Chapter 37

Employment in Ceylon: Contract or Status?

"THE common law of master and servant," Lord Devlin has said, "has fallen into disuse."[1] This statement is largely, though not literally, true of Ceylon, and this chapter is devoted to an examination of the extent to which the common law of master and servant has been modified, the reasons therefor and the extent to which employment in Ceylon is governed today by contract and status.

The law governing the relations between employer and employee in Ceylon is derived from the common law of master and servant, the industrial common law as enunciated by labour courts, collective agreements and the many statutes covering the field of employment. The common law of master and servant has come a long way from the time when an employer was regarded as having a proprietary right in his servant[2] and criminal sanctions attached to breaches of contract by employees. Nevertheless, even the modern common law regards the contract of employment as conclusive in determining the rights of parties and it implies rights and duties only in the absence of contractual terms. To describe the individual contract of employment, as the common law does, as a voluntary agreement entered into between parties of equal bargaining status, is unreal because "the terms of agreement are, and to an even greater extent were, largely imposed by the more powerful individual of the two, the employer."[3] The common law theory of employment looks at employment as a mere contractual relation between master and servant terminable at the will of either party, subject to the condition of notice in certain cases. We have seen the corrective influence of collective bargaining on the erroneous assumption of the common law that the contract of employment must be presumed to contain equitable terms.[4] Today, the contract of employment occupies a far more unimportant place in industrial relations than it did. This is due primarily to State intervention

1 *The United Engineering Workers' Union* v. *Devanayagam* (1967) 69 NLR 289 at 303.

2 This concept made a stranger wrongfully injuring a servant liable not only to the servant but also to the master.

3 K.W. Wedderburn *The Worker And The Law* (Penguin, Harmondsworth' 1965) at p.32.

4 See *ante* Part Two Ch.8.

through statutes and labour courts and to collective bargaining agreements. The reasons for this change are a combination of complex factors and account for the creation of special courts in countries such as Ceylon with a wider jurisdiction than the common law courts.[5]

Roscoe Pound's analysis of legal history[6] led him to conclude that, functionally speaking, law has evolved through four stages. Originally law was a method of maintaining peace, later a method used by the ruling classes to preserve their privileges and thereby to maintain the existing economic and social status quo, and in its third stage a means by which a maximum of individual self-assertion could be achieved. The common law as we know it today developed during this third stage in an environment of free enterprise. Today, on the other hand, we are moving "away from contract and towards a new concept of status."[7] This contrast between the common law and the modern tendency is succintly stated by W.F. Frank in the following terms:[8]

> "In a way this movement (towards status) has been unavoidable since contracts, especially collective ones, tend to grow into institutions. While, then, the Common Lawyers are still living in a world of free enterprise, our legislators have tended to harden the arteries of society by creating a new system of status. While Common Law may still be paying lip-service to the ideal of free choice of employment for the individual, Parliament has chosen to create the status of a trade unionist for whom jobs may be reserved by a 'closed shop' policy. Common law may still recognise the right of a master to dismiss his servant subject to notice being given .... Parliament has transformed ... the contract of employment into a form of status ...."

In the final stage of Pound's interpretation of legal history, we find the idea that law is an instrument for achieving social justice through 'social engineering.' This coin-

5 The term 'courts' is used loosely to refer not only to bodies set up to determine legal and equitable rights, and economic or interest disputes, but also to conciliation bodies.

6 R. Pound "Liberty of Contract" in 18 *Yale L. J.* 458, R. Pound "Twentieth Century Ideas As To The End Of Law" in *Harvard Legal Essays*, R. Pound "The End Of Law As Developed In Juristic Thought" 27 *Harv. L. Rev.* 605, 30 *Harv. L. Rev.* 201.

7 W. F. Frank "Full Employment And Industrial Law" in (1948-9) vol. 3 *The Industrial Law Review* 110 at 118.

8 *Ibid.*

cides with the emergence of the modern welfare state whose increasing functions explain Leon Duguit's[9] theory of 'social solidarity.' It was inevitable that a system of law founded on free enterprise would be unable to meet the social problems of the day without the aid of legislative intervention. It is the aloofness of the common law and lawyers to fundamental social and economic problems–indeed their claim that they are irrelevant in deciding issues–that has created the need for special courts to deal with issues which, fundamentally, are not legal but social and economic. It is this aloofness and indifference which accounts for the generally unsympathetic attitude of the law towards labour until recent times. The problems of labour cannot be understood in purely legal terms but only by a keen appreciation of the socio-economic issues and problems involved. As W. F. Frank observes:[10]

> "Once the lawyer becomes interested in the social effects of law he must abandon the old attitude which was characterised by Lord Finlay's famous dictum that it is not 'for any tribunal to adjudicate between conflicting theories of political economy' ..... Nobody would expect a judge to act as arbitrator in matters which are outside his own technical competence, but this does not mean to say that the judge should consider law in an economic vacuum. He must, of necessity, adopt some attitude to economic realities and it is unfortunate that so many learned judges have adopted an attitude which is out of touch with modern thought. When, for instance, Lord Haldane chose in 1921 to take his interpretation of the difference between fixed and circulating capital from Adam Smith one is tempted to imagine what lawyers would say of an economist who in the twentieth century

9 *Law In The Modern State.*

10 "The New Industrial Law" in (1949-50) vol. 4 *The Industrial Law Review* 15 at 24-5. Lord Scrutton 1923 *Cambridge Law Journal* 8 drew attention to this problem when he said: "The habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with labour. Labour says 'Where are your impartial Judges ?' They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice ? It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class."

were to derive his information about some current legal problem from Blackstone's Commentaries. We might, therefore, expect judges and other members of the legal profession to be responsive to current developments in economic theory and practice .... The present tendency ... to take legal issues out of the hands of the established courts and to submit them to newly created administrative tribunals is very largely the result of the unwillingness of the courts to deal with economic problems in the way which they deserve."

Issues which are increasingly facing the courts today are group issues and not merely individual ones, e.g., not the rights of an individual workman and his employer but the rights of trade unions and employers. The individualistic tradition of the common law–useful though it is to protect individual liberties against monopolistic control–is ill-suited to determine group problems behind which invariably lie the most complex socioeconomic issues. The present law of tort, for instance, adequately reflects the inability of the common law to accommodate new ideas and concepts of industrial relations; it is intended to determine the party who must bear loss caused accidentally or wilfully, and "imposes liability, and hence by necessary implication applies a value judgement of a sort concerning the justifiability of the loss inflicted by industrial action, without any consideration of the many and varied factors which may have led to the breakdown of industrial relations."[11] The common law has been unable to accommodate such concepts as a justified or unjustified strike since such concepts are largely based on extra-legal factors. The effect of a strike notice–a problem we have already discussed–is a case in point. It is unrealistic in the extreme to contend, as the common law appears to do, that a proper strike notice terminates the contract of employment; nothing is further from the minds of those who give the notice.

There are, however, some great common law judges who have been conscious of these problems. For instance Lord Devlin in *Rookes* v. *Barnard*,[12] having concluded that the defendants in the case were not protected by the Trade

11 A.D. Hughes "Liability For Loss Caused By Industrial Action" in (1970) 86 *LQR* 181 at 201.

12 (1964) AC 1129 at 1218 (HL). *Cf.* also Lord Devlin in *The United Engineering Workers' Union* v. *Devanayagam* (1967) 69 NLR 289 at 303-4.

Disputes Act, referred to the consideration that "the strike weapon is now so generally sanctioned that it cannot really be regarded as an unlawful weapon of intimidation; and so there must be something wrong with a conclusion that treats it as such." He nevertheless thought it undesirable to "cripple" the common law so as to make it incapable of giving relief in circumstances where relief ought to be given and added:

> "It may therefore as a matter of policy be right that a breach of contract should not be treated as an illegal means within the limited field of industrial disputes."[13]

Justice Holmes was one of the earliest of the few judges who appreciated in full the interests of labour and he perceived the futility of trying to stem the tide of labour. His many great dissenting judgements[14] are now justly famous. Holmes saw very early that free competition in the economic system meant the freedom to combine to have a competitive chance and that

> "A man is hardly free in his abstaining (from making a contract) unless he can state the terms or conditions upon which he intends to abstain."[15]

Holmes was also one of the earliest to realise that it is only by belonging to a union can a worker secure a fair contract of employment and that this should be given effect to by the law "in order to establish the equality of position between the parties in which liberty of contract begins ...."[16] If the function of the law is to protect certain interests and to satisfy as many wants as possible with the minimum of friction, the common law has been unable

> "to cope with the consequences of unequal bargaining power of contracting parties[17] ..... (and) everywhere you can see how in our society judicial law making has failed to give effect to the notion of social justice which is one of the attributes of our society. And if you see what law does in fact—even a glance at the law reports de-

13 *Rookes* v. *Barnard, op.cit.* at 1219.
14 *Vegelahn* v. *Gunter* (1896) 167 Mass. 92, *Plant* v. *Woods* (1900) 176 Mass. 492 and *Coppage* v. *Kansas* (1915) US 1.
15 (1894) 8 *HarvLRev* 8.
16 *Coppage* v. *Kansas, op.cit.*
17 For Ceylon see *Walker Sons & Co. Ltd.* v. *Fry* (1966) 68 NLR 73 at 77-8, 99 where the Supreme Court sought to whittle away the effect of the plain and unambiguous words in s.31B (4) of the Industrial Disputes Act, and it was left to the Privy Council in *The United Engineering Workers' Union* v. *Devanayagam, op.cit.* at 311 to give effect to its terms.

monstrates it—is it not obvious that statutes have become a more important instrument of (if I may repeat the use of Pound's phrase) 'social engineering'?"[18]

For these reasons it became necessary to set up a new system of courts with a view to creating a new body of industrial law, designed to balance conflicting group interests and–to adopt the language of Roscoe Pound–to satisfy as many wants as possible with the minimum of friction. These courts have been entrusted with what sociological jurists would call "social engineering" and the task of determining those interests which most urgently need protection. There is some truth in the criticism that this tendency may lead, and has led, "to justice without law, that is to the decision of cases without reference to any definite legal rules, making the approach to the Courts an even more uncertain affair than it is now."[19] But they have, by and large, helped to establish a man's right to his job,[20] to a fair wage, to decent conditions of work, and these rights have come to be sanctified in the same way that the common law sanctified contract and property rights. As we have seen,[21] labour courts in Ceylon have curtailed the employer's freedom to terminate the employment relationship in terms of the contract. In these ways the law has, to a limited extent, recognized compulsory labour–compulsory, that is, in favour of the employee as there is no corresponding general rule which can be utilised to compel an employee to continue in his job.

The common law, however, is yet not totally irrelevant. It still almost completely governs the question whether a relationship of master and servant exists between two persons. Here, too, certain modifications have been introduced by statutes by imposing on persons who are not strictly employers in the common law sense the duties of an employer for certain limited purposes.[22] Further, though labour courts are entitled to give relief contrary to the terms of a

18 O. Kahn-Freund "Reflections On Legal Education" (1966) vol. 29 *MLR* 121 at 135. In any event the courts are not a suitable instrument through which the law can be adapted to social and economic change.

19 W.F. Frank "The New Industrial Law", *op.cit.* at 33.

20 This right means a 'claim' in the Hohfeldian sense, arising once a contract of employment has been created. Such a 'claim' was never recognized by the common law according to which an employer may terminate a contract for any reason subject to the requirement of notice.

21 See *ante* Parts Four and Five.

22 See Wages Boards Ordinance (1941) Cap. 136 LEC (1956) as amended s.45 & s.59A, Industrial Disputes Act (1950) Cap.131 LEC (1956) as amended s.43B.

contract and to create new contracts for the parties, the terms of existing contracts would be a factor which weighs with a court in its determinations. The common law duties owed by an employee to an employer, though modified by the industrial law, are not wholly irrelevant and are sometimes reflected in the industrial law in the sphere of termination of employment. Industrial law has thus supplemented and modified the common law.

The modifications of the common law have been in two important respects. The common law gave effect to the contract unless it was illegal or contrary to public policy. With industrialization numerous problems connected with safety and health in factories, hours of work, holidays and remuneration arose, and in the context of the modern welfare state it was no longer possible to leave such matters solely to the free will of the employer and individual employees. Hence the necessity for legislative activity in this sphere of employment, regulating such matters as minimum terms and conditions of employment including wages,[23] safety and health in factories,[24] maternity benefits,[25] superannuation[26] and the employment of women and children.[27] These legislative provisions govern the content of the contract of employment by writing into it terms and conditions which the parties cannot contract out of.[28] While the modern common law generally affords only a civil remedy in the form of damages for the breach of common law duties, criminal liability attaches to the breach of these statutory obligations. Further, with the emergence of trade unions from the position of illegal combinations to legally recognised bodies enjoying special privileges and immunities under the law, collective bargaining has become an important method of negotiating terms and conditions of employment and, in Ceylon, the terms of a collective agreement become implied terms in the contract of employment between the employers and workmen bound by the agreement.[29] It must also be noted that terms and conditions in the contract of employment are modified

23 Wages Boards Ordinance, *op.cit.*, Shop & Office (Regulation of Employment & Remuneration) Act (1954) Cap. 129 LEC (1956) as amended.
24 Factories Ordinance (1942) Cap. 128 LEC (1956) as amended.
25 Maternity Benefits Ordinance (1939) Cap. 140 LEC (1956) as amended.
26 The Employees' Provident Fund Act No. 15 (1958) as amended.
27 Employment of Women, Young Persons and Children Act No. 47 (1956).
28 *Cf.* Wages Boards Ordinance, *op.cit.* s.62.
29 Industrial Disputes Act, *op.cit.* s.8 (1).

and added to by arbitrators and industrial courts under the Industrial Disputes Act. Parties, therefore, are no longer free, as under the common law, to contract on whateyer terms they wish.

Secondly, the common law has been subject to far reaching modifications in the area of termination of employment. Under the common law either party to a contract of employment could terminate it in accordance with the contract. Where the termination was in breach of contract the aggrieved party was entitled to damages but not to reinstatement as the common law courts did not decree specific performance of a contract of service either directly by ordering reinstatement or indirectly by granting an injunction against the employer. As stated by Lord Goddard[30] reinstatement is

> "a remedy which no court of law or equity has ever considered it had power to grant. If an employer breaks his contract of service with his employees ... the workmen's remedy is for damages only. A court of equity has never granted an injunction compelling an employer to continue a workman in his employment or to oblige a workman to work for an employer."

Common law courts have also refused to grant the remedy of a declaration, which is a remedy merely declaring the rights of the parties without any order of the court requiring their fulfilment. Nor were concepts of justice, wrongfulness and unfairness in terminating a contract part of the common law. The only question was whether the termination was legal in the sense that it was in terms of the contract. The common law in this respect has been altered by the creation of industrial courts, arbitrators and labour tribunals with special powers to award reinstatement to an employee unfairly dismissed even though the termination was in accordance with the contract. The common law recognized the right to terminate an employment in terms of the contract for no reason at all but industrial law requires the employer to justify a termination on grounds apart from contractual rights. Employees have therefore been vested with greater rights than those enjoyed by them under common law or statute law. In Britain

30 *R.* v. *National Arbitration Tribunal, ex parte Horatio Crowther & Co Ltd.* (1948) 1 KB 424 at 431.

> "...it is still true to say that industrial relations are a matter for voluntary action, and not for the operation of the compulsory jurisdiction of courts or tribunals. To some extent such compulsory action was introduced in periods of emergency such as wartime. But it has been found unsuitable. Hence the role of the law in the settlement of industrial disputes is minimal."[31]

In Ceylon it is voluntary action which may properly be described as minimal and the settlement of industrial disputes by extra judicial tribunals with compulsory jurisdiction frequent.

Nowhere does the law in Ceylon stipulate in express terms the grounds on which an employee's service may be terminated. These grounds have, by and large, to be spelt out of the decisions of labour courts. The law relating to termination of employment in Ceylon may be said to consist of the following:

(1) The decisions of labour tribunals, arbitrators and industrial courts;

(2) the common law, which is the Roman-Dutch law, according to which employment may be terminated in terms of the contract or on grounds recognised by the common law. This aspect of the law relating to termination has to a large extent been superceded by (1);

(3) the Service Contracts Ordinance[32] in terms of which the services of a workman may be terminated with one month's notice, or summarily in cases of misconduct;

(4) the Estate Labour (Indian) Ordinance[33] which requires an employer, in certain circumstances and in respect of persons governed by it, to terminate the services of a workman consequent on the termination of the services of the spouse;

(5) certain statutes which prohibit the termination of the services of a workman in certain circumstances. Thus under the Industrial Disputes Act it is an offence for an employer to dismiss a workman for the reason that such workman intends to give or has given evidence in any proceeding under the Act.[34] It is an offence for an employer to termi-

31 G.H.L. Fridman *The Modern Law Of Employment* (Stevens, London, 1963) at pp.10-11. This has increasingly ceased to be true even of England, see *ante* Part One Ch.4, and especially after the Industrial Relations Act (1971).

32 (1865) Cap. 72 LEC (1956) as amended.

33 (1889) Cap. 133 LEC (1956) as amended s.23.

34 S.40 (1) (j).

nate, without good cause, the services of a workman for the reason that such workman has become entitled to the benefit of any collective agreement, or any settlement or award of an industrial court or arbitrator or an order of a labour tribunal under the Act.[35] It is also an offence for an employer, after an industrial dispute has been referred for settlement to an industrial court, arbitrator or labour tribunal but before an award in respect of such dispute has been made, to terminate the services of any workman concerned in such dispute for any act or omission connected with, arising from, or constituting or included in such dispute.[36] Under the Wages Boards Ordinance[37] it is an offence for an employer to dismiss a workman from his employment by reason only of the fact that such workman is or becomes a member of a wages board, or has given information to any authority with regard to matters under the Ordinance, or has, after giving reasonable notice to his employer of his intention, absented himself from work through being engaged in duties as a member of a wages board, or is entitled to any benefit under any decision of a wages board. Similarly, the Shop and Office Employees (Regulation of Employment and Remuneration) Act[38] renders it an offence for an employer to terminate the services of an employee employed by him in or about the business of any shop or office for the reason that such person has given information to any authority with regard to matters under the Act, or is entitled to any benefit by or under the Act.

It will be seen that the law relating to termination of services of an employee consists of mandatory, permissive and prohibitory provisions.

The common law and the law of contract, it is submitted, are not totally out of place in a system of industrial law as it obtains in Ceylon. In India, where the Industrial Disputes Act has established courts not unlike ours, it has long been recognized that these courts are unfettered by considerations based on contractual rights as between employer and employee and are not bound by the common law of master and

35 S.40 (1) (k).
36 S.40 (1) (p).
37 S.49.
38 S.57.

servant.[39] In *Radha Raman Bajpai* v. *L.A.T.*[40] the court pointed out that the Industrial Disputes Act in India contains only a part of the law governing master and servant, and that the Contract Act must govern these relations insofar as that Act has not been modified by the Industrial Disputes Act, the object of which was not to provide for a different law of contract to govern employer-employee relations, but to establish machinery better suited to settle industrial disputes. The court observed:

> "An ordinary court of law will not reinstate the dismissed employee but adjudication ... (is) not governed by the same strict law of master and servant. Once it is found that dismissal of an employee is wrongful, the relief that a tribunal can grant may differ from the relief that can be granted by a court of law, but it does not follow that the law that a court of law would apply, when deciding whether the dismissal of an employee is wrongful or not, need not be applied by a tribunal when deciding the question."[41]

In *J. K. Cotton Manufacturers Ltd.* v. *U. P. Government*[42] the company employed a clerk on a contract of temporary service for a definite period after the expiry of which his services were terminated. The matter was referred for adjudication and the clerk was awarded reinstatement. The High Court held that it was not open to the tribunal to go behind the agreement between the parties, quoted with approval the observation of the Supreme Court of India in *Rohtas Industries Ltd.* v. *Brijnandan Pandey*[43]

> "But an industrial tribunal cannot ignore altogether an existing agreement and their existing obligations without any rhyme or reason whatsoever"

and observed:

> "... it may be that in certain circumstances, for good and substantial reasons a certain agreement may be modified by industrial tribunals, which probably ordinarily they

39 See *Varma* v. *Mettur Industries Ltd.* 1961 (1) LLJ 456 at 461-2 (Mad.), *Assam Oil Co.* v. *Its Workmen* 1960 (1) LLJ 587 (SC), *Rambhau Jairam Dhamange* v. *Vinkur Cooperative Society Ltd.* 1966 (1) LLJ 90 at 99-100 (Bomb.), *Ahmedabad Sarangpur Mills Co. Ltd.* v. *Industrial Court* 1965 (1) LLJ 155 at 167 (Guj.), *Bombay Labour Union* v. *International Franchises (Private) Ltd.* 1966 (1) LLJ 417 at 419 (SC).

40 1957 (2) LLJ 15 (All.).

41 *Ibid.* at 19.

42 AIR 1960 Allahabad 734.

43 1956 (2) LLJ 444 (SC).

would not be entitled to do; but if there are no reasons given, a solemn agreement entered into between the parties will stand."

Further, while an industrial dispute can arise in spite of the existence of a binding contract between the employer and workman and a court is not precluded from granting relief which is inconsistent with the contract, it does not follow that "if the employees themselves rely on a contract for their claim ... the Tribunal has the power to modify or discard the terms of contract which would govern the claim."[44]

All these developments–the intervention of the State by the prescription of minimum terms and conditions of service, the establishment of special courts unfettered by the common law and considerations based on contractual rights–illustrate one of the most significant features in the modern law of employment, namely, that the relationship of employer and employee is governed by status rather than by contract. The contract was the legal instrument which enabled men and goods to move freely in a developing industrial society.[45] It permitted, for example, an individual to change his employment. From the employer's point of view this meant the right to hire and fire and the right to hire an employee on any terms agreed upon between the parties. In the field of comparative jurisprudence Sir Henry Maine put forward the idea that progressive societies are characterised by the increasing legal freedom of the individual and this development he summed up in his famous aphorism:

"... the movement of the progressive societies has hitherto been a movement from Status to Contract."[46]

The principle which this celebrated generalization expressed was the emergence of the self-determining, separate individual from the network of family and group ties–the movement from group to the individual. His generalization referred, as pointed out by Maine himself, to those personal conditions described by him but which were not the result of agreement. It was intended to convey the idea that the individual's rights, duties, capacities and incapacities were no longer fixed by law as a result of his belonging to a

44 *Management of Consolidated Coffee Estate Ltd.* v. *The Workmen* 1970 (2) LLJ 576 at 581 (SC).

45 W. Friedmann *Law In A Changing Society* (Penguin, Harmondsworth, 1964, abridged ed.) at p.89.

46 Sir Henry Maine *Ancient Law.*

particular class, but arise in consequence of contract. Maine thought of status "as the sum total of the powers and disabilities, the rights and obligations, which society confers or imposes upon individuals irrespective of their own volition."[47] To this extent, the 'status' of an employee referred to here is different because the occasion for granting such status is contract–unlike the ancient family and group ties, slavery, guardianship and other personal conditions referred to by Maine. The Roman family, the slave, caste, the medieval guild and serfdom are examples of what Maine called status. The slave was born into his status and could not contract himself out of it, but this gradually gave way to more freedom of movement and will. The slave was given a limited right of contract and finally he was emancipated, while the medieval serf could become free by escaping into the town and slavery and serfdom are finally abolished. They are replaced by a free contractual relation between employer and employee.

Bearing in mind, then, that Maine's status was used in a different sense, status in the present context is used to refer to "a legal relation based on agreement but regulated by law, in the sense that its existence and its termination depended on the volition of the parties, but its substance was determined by legal norms withdrawn from the parties' contractual freedom."[48] In other words, status is here used not in the sense of the sum total of the rights and obligations of individuals as an incident of birth as understood by Maine, but as a compulsory personal condition as opposed to a conventional one–that is, the rights and obligations imposed on an individual by law and not by freely negotiated contracts.[49]

47 O. Kahn-Freund "A Note On Status And Contract In British Labour Law" in (1967) vol.30 *MLR* 635 at 636.

48 O. Kahn-Freund, *ibid.* at 640. In Roman law the term 'status' was used in a technical sense to refer to the entire position of an individual regarded as a legal person, and its function was to divide the legal system into the law of persons, things and actions. It was the normal citizen who had a 'status' under Roman law. In English common law 'status' referred not to the normal but to the abnormal person, or to those who in Roman law had suffered *capitis diminutio*. See R.H. Graveson *Status In The Common Law* at pp.4-5. A married woman's status vis-a-vis society has been a movement towards increasing individual freedom.

49 *Cf.* R.H. Graveson, *op.cit.* at p.48: "A characteristic feature of status is its legally imposed condition which cannot be got rid of at the mere will of the parties without the interposition of some organ of the State, administrative, legislative or judicial." He says (at p.59), on the authority of *Salvessen* v. *Administrator of Austrian Property* (1927) AC 641 (HL) that (a) status is a condition imposed by law and not by the act of parties, though it may be predicated in certain cases on some private act

But in modern times the movement is the very reverse of the one described by Maine. The tendency now is to return to status. In industry the individual is no longer able to negotiate his own terms, particularly where the 'closed shop' principle operates. It is an era of standardised contracts and of collective bargaining where the individual's freedom is little. The growth of trade unions has replaced individual bargaining with collective bargaining which imposes restrictions on both employers and employees. The growing tendency of State intervention is designed to remedy the worst results of freedom of contract. Just as much as freedom of property has come to be restricted in the social interest, so also the freedom of contract has come to be restricted since industrial conditions make abstract freedom of contract defeat rather than promote full individual life. Today the law constantly interferes in economic matters to protect the interests of the weaker elements of society. The relationship between employer and employee is today more than a mere contractual one because in terms of modern ideas of social justice the continuance of the relationship is in the interests of society as a whole. The relationship approaches more the position of a status in Ceylon in the sense that courts are entitled to restore the relationship even against the will of the employer. We can no longer view a contract of service with the same icy impartiality with which we may view an ordinary commercial contract. As R.H. Graveson[50] says:

> "The aim of law throughout the greater part of the nineteenth century was to secure individual rights of property and to give effect to the freest expression of the will in contractual undertakings. The law stood by as umpire or referee, to state the rules of the game of civilized life, to see that the game was played according to those

such as the contract of marriage. It is more than a mere contractual relation between the parties. (b) Whether the status will be imposed in consequence of private contract depends on the public interest in the relation created by the contract. (c) If status is so conferred, its effect is to impose on the party acquiring it rights and obligations towards the community at large.

50 *Op.cit.* at p.45. It is interesting to compare the status of employment with that of marriage. In both cases, while contract is the occasion for the granting of the status, in neither case is the status created by contract since status is "in every case the creature of substantive law"-*per* Scott L.J. *Re Luck* (1940) 3 AllER 307 at 327. As stated by Brett L.J. in *Niboyet* v. *Niboyet* (1878) 4 PD (CA) 1 at 11 "that relation between the parties, and that status of each of them with regard to the community, which are

> rules and, when disputes arose, to intervene neither on one side nor the other. This century has seen the early growth of a different conception of law; a conception in which law is gradually, and in England slowly, changing its purpose from the upholding of an abstract autonomy of the will and a concrete securing of gains and acquisitions to an active social and public concern in the protection from exploitation of the economically weaker members of society, the regulation of terms and conditions of contracts of employment, the imposition on the community as a whole of the responsibility of caring for its less fortunate members, stricken by old age, ill health or unemployment, the securing of reasonable remuneration to producers in farming and agriculture, and ... the introduction of compensation by employers to workmen for accidents arising out of and in the course of their employment."

While it is true that social legislation imposing minimum standards do not give contractual rights but impose extra-contractual obligations enforceable by criminal and civil sanctions, these obligations have narrowed the area of contractual freedom.

The power given to labour tribunals to override a contract of employment is nothing new or startling. It is merely a recognition of the simple fact that there is inequality of bargaining power between an employer and an individual employee. An analogous rule is to be found in the law of contract allowing courts to declare void contracts in restraint of trade which are unreasonable–unreasonableness being measured by the interests of the contracting parties as well as the interests of the public. The courts do not encourage restrictions on an employee's labour and skill which is his only capital. These rules are a recognition of the lack of freedom and the actual inequality caused by enormous differences in economic bargaining power and of the fact that "equality is equity." Thus Lord Devlin,[51] referring

constituted upon marriage are not imposed by contract or agreement but by law." In the case of marriage the relationship cannot be dissolved without State intervention. In the case of employment, while an employee may do so of his own accord, an employer who does so on his contractual rights *simpliciter*, runs the risk in Ceylon of being required by a labour tribunal to renew the relationship.

51 *The United Engineering Workers' Union* v. *Devanayagam* (1967) 69 NLR 289 at 311.

to s.31B(4) of the Industrial Disputes Act empowering a tribunal to grant relief contrary to the terms of a contract of service said:

> "it is not contrary to modern ideas of justice. The idea that freely negotiated contracts should be conclusively presumed to contain just and equitable provisions began to die with the end of the 19th century. Long before then equity had refused to give effect to provisions in a contract which it considered to be harsh and unconscionable. From the beginning of the 20th century legislatures all over the Commonwealth have been writing terms into contracts and taking them out, whatever the parties may think about them. No doubt it is taking the process a step further to leave it to the discretion of the court to say for itself what terms of the contract it will enforce, but there is nothing in this that is contrary to principle. Indeed in this sub-section the statute is doing no more than accepting and recognizing the well-known fact that the relations between an employer and his workman are no longer completely governed by the contract of service."

In Ceylon examples of social legislation which have curbed the freedom of contract in regard to terms and conditions of employment are many. The Wages Boards Ordinance[52] and the Shop and Office (Regulation of Employment and Remuneration) Act[53] render invalid contracts which are contrary to their provisions. Minimum wage legislation is another example. Such legislation is of two types. The first type makes it obligatory for contracting parties to negotiate wages in conformity with recognized standards, commonly referred to as "fair wages" standards. Contracting parties are thus required to adopt minimum terms determined by reference to standards outside their control. This type of legislation is not found in Ceylon. The second type imposes statutory minimum standards in particular trades and industries. Wages Boards set up under the Wages Boards Ordinance for the purpose of fixing wages and other terms and conditions of employment in resepct of specified trades and industries in Ceylon is an example of this second type.

52 *Op.cit.* s.56.
53 *Op.cit.* s.70 (3).

An international comparison in regard to ownership of jobs indicates that in Ceylon job protection is far more thorough than elsewhere.[54] Implicit in the notion of the right to one's job is the protection against involuntary termination of employment. The "purely contractual concept of the relationship of employer to employee avoids the issue of undisturbed possession, since it embodies no concept of job at all."[55] Therefore, termination by the employer must be for good cause, either on the ground of redundancy or for misconduct constituting a fundamental breach of contract.

In the U.S.A. protection against unjust dismissal is found in collective agreements providing for certain procedures prior and subsequent to dismissal. The position in the U.S.A. is stated by Frederic Meyers[56] in the following terms:

> "... in the world of collectively bargained relationships, the employer's control over possession of a job, leaving aside the right to decide on the continued existence of the job at all, is usually restricted to that which he may exercise at the point of initial access. Except in the strict closed-shop industries, the employer selects from among job applicants and, perhaps, retains the right within a contractually-determined probation period to reverse this initial decision to hire. But, once established in a job, so long as the job exists the worker cannot be dismissed except for proven personal cause .... It can realistically be said, then, that the typical worker covered by a collective agreement in the United States has a kind of life tenure in his job so long as it continues to exist. He cannot be dismissed, provided always that he wishes to exercise his rights, unless and until he can be shown to be incompetent or to have abandoned his equity by im-

54 See Frederic Meyers *Ownership Of Jobs: A Comparative Study* for an excellent analysis of the position in the U.S.A., England, France and Mexico. See also J.B. Cronin & R.P. Grime *Labour Law* (Butterworths, London, 1970) ch.5 especially at pp.132-51.

55 Frederic Meyers, *op.cit.* at p.2.

56 *Ibid.* at p.6. "... one function of collective bargaining in the United States has been to wrest from the employer a large measure of control over incumbency in jobs, and at least some measure of decision over how many jobs there shall be. Short of economic or technological change which may modify the relation, an employer who is party to a collective agreement takes on an employee for life or at the pleasure of the employee. He no longer retains the right to terminate the relationship, which has become, basically, one of employee to job rather than employee to employer. That relationship is at least analogous to ownership.": *ibid.* at pp.14-15.

proper conduct. The job is his, for his life and its life, irrespective of the will of the employer. In this respect, in unionised industry, the traditional notion of the employment relationship as an individual contractual one, voluntarily entered into by each party and voluntarily terminable by either, has been completely abandoned."

In Ceylon the protection against involuntary dismissal through labour tribunals is wider, and this forum is available to all dismissed employees, whether unionised or not.

In Britain, until the Industrial Relations Act (1971) which created courts to which employees unfairly dismissed can have recourse, the position was in contrast to that in the U.S.A. and Ceylon and there was no effective protection against unfair dismissals either in the form of labour courts or collective agreement procedures, the only protection being the right of workers to strike.[57] The reasons for this inadequate protection were two-fold:

(1) The legal status of collective agreements in Britain is substantially different to that in the United States and Ceylon. They are not legally enforceable.[58] In any event such agreements do not usually seek to protect employees against unjust dismissals.

(2) In Britain the common law of master and servant still governs the relations between employers and employees and there were no labour courts similar to those in Ceylon with the power to award reinstatement. In short, there was no separate body of enforceable industrial law governing the question of termination of employment. Even where the justifiability of a termination was submitted to arbitration in cases where such a procedure was provided for, the obligation to accept the arbitrator's decision was only moral.

In France, too, the protection of workers against unjust dismissals is different to that in Ceylon. This is due to the absence of reinstatement as a sanction against unjustified dismissal, damages in lieu being considered the appropriate remedy. Even to be entitled to damages the employer should have been guilty of abuse of his right to terminate, the burden of proof of such abuse being on the employee. In Ceylon the burden is on the employer to justify a dismissal, whether on disciplinary grounds or on the ground of redundancy. Placing the burden of proof on the employer

57 See *ante* Part Two Ch.7.
58 But see the Industrial Relations Act (1971).

assumes the employee's innocence until he is found guilty of conduct justifying dismissal. More important, it is a recognition of the fact that the job belongs to the employee. In France, except in a few cases,[59] the burden is on the employee to prove abuse of rights by the employer to be entitled to damages. But the fact that exceptions to this general rule as to the burden of proof have been developed indicates a gradual shift away from the notion of employment as a mere contractual relation terminable at the will of either party in accordance with the contract.

There are exceptional cases in Britain where statutes have intervened to confer a status on certain classes of employees. In *Vine* v. *National Dock Labour Board*[60] Lord Keith said:

> "Normally and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful, but could only sound in damages."

In this case the plaintiff was a registered dock worker under a scheme established by a statute in terms of which a registered dock worker was paid by the Dock Labour Board if there was no work, but if there was work he was allocated to a registered employer as his employee for that day. If a worker failed to fulfil his obligations he was liable to suspension, dismissal or stoppage of pay. The plaintiff refused to report for work and was dismissed after an inquiry by a disciplinary committee of the local board. In an action against the National Dock Labour Board for damages and a declaration on the ground that the dismissal was wrongful because the statute did not empower the Board to delegate its functions to a committee, the House of Lords granted both reliefs, with the result that the board was compelled to accept the plaintiff. Viscount Kilmuir said:

> "This is an entirely different situation from the ordinary master and servant case.... Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which by statute that status conferred on him."

59 Those who are ill or pregnant, strikers and representatives of workers, see Frederic Meyers, *op.cit.* at p.58.
60 (1957) AC 488 at 507.

Such situations are exceptional, and status in the sense of job ownership or a man's right to work has yet to be recognised in English law, and the only form of status recognized up to now is the regulation of the content of contractual relations by State-prescribed norms.

In Ceylon status in both these senses has been conferred on employees–status in the form of norms beyond the control of parties regulating contractual relations and status in the job. The former is represented by the numerous social legislative measures, the latter by the establishment of special courts with the power to award reinstatement, without which power there cannot be effective protection of job security.

> "If and when a right to continued employment is established, that right becomes fully effective only if the worker is entitled to be restored to his position when improperly removed from it. Only when the employer cannot buy back control over incumbency in the job by the payment of damages has the worker gained complete and effective possession."[61]

61 Frederic Meyers, *op.cit.* at p.103. "Once established, the right to reinstatement represents the ultimate loss of employer control and the final symbol of worker ownership of a post of employment.;" *ibid.* at p.113.