of acceptances and these will be discussed very briefly.

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[73] *Supra* note 42, at p. 26.
[74] *Supra* note 41.
[75] Robert Braucher, *Offer and Acceptance in the Second Restatement*, 74 *YALE L.J.* 306.

"Black letter" view:

The black letter view is that in the absence of an express specification by the offeror, an acceptance is effective when it is put into the mail (or put into the offeree's possession). This is the equivalent of the postal rule in India and England, however, this counter-intuitive rule is not fully accepted in all states in U.S.A.[76], but has met with more-or-less general approval in the United States.[77]

Early English and American cases establishing the rule that acceptance of a contract was communicated upon mailing, were decided when a letter could not be reclaimed from postal authorities, and the English regulations remain the same. However, United States Postal Regulations provided for the return of letters to the sender as early as 1887, and impose practically no limitations on that privilege today. Therefore, on occasions it has been held that an acceptance was inoperative and not communicated when mailed, where the privilege of withdrawal was actually exercised.[78]

The mailbox or black letter rule has been pressed into service to determine the place where a contract has been made by correspondence, the time when it is made, and related matters.[79]

Difference from English and Indian Law:

The one main area regarding communication of acceptance where American law differs from British and Indian law is that the "mailbox" or "black letter" rule, which in India and England applies only to letters and telegrams, is sometimes applied to telephonic contracts, faxes and other medium of communication in U.S.A. Unlike in England and India, and in conflict with what was laid down in the ***Entores*** case, in U.S.A., the place where the acceptance is spoken or the fax is sent from, generally determines the place of contracting by telephone or fax.[80] In ***Linn*** v. ***Employers Reinsurance Corp.***,[81] the acceptance to an offer made on telephone was held to be effective where spoken.

VII. Conclusions and Recommendations

Therefore, it seems evident that the existing principle for communication of offers in India is in keeping with fairness and equity. The same principle of communication of offer is uniformly used in India, England, and U.S.A.

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[76] Robert W. Hamilton et al, *Cases and Materials on Contracts*, West Publishing Co., St. Paul, 1984, P. 359.
[77] *See* Restatement Second, Section 63.
[78] ***Guardian Nat. Bank*** v. ***State Bank***, 206 Ind. 185 (1933), cited from, 35 Virg. L. Rev. 508 (1949).
[79] E. Allan Farnsworth, *Contracts*, 2nd Edition, Little, Brown and Company, Boston, 1990, P. 184.
[80] *Id.*
[81] 392 Pa. 58 (1958), cited from, 45 *Virg. L. Rev.* 121 (1959).

There exists, the world-over a great deal of uncertainty regarding communication of acceptances. Within U.S.A. itself, several states have different principles governing the communication of acceptances.

In India, there exist several distinct principles governing the communication of acceptances through different mediums.

The cases studied in this paper have helped establish some of the principles governing the communication of offers and the communication of acceptances. There exist substantial differences regarding communication of offer and communication of acceptances between contractual law in India, and contractual law in U.S.A, all of which have been explained in detail earlier.

Finally, with the rapidly increasing means of communication (including telexes, faxes, e-mails, radio-signals, telephones, etc) of contractual negotiations, it is submitted that domestic statutes must necessarily embody some clearly defined principles so as to prevent confusion over what constitutes an offer, what an acceptance, where the contract was created, time of creation of contract, etc.

Effectiveness of Laws in Protecting Coral Reefs

Avanthi Weerasinghe[♣]

Sri Lanka the pearl of the Indian Ocean receives its name for its sheer beauty. This beauty does not stop at its shorelines and it extends underneath the ocean where one finds the fascinating world of coral reefs, which beggars description and is considered as one of the most biologically valuable eco systems in the globe. For centuries corals have been a resource of immense importance to Sri Lankans in providing a habitat for marine life including fish, preventing coastal erosion, and in attracting tourists, which is one of the main revenue generating sources of the Sri Lankan economy.

In spite of these definite advantages the country accrues from corals, it is unfortunate that corals around the island have faced extinction particularly due to man made disasters resulting from anthropocentric development as opposed to eco - centric development. The Hikkaduwa coral gardens which has reached its death's door due to tourism and the Bonevista coral reef which is under threat due to the proposed development activities in the Galle port are but few examples. The main factors which contribute to the large scale degradation of corals are the destruction of corals for slaked lime industry, use of dynamite and other forms of fishing which indiscriminately destroy the surrounding coral reefs and over exploitation of ornamental fishing and destruction of corals for exportation. As the Hikkaduwa coral gardens provide adequate testimony 'Tourism' has become the archenemy of the Hikkaduwa reefs. Glass bottomed boats have become a major threat due to discharge of fuel effluents and dropping of anchors on to the reefs. Further, diving and collection of corals by tourists as souvenirs and the pollution of ocean waters from the release of waste water with toxic substances by tourist hotels and other industries located near the beach due to lack of proper waste disposal systems resulting from unplanned construction works has further exacerbated the problem. Apart from the above mentioned man made disasters, in the year 1998 the ocean current known as 'El Nino' caused an extensively high sea temperature as a result of which the entire coral reefs in Hikkaduwa has fallen on evil days. But as experts point out, the effect of 'El Nino' was aggravated due to the accumulated stress created by the above mentioned causes created by man, which had made corals vulnerable to any change in the environment.

♣ LLB (Hons), Colombo, Research Assistant, Law and Society Trust.

The legal regime and its effectiveness in protecting corals

Sri Lanka does not lack laws to protect coral reefs which range from specific laws such as Fauna and Flora Protection Ordinance[1] and Coast Conservation Act[2] to Marine Pollution and Prevention Act[3] and National Environmental Act[4] which deals with water pollution in general. Although these laws are not without limitations, on the whole the substantive provisions are wide enough to cover most of the actions which cause destruction of corals. But in spite of the existence of these laws, depletion of corals is taking place at an alarming rate, basically due to lack of implementation of the laws. This paper seeks to evaluate the effectiveness of the laws relating to the protection of coral reefs namely the Fauna and Flora Protection Ordinance and the Coast Conservation Act as regards their ability to prevent the causes of destruction of coral reefs as identified in the previous section. In doing so, the effectiveness of each of these laws and their limitations will be dealt with followed by several recommendations to improve their effectiveness.

The Fauna and Flora Protection Ordinance as amended by Act No 49 of 1993

The protection rendered to coral reefs by the Fauna and Flora Protection Ordinance has been extensively strengthened since the amendment in 1993. Provision for the establishment of seven types of National Reserves[5] with varying degrees of protection has given the Minister the power to declare areas which need protection as National Reserves. In the year 1998, Hikkaduwa coral garden was declared as a Nature Reserve.[6] According to the law, no person could enter[7] in to a Nature Reserve and acts which could cause direct threat to wild animals including hunting, killing and possession of protected animals are prohibited.[8] The animals protected under the law includes invertebrates[9] also, which in turn includes coral reefs.[10] Likewise, *prima facie* these provisions are wide enough to cover every type of destruction of coral reefs. And the most salutary provision is the one which imposes a complete prohibition on the entry into the Nature Reserves which is essential to keep certain areas intact from human activities. In the case of Hikkaduwa, this provision is wide enough to prevent glass-

[1] Fauna and Flora Protection Ordinance as amended by acts No .44 of 1964, 1 of 1970 and 49 0f 1993.
[2] Coast Conservation Act No 57 of 1981 as amended by Act No 64 of 1988.
[3] This was enacted in 1982.
[4] National Environmental Act No 47 of 1980.
[5] Section 2
[6] Before 1998 this remained as a Marine Sanctuary as declared by a Gazette regulation in 1978.
[7] Section 3(1).
[8] Section 6.
[9] Section 11 interpretation section.
[10] Schedule IV A.

bottomed boats, divers and tourists from entering in to the Hikkaduwa Nature Reserve. Furthermore, commission of these prohibited acts attract a very severe punishment of imprisonment[11] as opposed to a mere fine. If properly implemented, this could have a very strong deterrent effect against destruction of coral reefs.

Moreover the amendment brought in by Act No. 49 of 1993 seems to have addressed another major threat to corals namely tourism, by prohibiting construction[12] of tourist hotels within the Nature Reserve and within one mile[13] of the Reserve. Also another important provision is the requirement to prepare an Environmental Impact Assessment for any activity proposed to be established within one mile of the boundary of any Reserve which is consonant with the concept of sustainable development.[14] This is a very salutary provision in the context of large-scale pollution caused by tourist hotels through the release of toxic waste in to the sea.

In spite of these effective provisions, it is disappointing that none of these laws are properly implemented with regard to the Nature Reserve in Hikkaduwa which inturn has defeated the purpose of declaring it as a Nature Reserve. Even though according to the law no body could enter in to Hikkaduwa, this has become a dead letter of the law in view of the unlimited number of glass bottomed tourist boats which enter the area, thereby continuing to cause destruction of corals. As Mr. Jagath Gunawardana[15] points out, the advisory committee[16] established under the Fauna and Flora Protection Ordinance has come up with a recommendation to register a limited number of boats and impose a charge on the boats to restrict and regulate entering of boats. Even though at present a charge is imposed, the number of boats is not regulated. Today the boat owners monopolise the area with eighty-two boats, at the expense of a national resource. It is submitted that these proposals were very much in line with the concept of eco tourism[17] which tries to balance both developmental needs and conservation of natural resources. It is also observed that, although strict punishment by way of imprisonment is provided for, in practice it is not implemented[18] and offenders go scot free with a suspended punishment which dilutes the whole purpose of the law. This has led the Magistrates to convict these offenders either under Section 31 B of

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[11] Section 6(4) imprisonment of either description for a term not less than one year and not exceeding five years.
[12] Section 6(1) k.
[13] Section 3 A
[14] Section 9A
[15] As per the interview held with Mr. Jagath Gunawardana, Attorney at Law on the 8th of April 2002.
[16] Fauna and Flora Protection Ordinance has provided for the establishment of an advisory committee in S: 70(1) for the purpose of advising the Director and making recommendations to the Minister
[17] Eco Tourism is defined as "responsible travel to natural and cultural areas that conserves environment and sustains the well being of local people."
[18] Due to inadequacy of prisons.

the Fauna and Flora Protection Ordinance which apply to offences outside National Reserves, or Section 58 which embodies a general punishment, as under both provisions **fines** could be imposed. It is submitted that this is not a healthy trend in view of the inapplicability of Section 31 B to Nature Reserves and the inadequacy of fines in Section 58.[19] The law should be amended in order to rectify this anomaly by providing extremely high fines.

The next most important provision is Section 31 B which deals with offences relating to invertebrates including corals in Schedule IV A, committed outside National Reserves. This deals with all types of intentional destruction of corals, possession, sale and purchase. As Mr. Jagath Gunawardana[20] pointed out Fauna and Flora Protection Ordinance is more effective than the Coast Conservation Act in embodying destruction[21] and possession[22] of corals as separate offences, which makes possession of corals a compound offence attracting a fine of Rs. 40,000 which has a very strong deterrent effect.[23]

But the emphasis placed by these provisions on destruction caused *knowingly* has excluded negligent acts of destruction of corals resulting from anchoring of boats, diving and tourist hotels. This has hindered the effectiveness of the Fauna and Flora Protection Ordinance, especially in the context of large scale destruction caused by these methods. There fore it is imperative that this section be amended in order to encompass all types of negligent destruction also.

Section 40 prohibits export of corals except for promotion of scientific knowledge and this section forms part of the Customs Ordinance. This provision has several weaknesses. In relegating the enforcement of this provision to the Customs Ordinance, illegal exportation of corals would only attract a fine as opposed to both a fine and imprisonment as provided for by the Fauna and Flora Protection Ordinance. This dilutes the deterrent effect particularly in view of the lucrative nature of the export of corals. Therefore penalty for unlawful

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[19] fine not less than Rs 2000 and not exceeding Rs 5000.

[20] *Supra* note. 15

[21] Section 31 B Any person who in any area outside a national reserve.

a) Knowingly kills, wounds, injures, takes or collects any invertebrate included for the time being in Schedule IV A; or
b) takes or destroys the eggs, spawn, larva, or nest of such invertebrates; or
c) uses any boat, lime, snare, net, spear, trap, gun, rod, line or hook with any accessories or bait, or explosives of any description or any other instrument used for the purpose of killing, wounding, injuring, taking or collecting any such invertebrates;

[22] Section 31 B (d) has in his possession, or under his control, any such invertebrate killed or taken or any part of such invertebrate egg, spawn or larva.

[23] Section 31B specifies a fine not less than Rs. 10,000 and not more than Rs. 20,000.

exportation should be determined according to Section 41, which carries both a fine and an imprisonment.

Further issuance of a permit for the promotion of scientific knowledge without any reference to a requirement to provide some proof to that effect could lead to a situation where people establish front organizations, which is a total farce, to get the permit. In order to remedy this, it is essential to insert a provision which requires some proof in order to prove the existence of a scientific research. Also even with regard to the permit holders, a maximum limit should be imposed in order to prevent export of corals for commercial purposes in the guise of research. Although Section 40 specifically refers to corals, the preceding provisions have referred only to invertebrates. This has led to a situation where one could argue that corals have been excluded from the preceding sections due to specific mention of it in only one section. Therefore it is advisable to take away this specific reference in order to remedy this anomaly.

Coast Conservation Act as amended by Act No 64 of 1988

In declaring that control and custody of the coastal zones are vested in the Republic, one could argue that by implication the Coast Conservation Act has embodied the Public Trust Doctrine.[24] The Coast Conservation Act has prohibited mining, collecting, processing and transporting of corals.[25] The most salient feature in this law is the prohibition on operation of kilns for the purpose of burning corals. Section 31(c) gives power to the Director of Coast Conservation to demolish kilns within the coastal zone. In this regard Coast Conservation Act has instituted measures to curb one of the major threats to the corals, namely coral mining and operation of kilns. In fact in 1984, 18000 tons of coral was mined in the coastal zone between Ambalangoda and Dickwella. By 1993 this amount has declined to 4020 tons recording a 48% decrease from 1984 apparently due to the implementation of the above provision. Another salutary provision is Section 25(1), which gives power to the Director to give directions to prevent intrusion of waste or foreign matter in to the coastal zone. Unlike the Fauna and Flora Protection Ordinance this section seems to be broad enough to cover negligent release of toxic waste into the sea. But it is disappointing that in spite of these laws, still the authorities have failed to prevent the release of polluted water to the ocean due to weaknesses in the enforcement of the law. Moreover, Section 16 which requires the

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[24] Section 2.

[25] Section 31 A (1) No person shall within the coastal Zone.

a) engage in the mining, collecting, possessing, processing, storing, burning and transporting in any form what so ever, of coral,
b) own, possess, occupy rent lease, hold or operate kilns for the burning and processing of coral,
c) use or possess any equipment machinery... for the purpose of breaking up of coral,
d) use any vehicle, craft or boat in or connection with, the breaking up or transporting of any coral.

preparation of an Environmental Impact Assessment with regard to development projects within the coastal zone, could be used to prevent the establishment of projects which could have detrimental effects on marine life.

As mentioned earlier, although the Director's power to order demolition of lime kilns is a very salutary one, it is restricted only to such kilns within the coastal zone. This has the effect of leaving the kilns situated outside the zone intact. In order to remedy this situation, either the powers of the Director of Coast Conservation should be extended to cover the kilns situated outside the coastal zone or else the Director of Wild life should be empowered to look into such issues, as the operation of these lime kilns pose a direct and major threat to the reefs.

Apart from Section 25, the Coast Conservation Act deals only with acts done *intentionally*, which should be amended in order to include acts done negligently which pose a threat to the corals. Further the Coastal Zone Management Plan which was prepared under the Act[26] should be given legal effect. This could be done by virtue of the Urban Development Act or National Environmental Act, by declaring and protecting certain areas in the coastal zone due to their value which includes the coral reefs.

Moreover fines provided in the Coast Conservation Act which ranges from Rs. 1500 to a maximum of Rs. 25000 are extremely inadequate. Although a person who is caught with corals could be prosecuted under either the Fauna and Flora Protection Ordinance or the Coast Conservation Act, due to lack of knowledge, police officers tend to prosecute them only under the Coast Conservation Act which attracts only a very simple fine. This dilutes the deterrent character of the law. In order to remedy this effect, it is essential to amend the Coast Conservation Act in order to include higher fines which are at least in line with the fines under the Fauna and Flora Protection Ordinance. It is praiseworthy that in the year 2001, in a proposed amendment to the Act[27] which is still in draft form, it was proposed to make certain offences under the Act non bailable offences if the offencé was of a continuing nature.

A noteworthy distinction between these two laws is that though the Coast Conservation Act applies to both live and dead corals, the Fauna and Flora Protection Ordinance applies only to

[26] Section 11 provides for a survey of Coastal Zone and to make an inventory of all areas and structures with in the coastal zone. S: 12 provides that Coastal Zone Management Plan should be prepared and this has been put forward in year 1990 though this has not been given any legal effect yet.
[27] Section 31 J

live corals. In fact, in Kalkuda there had been a small Island which consisted of dead coral deposits which has disappeared at present, as a result of mining of dead coral reefs by people. Due to the war that existed in the North and East only the Wild Life department was present in that area. However their hands were tied due to lack of authority. This area comes within the purview of the Coast Conservation Department due to whose absence these unlawful actions could not be prevented. Again, this incident highlights the weakness in the enforcement of the law.

Though some are of the view that existence of several laws result in fragmentation of the law thereby hindering its effective functioning, it is believed that the existence of both the Fauna and Flora Protection Ordinance and Coast Conservation Act is a healthy feature, as what is not covered by one law can always be covered under the other. Ideally, it is best to have one authority under one law, which has power to deal with all the acts relating to corals. But this does not appear to be a very practical solution given the limited amount of funds allocated to conservation authorities by the Government. Further, in order to provide greater protection to corals, it is advisable to declare other coral reef areas as Nature Reserves in order to protect them from potential threats through tourism in the future.[28]

As was elucidated in the preceding sections, just as much as the substantive provisions in the laws, the effective implementation of these laws is also important, in the absence of which protection of coral reefs would be a mere wild goose chase. Provision of more resources to conservation oriented agencies together with a system which gives enforcement officers commissions according to the number of prosecutions they have carried out successfully would help to ensure effective functioning of the law. Further, in order to strengthen the effective functioning of the law, it is advisable to include a provision in both statutes dealt with above, allowing public spirited individuals to initiate actions in the Magistrate Courts praying for conditional orders against private parties who destroy natural resources which are protected by these laws. This could be done by virtue of Article 28[29] of the Constitution, which would provide the general public with an effective tool, as opposed to the existing writ action which is seemingly ineffective.[30]

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[28] At present only Hikkaduwa has been declared as a Nature Reserve and the Bar reef being declared as a Marine Sanctuary.

[29] Article 28 "it is the duty of every person in Sri Lanka to protect nature and conserve it's riches."

[30] At present only writ of Mandamus is available, to compel the Government Authorities to discharge their legitimate functions and it is only through this mechanism that the public can prevent private parties from polluting the environment.

As was observed by J. Douglas[31] this would be the first step in granting legal standing to natural entities which have become silent victims of mankind's actions and a very effective step in conserving the corals, which is undoubtedly a heritage of both the present and future generations, yet unborn.

[31] J. Douglas made an impassioned plea for granting legal standing to natural entities such as rivers and mountains in his dissenting judgement in *Sierra Club* v. *Morton* 405 US 727 1972.

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Law & Society Trust
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