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Jurisprudence of statutory rape

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Abstract
The law relating to statutory rape in Sri Lanka is governed by the Penal Code No. 02 of 1883 by an amendment brought to it under Act No 22 of 1995. According to the amended section 363 (e) of the code, whosoever has a sexual intercourse with a girl who is under the age of 16 whether such sexual intercourse is carried out with or without the consent of such a girl shall be guilty of rape. In this instance, the law considers that the matter of consent is immaterial viz regarding the attribution of liability upon the culprit. While this being said, the Courts in Sri Lanka has taken the view that despite the fact that statutory rape carries with it a minimum mandatory sentence of 10 years imprisonment, that regard must be had to the circumstances of the case and that whatever punishment to be given shall not be excessive so as to breach the fundamental rights guaranteed to individuals under the Constitution. In light of the above circumstances, this paper discusses the jurisprudential basis for the recognition and punishment for the offence of statutory law under the laws of Sri Lanka.

Keywords: criminal law, statutory rape, judicial activism

Introduction

Law is not, therefor, an actor in itself but only the instrument of human actors whose interest it represents. Thus the full consideration of the effects of particular laws cannot be separated from an analysis of the forces which shaped those laws [1].

In the realm of jurisprudence, many theories have come forth to give an understanding about the role of law, or the role of law in a society. But no theory has captured the wide imagination of many as with the case of sociological jurisprudence. One of the most celebrated members in this school of thought Roscoe Pound describes 'sociological jurisprudence is in another line of development. It proceeds from historical and philosophical jurisprudence to utilization of the social sciences, and particularly of sociology, toward a broader and more effective science of law [2]'.

Though the legal realism of the American kind broadened the scope of jurisprudence by connecting what lawyers and judges actually do with the society that they are asked to serve through the processes of the law. Even so, the American realists were preoccupied with official law – the law of the courts and of the legislatures as interpreted by the courts [3]. On the other hand Sociological jurisprudence, with the help of sociology of law, expanded the boundaries of jurisprudence much further – so much so that the field is difficult to demarcate. There are innumerable connections between law and society: every branch of human learning, from physics, chemistry and medicine to philosophy, religion and psychology, produces knowledge about law and society. Sociology borrows from all these fields, and sociological jurisprudence borrows from sociology [4]. Sociology seeks to understand the workings of society in a scientific way. Sociological jurisprudence may be said to be the scientific method of studying the law.

However there is a divergence of views regarding the use of scientific methods with regards to sociology. The positivist sociology is based on empiricism and scientific method they believe that the only true knowledge is knowledge gathered from observed facts. They believe in gathering and analyzing of facts will lead them to the desired objective. This group believes that sociology is in similar to any other science like, physics or chemistry. But on the other hand the inter pretive sociology rejects the claim made by the positivist sociology that the social world is capable of being studied in such a scientific manner. They argue that since human behavior changes in an uncertain way it becomes impossible to predict there patterns of life. They believe that any study carried out regarding the society will necessarily be limited by this fact.

In any event sociological jurisprudence does draw most of its inspiration from sociology and tries to combine the sociological facts to better understand the functioning of a legal system in a given country.

Social Dimension of the Laws Relating to Statutory Rape in Sri Lanka

With the above understanding of sociological jurisprudence, in this survey the laws relating to statutory rape is evaluated from a sociological and a philosophical point of view. Most of the data used are not primary once and a small amount of data gathered via a field research, which is of primary source is also analyzed. Though this may not be called one of the most highly talked about issues of the recent years yet it warrants a study none-the-less as this issue has serious repercussions upon the society. The main reason for this is the parties affected by such laws represent a broad category and there competing of interest are somewhat difficult to reconcile. The law has to be evaluated from a sociological dimension in order to better understand their respective claims and to find solutions to the existing problems. To attempt to explain the law on a purely logical basis is equivalent to interpreting a graph of the vibrations in a speeding motor-car without taking into account the surface of the road [5].

Laws Relating to Statutory Rape

Statutory Rape Laws (SRLs) are traceable to the British Statute of Westminster, which was promulgated in 1275 during the reign of Edward I. This statute made it a crime to ravish with or without consent a maiden of under-twelve the age at which a girl could legally consent to marriage [6]. Power is a prerequisite of responsibility, and the primary justification for statutory rape laws is that women in our society do not have enough power to resist coercive male initiative in sex The current Sri Lankan Law regarding Statutory Rape is to be found in the Penal Code [7] under section 363 (e). The changes in marriage law simultaneously introduced changes in the Penal Code, this came with the amendment made to the penal code in 1995 [8] which raised the age of sexual consent / freedom from 12 to 16 years keeping it on a par with age of freedom to make decisions on education which was 16 years. This change in the Penal Code has implications for the law on rape. The offence of "statutory rape" in criminal law referring to sexual intercourse with or without consent, with a minor child below the age of 16 has become the law of statutory rape afterwards [9]. The original provision in the Penal Code, (s.364 A) on the offence of "carnal intercourse with girls" was repealed, and the Penal Code was also amended to create a new offence of statutory rape of a girl under 16 years, irrespective of any proof that she consented to sex (s.363 as amended 1995). Incest up to that time was not criminalized in the Penal Code. The amendment of 1995 replaced the s.364 (A) offence of carnal intercourse with girls with a new broader offence of incest [10]. The age was not raised to 18 years in recognition of the fact that adolescent sexuality and teenage pregnancy was a reality in Sri Lanka, and raising the age of sexual consent to 18 years would make law enforcement impossible, encouraging violations and impunity [11]. The Code stipulates that "A man is said to commit rape, whose enactment has sexual intercourse with, a woman under circumstances falling under any of the following descriptions: [under section 363 (e)] with or without her consent when she is under sixteen years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man". This constitutes statutory rape.

The crime if committed enforces a somewhat of a strict liability, in the sense even if the female partner has given the full consent for the sexual activity, but if she is under the age of 16 and not the lawful wife of the offender, her consent is invalidated by the law. Even if the offender bona fide believed the female to be above the age of 16 it may not avail him of the liability. This means that even if a girl/woman is mature enough to understand the nature and consequences of her behavior, desires to have sexual intercourse with a particular man, initiates the act, and knowingly consents to same, she is disabled by law from doing so if she is below the statutorily prescribed age [12]. It is interesting to note that under the Sri Lankan law, protection given for the under aged persons, meaning persons below the age of 16 with regard to rape only covers the females and not the males, as the wording of section 363 begins with 'a man is said to commit rape'. But it must be noted that if a male who is below 16 years of age is sexually exploited, that would not be covered under the provisions of the penal code regarding statutory rape. The Sri Lankan law relating to statutory rape can be said to be sex-specific than sex-generic in so much as it gives protection to females only.

Competing interest of the Affected Parties

Interests are claims that persons make of the legal system. Some of these claims are already recognized by law, but there are others that are not so recognized. Law's task is to recognize and adjust competing interests with a minimum of friction and waste. The above claim made by Roscoe Pound applies with great force with regard to the balancing of the competing interest of the affected parties with regards to the laws relating to statutory rape. Pound recognizes three types of interests, they include, individual, public and social interests.

The resulting conflicts must be resolved by the legislature and, in the absence of legislation, by the courts. In doing so the people who are responsible for the resolving the disputes must not act like robots, they must consider not only the black letter law, but also the other such conditions which the law is to be applied. As Pound puts this neatly with reference to the law in books and law in action, he further emphasizes this with the following statement published in an article titled "The need of a sociological jurisprudence" [13]. Pound states that "Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood. The most logical and skillfully reasoned rules may defeat the end of law in their practical administration because not adapted to the environment in which they are to be enforced" [14].

The main conflicting of interest with regard to statutory rape involves the victim, in a Sri Lankan context it would be the female who is below 16 years of age. Here her autonomous right of deciding what is best for her, or her freedom of choice is precluded in a way. Even if she is perfectly capable of understanding all the effects of having a sexual intercourse with a man, and she consents to it with her free will, her consent is not recognized by the law as a valid one. In the particular reading of the Articles 19 and 34 of the CRC (Convention on the Rights of the Child) the state parties are obliged to make laws to protect children against the sexual exploitation of them. If this is the case then one can perfectly argue that this purpose is served by the laws regarding Statutory Rape as the offender is not given a chance to exploit any weakness in the victim due to her tender age. But the issue comes with the generalization of the age. As the age is set at a standard it may fail to capture the individual interest to the fullest. Individual interests are claims or demands or desire involved immediately in the individual life, and asserted in title of that life [15]. Unfortunately, SRLs do not forbid and punish intercourse with the immature; they prohibit and punish intercourse with the underage. The question for the liberal is whether age is sufficiently correlated with maturity to serve as the basis for a SRL [16].

In achieving a fair balance between the competing of interest, Pound puts forward a theory called "jural postulate" which means 'the method by which interest may be tested and evaluated so that the conflicts between the various interests may be resolved' [17]. He suggests that the balancing process is a form of social engineering in which the role of the law is to "provide as much as society can". He identified legal and judicial activity as a form of social engineering. Pound did not use the term 'social engineering'

in the modern sense of deliberate attempts to restructure society or rearrange social relations. Rather, it was used to compare the legal task to that of a problem-solving design engineer who tries to make the machine run more efficiently and smoothly [18].

However with regard to the enacted provisions of the law relating to statutory rape, the victims conduct is not taken into consideration. This means that even if she knowingly and willfully committed the act, her conduct is not taken into consideration. Imagine a situation where, the girl, though below the age of 16 had acted promiscuously towards the offender and had entice the offender into sexual intercourse, but this does nothing to avail the offender of his liability. But if you consider the laws of other parts of the universe, in some countries a promiscuous defense is given to an offender. This is the case in Texas, where if the victim or the under-aged girl has acted promiscuously the offender's liability is reduced [19].

When the legislature enacts a law, according to pound, there are four main things to consider. First all the parties/stakeholders who are going to be affected by the law must be recognized. Then the retrospective and prospective effects of the new law must also be evaluated. After which all the interests or the competing claims that are going to be put forward must be presumed and evaluated and finally the normative standards must be set, meaning there should be ways and means to evaluate the effectiveness of the enacted law. For this necessary institutions and mechanisms must be set forth.

When the penal code was amended in 1995, to lift the age from 12 to 16 in order to be legally capable to give consent regarding sexual intercourse, it goes without saying that the interests of the females were duly given recognition. At that time the registration of child marriages were at a high and it has been shown that since the introduction of the new law relating to the minimum age of marriage being lifted to 18, under-aged marriages have decreased rapidly, from 6000 in 1994 to less than a 1000 in 2003 [20]. With the change in the minimum age of marriage raised to 18, this amendment regarding statutory rape was also seen inevitable. But surprisingly however compared with the decrease in child marriages the number of statutory rape incidents have increased. According to the data provided by the correctional institutions and safe houses, the incidence of statutory rape is increasing.

As most cases that are reported to the correctional institutes are from less developed districts, war-affected areas, and minority communities of the country, there are grounds for believing that incidence of statutory rape is rising such poor districts and communities and in poverty pockets (Poor care for children, broken and disorganized families, remarried mothers, single parent families, families without parents have reported high incidence of statutory rape in these districts [21]. From December 2010 to December 2011 134 incidents of sexual abuse of children were reported in the English newspapers and of these the majority, 117 cases involved children below the age of 16 years; that is, these were incidents of statutory rape. 16 cases were reported in the Sinhala media and 14 of these were incidents of statutory rape. However, the word statutory rape was not used in relation to reporting on any of these incidents. Instead, the word that is used is 'underage' therefore not distinguishing clearly between statutory rape and rape [22].

In most of these cases, it has also been observed that, the sexual intercourse was done without any kind of intimidation or fear created in the female partner and most of it was done with her consent, which the law obviously does not recognize. But the issue lies with the punishment that the perpetrator has to suffer at the hands of law for his alleged crime.

The most controversial issue regarding statutory rape is the punishment that it enforces on the offender, who most of the time is held strictly liable for his conduct. According to section 364 of the penal code, if a person is convicted of raping a person (female) below 18 years of age, the minimum punishment that is imposed is 10 years of rigorous imprisonment, and the maximum being 20 years. So any person convicted of statutory rape, meaning a person who had a sexual intercourse with a female below the age of 16 even with the consent of the victim which the law does not recognize is to be imprisoned for a minimum of ten years for the offence committed. The time of imprisonment is in equal footing with the punishment imposed on an individual, who is convicted of a culpable homicide not amounting to murder, this is hardly said to be proportionate to the ratio of crime and punishment, with there being little ability of maneuver or discretion given to a court regarding the mandatory nature of the minimum sentence of 10 years.

However in the proviso of section 364 it provides that 'where the offence Is committed in respect of a person under sixteen, years of age, the court may, where the offender is a person under eighteen years of age and the intercourse has been with the consent of the person, impose a sentence of Imprisonment for a term less than tea years'. Here is the only instance that the conduct of the victim is taken in to account, other than that the plain reading of the enactment would suggest that, if a person is convicted of statutory rape, and if he is above 18 years of age, he is to be imprisoned for a minimum of 10 years.

In 2009 the law commission of Sri Lanka, prepared a report on the suitability of the mandatory nature of the punishment imposed on the convicts of statutory rape. It asked whether 'where a young boy engages in sexual intercourse with a girl below 16 years of age and is convicted of rape, the court has no discretion to impose a sentence which is less than the minimum mandatory sentence even if there are circumstances that may justify the imposition of a lesser sentence. The imposition of a minimum mandatory sentence on the young offender, in such circumstances, may not meet the ends of justice' [23]. The commission investigated this matter by consulting many stakeholders who are affected by this issue.

The general consensus of these groups was that the imposition of a minimum mandatory sentence was acceptable in all cases other than in the case of young persons who have engaged in sexual intercourse, and who have subsequently demonstrated their intention to sustain their relationship [24]. They suggested that 'in such cases the vesting of discretion in court to impose a sentence which is lower than the minimum mandatory sentence of ten l0 years is advisable provided that such discretion is used within statutorily recognized guidelines'.

With the above findings the law commission has made recommendations with regard to the amending of section 364 of the penal code that deals with sentencing offenders convicted of statutory rape. First of all they suggest that the proviso of section 364, which gives the judge a discretion as to sentencing an offender who is below 18 years of age, who

has had a sexual intercourse with a girl below 16 years of age with her consent, should be dispensed with, as the having recourse to the consent of the victim is in contrary terms with the objectives of the enactment, which clearly stipulates in other situations that such consent is not recognized under the law. Instead the law commission suggests that amendments should be made to the existing provisions regarding the age of the offender.

They suggest the minimum mandatory sentencing of 10 years should be relaxed or the judge be given a discretion as to sentencing, in circumstances where,

1. The offender is below l8 years of age and the evidence establishes that there are circumstances which justify the imposition of a lesser sentence,
2. The offender is over 18 years of age but below 21 years of age and the evidence establishes that there are exceptional and compelling circumstances which justify the imposition of a lesser sentence.

However these recommendations have not been carried out and the law still remains in still. And if one is to give a judgment on the existing black letter law, it could be hard to have said to have done any justice. So in the existing legal frame with regard to statutory rape, if one looks at the individual interest and what is at stake, it would be safe to say the tip of the scale has been placed in favor of the females. But the law itself cannot be impartial (in one sense) for its very raison d'être is to prefer one social interest to another [25]. However when doing so one must always follow Pound's advice in doing it in a manner that is by satisfying many interests as possible with the least sacrifice [26]. In the above mention situation with regards to the Statutory Rape convictions, the punishment imposed on the offender does not fit the Pound's criteria as the sacrifice made by the offender at most occasions would not be proportionated to his misconduct.

In evaluating the suitability of the law in its capacity to make the functioning of the society smoother, one must not only consider about the private/individual interest, but one must also survey about the public and social interest as well. It may also have serious ramifications on the stakeholders as well. Social interests are claims or demands or desires involved in the social life in civilized society and asserted in title of that life, they include the interest in public safety, peace and order, and public health. It would be in the best interest of the public that teenage pregnancy rates are kept to a bare minimum if it cannot be totally gotten rid with.

In achieving this policy objective, it would be necessary to have strong laws that prohibit, sexual relationships that will result in pregnancy. But the current law is somewhat misguided in this respect, as girls between the ages of 16-18 are permitted under the law to give consent to sexual relationships that may result in them getting pregnant, but non-the-less denies them of the opportunity of getting married if they are below 18 years of age. This was strongly stated in *Gunaratnam v. Register General* [27] by Tilakawardane J, when she held that, 'since the prohibited age of marriages has been raised to 18 years of age, the absolute bar to marriage must necessarily override the parental authority to give consent to the marriage of a party.

It was not relevant whether parents agreed or did not agree to the marriage of their children, only persons who had completed 18 years of age could enter into a valid marriage' [28]. So a girl who even with her parents' consent cannot get married if she is below 18 years of age, but can consent to a sexual intercourse if she is over 16 years of age. This puts females who are between the ages of 16-18 in a rather mercy situation. This is more so since, if they have consented sexual intercourses, the male partner will not automatically be convicted and yet she can't marry the same since she is below 18 years of age. Assigning one age (age 16) as age of sexual independence and an older age (age 18) as age of marriage, has given rise to problems regarding legal actions on sexual perpetrators of victims whose age falls between 16 and 18 years of age, as viewed by the officer of the AG's Department [29].

In this context, many were of the view that the age of marriage and the age of consent should be the same. That is, either the age of marriage should be lowered to 16 years or the age of consent should be raised to 18 years [30]. However no such change in legislation has occurred yet, and this dilemma still continues to haunt. It could be thus said that the law has failed or have come short of properly recognizing the competing claims of girls who are between the ages of 16-18, with regard to giving consent to sexual intercourse and having the capability to marry. However under the Kandyan law, under section 4(3) of the, Kandyan marriage and divorce Act no 44 of 1952, even if both the parties to a marriage was under the lawful age of marriage, such a marriage is not invalidated by law, in two particular instances. One being that, after gaining the age of lawful marriage, if they cohabit for over a year after attaining the, age of marriage which is 18, there marriage is not invalidated, and if they have a child from their cohabitation, even before both parties have attain the age of marriage, their marriage is not invalidated. This could be said to be of a great piece of social engineering, that keeps the interests of the both the parties and the child, if born in conformity. Unfortunately however this privilege is not enjoyed by the couples who are governed under the general law of the country.

With regards to the public interest at stake, pound describes them as claims or demands or desires involved in life in a politically organized society and are asserted in title of that organization. They are commonly treated as the claims of a politically organized society thought of as a legal entity [31]. With regard to statutory rape, the government would have to take the responsibility to, bring in legal proceedings against the accused and to rehabilitate the victim. In doing this it would require to set up the necessary institutional framework to do this. However with regards to the Sri Lankan system, while mechanisms to report such incidents seem to be in place (hotlines etc.) service providers had less assurance about what to do after cases came into their purview. One of the major problems as pointed out by the police was the delays in the legal process. The police refer cases of statutory rape to the Attorney General's Department for instructions. The average waiting time for the AG to respond was between 4-5 years. During this period, the perpetrator is usually released on bail and the victim's life circumstances have also undergone changes. Taking the case up after so many years has severe emotional and psychosocial consequences for the victim [32]. Though it has to be borne in mind that, the courts are stag up with thousands of many other cases, yet there has to be some kind of alternative dispute resolution mechanism, like that of a statutory board should be established to inquire into these matters in order to fast serve justice and to balance the

public interests.

The judiciary and its marvelous piece of social engineering

As mentioned earlier in the survey, the most critical issue regarding the law relating to statutory rape was concerned with the mandatory minimum punishment that it imposed on the offender which was ten years of rigorous imprisonment. The supreme court of Sri Lanka [33] had the opportunity of reviewing the nature of the enactment that stipulated the mandatory sentencing of a statutory rape convict, when the High Court of the North Central Province made a special reference to the Supreme Court under Article 125(1) of the Constitution.

In May 14th 2008 in the proceedings of the **case** No.HC.333/04, the Provincial High Court of the North Central point, made a reference to the Supreme Court via Article 125(1) of the constitution, in that reference the learned High Court Judge inquired whether section 364(2) of the penal code as amended by the penal code (Amendment) Act No 22 of 1995has removed the judicial discretion when sentencing an accused convicted of an offense in terms of that section. In a brilliant piece of interpretive work, the Supreme Court went on to hold that, despite the black letter wording on the enactment, the lower Courts could still enjoy a discretion as to the minimum sentencing.

In the above-mentioned case, the facts revealed shows that, the accused was having a love affair with the complainant and on one instance they have eloped and had sexual intercourse. The evidence also proved that the sexual intercourse was consented with. However, accordingly the wording of section 363(e) makes the consent given by a person below the age of 16 irrelevant. However the Court observed that her consent was a relevant fact in deciding the minimum sentence for such an offence. The learned High Court Judge ….observes that in the Anuradhapura District …love affairs are a common occurrence (meaning elopements and early marriage) and that complains often present a different version of their complaint to the police after the parents raise objections to (them)…. The learned High Court Judge also notes that the family life of the first accused would now be disrupted. …. Also notes that such a custodial sentence would also not benefit the complaint. Having regarded all the circumstances of the case the learned High Court Judge observes that the imposition of a minimum mandatory sentence for an offence committed consequent to a love afire between two persons in their youth is against her conscience [34]".

In its reasoning the Court looked at the Constitutional Validity of the enactment. The Court, referring to an earlier case [35] held that, according to the Article 4 (c) of the constitution, since the judicial power of the people is going to be exercised by parliament through Courts minimum mandatory sentence was unconstitutional since it resulted in legislative determination of punishment and a corresponding erosion of a judicial discretion and a general determination in advance, of the appropriate punishment, without a consideration of relevant factors which proper sentencing policy should not ignore; such as the offender, and his age and antecedents, the offence and its circumstances (extenuating or otherwise), the need for deterrence, and the likelihood of reform and rehabilitation [36].

The Court also took in to consideration the Article 12(1) of the constitution, which guarantees the equal protection before the law. The Court reasoned that, since with disregard to the circumstances surrounding the case and the judge is compel to impose the mandatory sentencing upon the accused, it would lead to a situation where unequal's will be treated equally. The Court quoted with Approval its previous decision of *Re: Prohibition of Ragging and Other Forms of Violence in Education institutions Bill* [37] where it reiterated that "the cumulative effect of all this will be an erosion of an essential judicial discretion in regard to sentencing. There will be gross disparities in sentences, which will not only violate the principles of equal treatment, but may even amount to cruel punishment"

The court also maneuvered the obstacle that is imposed upon them by the Article 80(3) of the Constitution, which stipulates that, once a Bill becomes an Act, no court is to make determinations regarding its Constitutional compatibility. The Court with regard to this issue argued that, "Article 80 (3) only applies where the validity of an Act is called in to question. However, Article 80(3) does not prevent a court from exercising its most traditional function of interpreting laws. Interpretation of laws will often require a Court to determine the applicable law in the event of a conflict between two –laws (or interest).

According to Pound there is no theory available to judges other than the judicial pragmatism that has served society well. Thus in his view the aim of the legal order is also principle in method [38]. He also contends that 'the comparative tendency is followed by a philosophical tendency. Law is felt to be reason. It is not enough that a rule exist in one system or that it has its analogues in others. The rule must conform to reason, and if it does not, must be reshaped until it does, or must have reasons made for it' [39]. In the above mentioned case this was what exactly the Court did in reshaping the law for it to comprehend with the logical basis of the sentencing policy. Hence law as a form of social control, to be adequately employed in enabling just claims and desires to be satisfied, must be developed in relation to the existing social needs [40] and the existing social needs at the time regarding the sentencing needed to be adjusted accordingly to the social desires which obviously would have required the mandatory sentencing of 10 years to be reduced.

According to Pound, when a Court is required to balance a competing of interest amongst the stakeholders who's interest are going to be adversely affected, three things must be considered and done in order to achieve this. First the court should try to satisfy as many interests as possible with the least sacrifice. Then a court should not be arbitrary in adjusting competing claims, this means that similar conflicts should be similarly resolved. Finally a court must have a rational basis to recognize a new right or to extinguish an existing right, and must explain the reasons for its decision. A departure from the existing law is usually rationalized on the ground that the new case is materially different from the past decided cases, or the past decisions were clearly mistaken or, more rarely, that there are compelling policy reasons for not following a precedent [41]. In the above mentioned case, the Court did a great job with regard to all of these aspects. By allowing a lower court the discretion to decide as to the amount of years that a particular offender should be sentence to, serves the ends of justice. This will enable the court to balance the competing interests of both the victim and the accused as it gives the judge to take into

account the surrounding circumstances and the appropriateness of the sentencing, this discretion nevertheless does not take away from the judge, of sentencing the accused for the mandatory amount of 10 years as well. Here it must also be borne in mind that the court was not arbitrary in coming to its conclusion as it rigorously showed the relevant precedents and how it has in previous cases balanced the competing of interests. And finally the court found its rationale basis for its determination, on the most fundamental law of the land the Constitution. And as the guardian of the supreme law, through its powers of interpretation it concluded that the mandatory sentencing requirement was not consistent with the articles 4 (c) and 12(1).

Gaps Still Unfilled or Not Fulfilled

One of the major concerns regarding the law relating to statutory rape involves the lack of knowledge regarding the issue. Except for the police, POs and Child Rights Promotion Officers (CRPOs), and some medical personnel the law regarding statutory rape was not clearly understood. In fact, some were completely unaware of it [42]. This lack of knowledge consists primarily in the nature of the crime, meaning that most believe that consensual sexual intercourse; even for a girl under 16 is not a crime (of whom I surveyed, who were between the ages of 15-19 most believe this age is still 12). The reasons for statutory rape and early marriage or cohabitation were primarily at the family level, issues such as alcoholism, mothers migrating for employment, marital discord between parents as pushing children towards 'unwholesome' behavior. Ignorance was another widely cited reason for such incidents. Ignorance referred to not merely ignorance of the law – but being 'uneducated in the right way of doing things [43]. Children who came from particular social backgrounds were particularly vulnerable to statutory rape and early marriage or cohabitation. For instance, children of poor socio-economic backgrounds or children who lived in specific locations (remote areas) or children whose families were from the fisher families. Such social groups were perceived to have certain characteristics such as high levels of alcoholism and bad child rearing practices. Parents also were morally relaxed and did not instill correct values among their children; often parents too were engaged in 'immoral' behavior and thus set bad examples for their children [44].

Even though these causes are well understood, with regard to the protection of victims of statutory rape is not satisfactorily dealt with. Apart from policy and legal frameworks, the child protection sector has failed to establish proper mechanisms to support child victims of statutory rape and early marriage. Essentially, while emphasizing the importance of identifying and reporting such incidents, what happens after, is not considered sufficiently. Lack of clear support mechanisms have also led to service providers implementing 'pragmatic' solutions which may or may not be in the long term interests of children. Faced with the highly complex situations of their clients, service providers often choose what appears in their opinion to be the least harmful solution. One service provider described an instance where a 14 year old girl was the victim of incest. The perpetrator in this instance was her father. Her mother was a migrant worker and there were three other children who were being cared for by the 14 year old girl. In this situation, the service provider had to consider many aspects of the situation: imprisoning the father meant that the family was left with no breadwinner and removing the 14 year old girl from the family left 3 other children at risk. The alternative was to find shelter for all the children but to find a place which would accept all the children proved to be equally challenging. Finally, the decision was to do nothing and wait for the mother to return from abroad.

Due to lack of data, which is a result of poor data collection procedures and coordination among service providers, it is hard to comment on the prevalence or patterns of unregistered early marriages, and unreported statutory rape, which are considerably high as revealed in this study. However Pound expresses the need of proper data gathering 'in all these things the public shows an enduring interest. It ought to be someone's duty to advise the people of the progress of juridical science and to make its results public property. But no one can obtain statistics at all complete or at all authoritative upon the most everyday points in judicial administration' [45]. Though Pound is regarding the collecting of data with regard to the administration of justice, other acute aspects of social life must be taken into account on equal footing. Functional jurisprudence, therefore, is a parasitic study which can develop only as fast as social science. It needs money and men; and ironically enough society is willing to spend millions to put a man on the moon, but relatively little for the solution of social problems which are of far greater importance to the common man [46]. It could be seen that the existing mechanisms fails to properly address the competing claims of the persons who are the victims of statutory rape. The most damaging aspect to their life is the loss of education. The victim not only loses her right to marry the accused even if they are willing, since she has not reached the age of marriage, she will also lose her education, as she will most probably be sent to a rehabilitation programme. And if the legal proceeding is going to take place for a term of around 3-4 years as observed earlier, this may result in the victim having to suffer every occasion when she needs to appear before the court before the dispute is eventually resolved. By that time most likely she would be married to another man and these proceedings will definitely have a very bad effect on her family relationship as well, thus worsening her position. Even with regard to the accused, if the mandatory sentencing of 10 years was to be imposed on him, he will also most probably lose the chance of marrying the victim even if the parties consented as he would be in prison. Even if they get married while the accused is serving his sentence, the marriage would almost be meaningless. These issues have to be thoroughly examined and dealt with. As Ehrlich observes that legislation does not operate in a social vacuum, and if this is so, then the factor that shaped the law relating to statutory rape must be taken into consideration in its fullest social context. Without theory which attempts to explain the character of law as a social phenomenon and the position that it occupies in overall structure of social life, discussions of the conditions under which law can influence other aspects of society can hardly progress beyond this listing of factors, often with no convincing means of analyzing the way they interrelate and their relevant importance [47].

Case Study and Conclusion

In order to better understand what the social consensus is regarding the laws regarding to statutory rape, I carried a small research where I asked 8 specific questions [48] from 20 school students whose ages range from 15-19. There were 10 boys and 10 girls and the answers were provided to them and they just had to make a tick, for the answer that they were going to give, before the question paper was given I explained to them what it was meant by 'sexual intercourse'. From the outset it must however be said that, this is a very limited research and the sample of 20 individuals is not enough for a full research. However the findings of the research were rather interesting.

First of all I asked whether they have heard anything called 'statutory rape' not surprisingly none of them have even heard the word before. When asked about what is the proper age for having a consensual sexual intercourse, the answered varied. Most of the boys thought that the girls who are under 16 should not be given that opportunity and most of the girls thought that the age should be somewhere around 12-16. The next question was, was it alright to have a sexual intercourse with her consent, the answer was unanimous. All of them agreed that, if she consented that should be alright. Then we asked whether such a person who has a sexual intercourse with a girl below 16 should ever be punished, again the answer was no. Then we asked whether such a person, if he is to be punished, that punishment should needs to be imprisonment, again the answer was no. Next we asked if he is to be imprisoned, for how many years should it be? The overwhelming majority of them said that it should be less than 1 year and no one said that it should be more than 5. Then we asked whether even after the incident if both the parties still wanted to continue with their relationship all the charges should be dropped? Again most thought that all the charges should be dropped. Finally we asked the bold question, whether the law that punishes the accused who is convicted of having a sexual intercourse with a girl below 16 should be amended and again most said that it should.

Though no way near substantial, the above research dose show a one staggering fact that when an independent consent is given by a girl below the age of 16 to a sexual intercourse even people who represents that age category believes that, such consent should be respected. It reveals that, most conceive the fact that, if a girl does consent to a sexual intercourse, it is highly improbable that she is consenting without knowing its consequences. To this end it seems that, the vulnerability of the girls below the age of 16 is not due to the lack of their knowledge regarding consequences of a sexual intercourse. The vulnerability may rest in them not having a proper education regarding the sexual education, which unfortunately even today is considered taboo to be openly spoken about.

In shaping the society law is one of the factors that contribute to it and the law is not the only factor that brings social change. The change in the education system is also a vital part of bringing social change, and If the laws relating to statutory to be more effective, there is an urgent need of reforming the sexual education in the schools. This fact was revealed to me in the research that I conducted, where students clearly lacked the proper knowledge regarding sexual education. It seems clear that Public knowledge of and support for the law, may vary considerably depending not only on the aims of law but on its form as well [49]. With regards to statutory rape law in Sri Lanka the aim of the law does get the backing of the society, but its form of imposing a mandatory sentence and the lack of opportunity it provides for the willing partners to continue with their relationship lacks support.

It could be said that if it wasn't for the Supreme Court's decision to vest the discretionary power back in the magistrate judge with regard to the mandatory sentencing, the law relating to statutory rape would have been rather harsh on the offender as it would impose upon him a liability disproportionate to his act. Since there is no real mechanism to evaluate the effectiveness of a enacted legislation the Courts have to always listen to the social appeal when deciding a case that requires the Court to listen to such an appeal. The common-law doctrines, at least as explained to the people, did not commend themselves to the public intelligence. In such cases, something is to be done; and it is done too often with but little understanding of old law, mischief, or remedy. But we have no right to rail at such miscarriages. The public must move in such legal light as the luminaries of the law afford. Those who practice and those who teach the law should be in a position to command the popular ear [50].

And according to Pound [51] in all cases of divergence between the standard of the common law and the standard of the public, it goes without saying that the latter will prevail in the end.

This was the scenario in the above mentioned case as well, where the Court in the end recognized what the conscious of the public demand in striking out the enactment that took away the discretionary power of the Courts in determining the amount of sentence, with regard to a statutory rape offender. If the law is to be effective it must be in the interest of those upon whom the law depends for its invocation or enforcement to set the legal machinery in motion. The law must provide incentives to ensure its own use. In many cases this will mean ensuring the availability of adequate and suitable remedies in the law for those whom it is designed to aid or protect; remedies sufficiently attractive to motivate the victim of illegal practices to seek the aid of the legal system [52].

It would be safe to conclude that the social engineering structure of the current law relating to statutory rape needs to be restructured in order to both protect and advance the interest of both the accused and the victim. In doing this the law makers and the policy makers must take in to consideration not only the interest of the victim, but of the accused as well. The main reason behind this is the fact that, in most of the cases involving statutory rape, since the sexual intercourse happens with the consent of a girl who is below the age of 16, it is the others and not necessarily they, who conceive it as an offence.

References

1. Cotterrell R. The Sociology of Law: An Introduction (1st, Butterworths, London, 1984, 49.
2. Pound R. Sociology of Law and Sociological Jurisprudence' the University of Toronto Law Journal V. 1943; (5-1):1-2.
3. Ratnapala S. Jurisprudence (2nd, Cambridge University Press, Cambridge, 2013, 211.
4. Ibid
5. Paton GW. A Textbook of Jurisprudence (4th, Clarendon press, Oxford, 1972, 31.

6. Jackson KB. 'Statutory Rape: A Philosophical Analysis' 8 Can. J. L. & Jurisprudence, 1995, 139-140.
7. Ordinance No 11 of, 1887.
8. Act No 22 of, 1995.
9. Ohchr.org, [online]Availableat:http://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/AmarasiriDeSilva.pdf [Accessed 25 Apr. 2015], 2015.
10. Unicef.org, [online]Availableat:http://www.unicef.org/srilanka/Final_Uploaded_report_compress.pdf [Accessed 25 Apr. 2015], 2015.
11. Unicef.org,[online]Availableat:http://www.unicef.org/srilanka/ Final_Uploaded_report_compress.pdf [Accessed 25 Apr. 2015], 2015.
12. Jackson KB. 'Statutory Rape: A Philosophical Analysis' 8 Can. J. L. & Jurisprudence, 1995, 139-141.
13. Pound R. 'The Need of a Sociological Jurisprudence' 31 Annu. Rep. A.B.A, 1907, 911.
14. Ibid
15. Jackson KB. 'Statutory Rape: A Philosophical Analysis' 8 Can. J. L. & Jurisprudence, 1995, 139-141.
16. Ibid
17. Nalbandian E. 'Sociological Jurisprudence: Roscoe Pound's Discussion on Legal Interests And Jural Postulates' 5 Mizan L. Rev, 2011, 141-145.
18. Ratnapala S. Jurisprudence (2nd, Cambridge University Press, Cambridge, 2013, 211.
19. Jackson KB. 'Statutory Rape: A Philosophical Analysis' 8 Can. J. L. & Jurisprudence. 1995, 139-141.
20. Ohchr.org,[online]Availableat:http://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NG/AmarasiriDeSilva.pdf [Accessed 25 Apr. 2015], 2015.
21. Ibid.
22. Unicef.org,[online]Availableat:http://www.unicef.org/srilanka/ Final_Uploaded_report_compress.pdf [Accessed 25 Apr. 2015], 2015.
23. Lawcom.gov.lk,[online]Availableat:http://lawcom.gov.lk/web/images/stories/reports/punishment_for_rape_of_a_girl_under_16_years_of_age.pdf [Accessed 26 Apr. 2015], 2015.
24. Ibid
25. Paton GW. A Textbook of Jurisprudence (4th, Clarendon press, Oxford, 1972, 31.
26. Ratnapala S. Jurisprudence (2nd, Cambridge University Press, Cambridge, 2013, 236.
27. 2 Sri LR 302, 2002.
28. Ibid.
29. Ohchr.org, [online] Availableat: http://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/AmarasiriDeSilva.pdf [Accessed 25 Apr. 2015], 2015.
30. Unicef.org, [online]Availableat:http://www.unicef.org/srilanka/ Final_Uploaded_report_compress.pdf [Accessed 25 Apr. 2015], 2015.
31. Nalbandian E, 'Sociological Jurisprudence: Roscoe Pound's Discussion on Legal Interests and Jural Postulates' 5 Mizan L. Rev, 2011; 141-145.
32. Unicef.org.[online]Availableat:http://www.unicef.org/srilanka/ Final_Uploaded_report_compress.pdf [Accessed 25 Apr. 2015], 2015.
33. SC. Reference No.03/08
34. Ibid
35. Re: Prohibition of Ragging and Other Forms of Violence in Education institutions Bill SC. Special Determination 6/98(SD) and 7/98(SD)
36. SC. Reference No.03/08
37. SC. Special Determination 6/98(SD) and 7/98(SD)
38. Ratnapala S. Jurisprudence (2nd, Cambridge University Press, Cambridge, 2013, 236.
39. Pound R. 'The Need of a Sociological Jurisprudence' 31 Annu. Rep. A.B.A, 1907, 911.
40. Freeman MDA. Lloyd's Introduction to Jurisprudence (7th, Sweet and Maxwell, London, 2001, 726.
41. Ratnapala S. Jurisprudence (2nd, Cambridge University Press, Cambridge, 2013, 236.
42. Unicef.org, [online] Availableat: http://www.unicef.org/srilanka/Final_Uploaded_report_compress.pdf [Accessed 25 Apr. 2015], 2015.
43. Ibid
44. Ibid
45. Pound R. 'The Need of a Sociological Jurisprudence' 31 Annu. Rep. A.B.A, 1907, 911.
46. Paton GW. A Textbook of Jurisprudence (4th, Clarendon press, Oxford, 1972, 31.
47. Cotterrell R. The Sociology of Law: An Introduction (1st, Butterworths, London, 1984, 49.
48. Please See Annexure 1
49. Cotterrell R. The Sociology of Law: An Introduction (1st, Butterworths, London, 1984, 49.
50. Pound R. 'The Need of a Sociological Jurisprudence' 31 Annu. Rep. A.B.A, 1907, 911.
51. Ibid
52. Cotterrell R. The Sociology of Law: An Introduction (1st, Butterworths, London, 1984, 49.