Reciprocity of legal regimes: *Status of Common Law and Statutory Law in the Relationship of Employer - Employee*

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Abstract— *The relationship of Employer-Employee, distinguished from the relationship of Employer and Independent Contractor is identified based on a written contract of employment. Yet the doubt arrives where there is no written document to recognize any such relationship, what the format shall be. Judiciary over the years have developed common law yard sticks in order to fill this gap. However it is an exaggeration if it is said that these common law tests are of universal application because still there are professions which do not fall into any of the yard sticks yet they are employees in the organization. Furthermore statutory recognition of Employer-Employee relationship is not face of this discussion. In one hand examples can be given where statutes have taken the same standpoint of common law rulings and on the other hand statutory definitions have extended such rulings. Thereby no one can say that common law rulings of Employer-Employee relationship recognition have faded away. This study focuses to evaluate the position of aforementioned common law tests and contact of employment in the process of determination of Employer-Employee relationship. Methodology will be exploratory where documented sources are utilized to carry out the study.*

Keywords— ***Contract of Employment, Common Law Tests, Statutory Recognition of Employer-Employee***

I. INTRODUCTION

Instigation of employer-employee law (In this study employee-employer law is interchangeably used to mean the Labour Law, Industrial Law and law of employment) was positioned way back in the era of laissez-faire (Laissez Fare is a Policy dictating a minimum of governmental interference in the economic affairs of individuals and society. It was promoted by the physiocrats and strongly supported by Adam Smith and John Stuart Mill. Widely accepted in the 19th century, laissez-faire assumed that the individual who pursues his own desires contributes most successfully to society as a whole). It was founded upon the sole agreement between employer and employee, what was agreed by the employer and employee in terms of the employment governed their relationship. In accordance with the rules of common law contract between employer and employee was treated as a relationship that results in a voluntary agreement between parties of equal bargaining status. This stand was changed as a result of unionization [of employees] that triggered collective demands towards the various conditions of employment which ultimately imposed directions to the contract of employment. Thus it is no longer a sole agreement between employer and individual employee. Subsequently; the replacement of "Laissez Faire State" with modern "Welfare State" further attenuated common law rulings on contract of employment. Statutory intervention and judicial intervention are the dooms of common law which curtailed its sanctity. Statutory intervention and judicial intervention was to attain social justice [derived from the idea of welfare State] Herein after in this report it is objected to make conversant image about the importance of contractual relationship and yardsticks to determine such relationship taking examples from Sri Lanka and United Kingdom.

II. RELEVANCE

It is exaggerate to demonstrate that application of common law in the governance of contract of employment is completely removed. The relevance and significance of the common law in the modern law of employment is still apparent in many areas. For instance the common law continues to govern the question whether the relationship of employer and employee exists between two persons (De Silva, 2004)

Contract of employment can be defined as an enforceable agreement between two parties where one party agrees to let out his services to the other for a consideration. It is the grass-root of the relationship between employer and employee which is the whole concern of labour law. Thus it is the determinant factor of question whether the

relationship of employer and employee exists between two persons. Importance of having a contractual relationship is not only advantageous to the employee but the employer also.

It is considered and treated differently; the employee and independent contractor in labour law. The distinction between an independent contractor and an employer has important legal consequences because an independent contractor is usually not covered by many labour laws that exist and has no recourse to the labour courts as per the law (Employers' Federation of Ceylon, 2012). The distinction still remains important for purposes of vicarious liability (De Silva, 2012). Establishing a contractual relationship will demarcate the line between 'employer-employee relationship' that of an independent contractor.

Contract of employment prescribes the role to be performed by an employee (Employee must perform work by himself). It distinguishes from an independent contractor where he agrees to produce a given result. Employee is under the supervision of and direction of his employer which is stated in the contract of employment [The distinction lies not only regarding independent contractor but also other relationships such as agency and partners] There is a common misconception that the two parties cannot attach a label to a contract in such a way that the law would deem the contract to be what the parties have described it irrespective of other considerations (De Silva, 2012). The fact of the matter is that the parties cannot change the nature of a contract by the mere use of words, though the description of the contract by the parties may be a relevant factor but by no means conclusive (De Silva, 2012). In order to ensure the rightful entitlements of the employee in the course of employment, deviation recognized in a contractual relationship has a greater value. For instance entitlement under Employees Provident Fund Act No. 15 of 1958 (Sri Lanka) applies only to an employer and a workman who have a contract of service. But this doesn't mean that common law definition of master and servant is the conclusive platform in the application of statutory privileges.

Judicial view must also be looked into at this point. In the case of *Ready Mixed Concrete (South East) Ltd. vs. Minister of Pensions and National Insurance* (1968) 2 QB 497 at 512-13 it was stated that whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something else. Same position was taken in *Ferguson vs. John Dawson and Partners (Contractors) Ltd* (1976) 3 All E.R. 817. In the case of *Young and Woods Ltd. vs. West* (1980) I.R.L.R. 201 (C.A.) the court saw its duty as one of seeing whether the label attached by the parties to their contract correctly represents the true legal relationship which indicates the judicial intervention on the contractual freedom of the parties.

On the other hand employer obtains certain benefits in consequence of contractual relationship. Directions and orders can be prescribed in the contract of employment. It can be regarded as a guideline regarding behavior of employees. Duties of the employer can be determined from the contract of employment.

Thus contractual relationship holds vital importance on both sides; employers' and employees'.

III OF COMMON LAW CONCEPTS

Although the contract of employment is one of the considerations in the determination of existence of an employer-employee relationship or otherwise, common law also plays a key role. Especially in the absence of a written contract of service common law will be applied subject to few modifications of the judiciary. Further common law continues to govern the area of labour law in the establishment of employer-employee relationship as a mechanism of filling gaps [when contract of employment does not recognize the true relationship]. The yard-sticks of common law have been developed by judiciary over the years in order to suit the new realities. In that sense it is not only the "pure common law".

Extent to which the employer controls the employee is one of main considerations in determining the relationship of employer-employee. It is regarded as the 'Control Test'. It mainly focuses on employer's right not only to prescribe the end result of employee's work but also the right to determine the way of achieving it. In the case of *Regina vs. Walker* (1858) 27 L.J.M.C. 207 it was stated that "… A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done".

Since independent contractor is employed to do certain work according to his own discretion [the way of doing is decided by him] he doesn't satisfy the elements of the control test. Further it is the 'right to control' not the

'actual control". This distinction is crucial as in modern industry actual control is often within the powers of the supervisor; who is also an employee.

But the application of control test to employees who use professional skills or technical knowledge in performing work is impractical. In *Cassidy vs. Ministry of Health* (1951) 1 All E.R. 574 visiting or consulting surgeons of a hospital are not employed under a contract of service and therefore, not servants of the hospital and the hospital authorities cannot direct them as to 'what to do or how to do'. No according to this view, are nurses the servants of the hospital when they are under the direction of a consulting surgeon in the hospital theatre. However recent cases show that persons possessed of a high degree of professional skill and expertise may nevertheless be employed as servants under contracts of service (De Silva, 2012).

Thus control is not determinative in such a case. Aforesaid loophole didn't turn the control test into disuse since it is still of value in that the greater the degree of control exercisable by the employer the more likely it is that the contract is one of service (De Siva, 2012)

In a complex context of world of work a simple test like control test would not be facilitative to determine employer-employee relationship. Thus requirement of a comprehensive test came-up which covers ample of employment that can be counted in the employer-employee relationship. 'Four-fold test' was suggested as appropriate in this context. Control, ownership of tools, chance of profit and risk of loss were the elements to be satisfied in the determination. It must be asked the question whether the party is carrying on the business for himself or for a superior. This yard stick was introduced by *Montreal vs. Montreal Locomotive Works Ltd.* (1947) iD.L.R. 161

The inadequacies of the control test [plus its extension of four-fold test] have led judges to look into other tests (De Silva, 2012). Lord Denning's notion of 'Integration test' in *Stevenson Jordon and Harrison Ltd. vs. Macdonald and Evans* (1952) I.T.L.R. 101 is one such step forward. Accordingly it was affirmed that a person employed under a contract of service performs his service as integral part of the business whereas independent contractor's work is not integrated into the business only auxiliary to it. The problem with the integration test is that the courts have not spelt out clearly what is meant by ''integration''; which caused ambiguities. While it applies quite well to professionals over whom the employer does not have direct control, it does not fit so well with others, such as outworkers or sub-contractors, who may be highly ''integral'' to the employer's business without necessarily being employees.

'Economic Reality Test' or the 'enterprise test' made advancement to tests determining the employer-employee relationship. It asks the question whether workers are in the business on their account. If the answer is "No" such employment is treated as contract of service and if the answer is "Yes" it will be considered as a relationship of employer-independent contractor. The test was outlined in the English case of *Market Investigations Ltd vs. Minister of Social Security* (1969) 2 QB 173. But it was criticized of lacking the universal applicability. This test could not be treated as being of universal application where the issue for determination involves the broader question as to what is the nature of a particular work relationship between two parties. This is because in certain cases a work relationship is not capable of being defined in terms of a simple choice as to whether it is governed by a contract of service or a contract for services.

Combination of control test and economic reality test planted the seeds of 'Multiple test' where it is sought the right to control and the economic dependency. It is known as the two tiered test of determining the relationship of employer and employee. It will be tested;

- Employer's power to control the employee; and
- Underlying economic realities of the activity.

As per the multiple-test if the employer has the power and right to control the employee and the employee performs on the account of employer such relationship is governed by contract of service.

IV OF STATUTORY EXTENTION

Statutory extensions to the common law definition of employee enable them [employees recognized as per statutory extension] to enjoy the rights that are confined to contract of service. Few Sri Lankan statutes will be taken into consideration in this analysis.

Wages Boards Ordinance 27 of 1947 defines a worker as any person employed to perform any work in any trade as per Section 64. Thus it appears that common law requirement of having a contract of service is considered under the enactment. But some provisions like Section 38 (1) and Section 45 of the Ordinance provide otherwise where certain persons who may not be workmen are

brought within the scope deeming them to be workmen. It can be regarded that statutory law always does not follow pathway equivalent to common law concepts.

The Shop and Office Employees (Regulation of Employment and Remuneration) Act No 19 of 1954 is perhaps an even better illustration of an example of the legislative abandonment of the common law concept of employer and employee for the purpose of achieving certain specific objectives of social policy (De Silva, 2012). Act defines an "employer" by Section 68 (1) which has no reference to the common law concepts either implicitly or explicitly. It has included persons who do not have a contract of service with the employee, persons having the charge of the general management and control of the shop [E.g. A managing director, general manager or manager] Although the Act does not define an "employee" it can be traced from Section 68 (2) which articulates the common law sense of person having a contract of service with the employee. Since the scope of an employer is extended further [although it has not extended the definition of employee] despite the common law, still it is valid to say that Shop and Office Employees Act corroborates more than common law employer-employee relationship.

Apart from afore-used statutes in the illustration there are more legislative extensions to the common law recognition of employer-employee relationship. Employees Provident Fund Act No. 15 of 1958, Employment of Women, Young Persons and Children Act 47 of 1956, Payment of Gratuity Act No. 12 of 1983, Workmen's Compensation Act No. 15 of 1990 and Industrial Disputes Act No. 43 of 1950 are some other instances that encompass non-equivalent usage of common law rules of employer-employee relationship.

V APPRECIATED ROLE OF JUDICIARY

It is worthwhile of noting that rights and duties in the employment relationship are dependent upon existence of contract of service. In the process of claiming rights of parties establishment of such relationship is facilitated by the yard-sticks of common law. In accordance with the analysis of the report it is arguable that not any of the tests/yard-sticks deserve universal application in the determination of contract of employment. Judicial role in this context is pertinent; which is an activist role that contemplated errorless application and modernization of common law rules as per the contemporary needs of the industrial world.

The most commonly known determinant is the control test which expects an employer to direct the out-come of the work done by employee *inter alia* the right to decide the way of doing it. On the other hand employer lacks such control over independent contractor's work. It is the accepted position in *Regina vs. Walker*. Further development was the linkage of control test with vicarious liability of master for the acts of his servant in *Mersey Docks and Harbor Board vs. Coggins.* Conversely it was held that it would have been inequitable to hold a master liable in respect of acts of a workman over which he had no control. It elucidates one advantageous aspect in the role played by the judiciary where the control test was used equitably. Further application of control test in an equitable manner can be seen in *Denham vs. Midland Employers Mutual Assurance Ltd.* (1955) 2 All E.R. 561

The control test worked adequately in the simple relationships of domestic and menial service that existed at the time it was formulated in an age which was free of rapid and sophisticated technological developments (De Silva, 2012). There could be situations in which a servant would be in breach of his contract of employment if he were to submit to his employer's control where expertise technical knowledge and skills required in some employments; such as aero plane pilot, engine driver, scientist or doctor.

In order to facilitate such inadequacies the judiciary compelled to formulate new criteria or modify the existing one, keeping abreast of modern developments. One such modification to the control test was hosted in the case of *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* which is regarded as open-ended approach. According to MacKenna J:

> ''...A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. The servant must be obliged to provide his own work and skill. Freedom to do a job by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be…"

Elements of control test and all the other elements of the employment relationship will be considered as per this modification. Similar approach can be seen in the recent judgment of *Express and Echo Publications Limited vs. Ernest Tanton* Ca 11 Mar 1999 where it was distinguished between the independent contractor and employee. This case has been cited later on in *Montgomery vs. Johnson Underwood Ltd* [2001] ICR 819 and *Autoclenz Ltd vs. Belcher and Other*s [2011] UKSC 41.

A fresh approach to the tests of contract of employment that corresponds with modern needs was introduced by Lord Denning in *Stevenson Jordon and Harrison Ltd. vs. Macdonald and Evans*. It is known as 'integration test' which seek the extent to which an individual is employed as an integral part of the business. Through integration it appears that scope of employment relationship was stretched and many persons came-up within its bounds.

Economic reality test is another development that can be regarded as pro-active result of judiciary which made an advantageous stak Combination of two tests to facilitate the recognition of employer-employee relationship was a worthwhile modification the court. Multi-factor test was applied in cases like *Religious of the Virgin Mary vs. NLRC* G.R. No. 103606, October 13, 1999 and *Sevilla v. Court of Appeals* G.R. Nos. L-41182-3, April 15, 1988. Assimilation of common law in accordance with modern requirements is a positive factor of the role played by the judiciary.

The judiciary kept trying to balance the interests of both parties in employment relationship by selecting the most suitable test in the process of determination. Sometimes the deficiencies inherited by the tests cannot be surpassed due to oldness of common law principles.

On the other hand it must be pointed that no test was universally applicable in the vast majority of relationships in the modern industrial sector. It challenges the adequacy of common law rules on master-servant since most relationships exist between the servants as an individual and masters not as an individual but a corporate legal entity that exercises control through its agents. Thus developments in the modern industry have increased the magnitude of having variety of employer-employee relationships. Such relationships cannot be covered only by way of old-aged set of principles. It might create inadequacies as well as injustice. Hence some of inadequacies are facilitated by statutory intervention.

VI CONCLUSION

State intervention through enactment of legislations and establishment of judicial bodies, was largely influential towards the recognition of employer-employee relationship. But it is suspicious that Lord Devlin's statement in *United Engineering Workers' Union vs. Devanayagam* (1967) 69 NLR 289 at 303 that common law of master and servant has fallen into disuse is attainable since it is evident that the contract of employment and common law are still relevant and significant in many respects. One such instance is recognition of employer-employee relationship.

Although certain modifications have been set forth; common law completely governs the question whether a relationship of employer and employee exists. Such relationship is foundational in order to elucidate the rights, duties and liabilities arising out in labour relations since not every relationship incur similar rights, duties or liabilities in industrial relations. Hence it is worthwhile to note a comment of the legal scholar S.R. De Silva (2012) at this point:

"…*The contract of employment and the common law are still relevant in many respects, the difference really being in the sanctity attached to it*".

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BIOGRAPHY

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