



RAPPORTEUR FOR
THE SPECIAL EVENT: TRAINING PROGRAMME FOR LABOUR
TRIBUNAL PRESIDENTS OF SRI LANKA

[SE-1]

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TABLE OF CONTENTS

<u>SR. NO.</u>	<u>CONTENTS</u>	<u>PG. No.</u>
1.	INTRODUCTION	3
2.	LIST OF RESOURCE PERSONS	4
3.	HUMAN RIGHTS COMMITMENTS OF FOREIGN COMPANIES INVESTING IN SRI LANKA	5
4.	COMPANY, COMMUNITY RELATIONSHIPS IN COMPLEX ENVIRONMENT	7
5.	APPLICABILITY OF ILO STANDARDS AND CONVENTIONS IN SRI LANKA	9
6.	HYPOTHETICAL PROBLEM ON APPLICABILITY OF ILO STANDARDS AND CONVENTIONS	10
7.	JUSTICIABLE AND NON-JUSTICIABLE PROTECTIONS OFFERED UNDER THE CONSTITUTION AND OTHER STATUTES OF SRI LANKA AND INDIA TO PERSONS WORKING IN UNORGANIZED SECTORS	12
8.	JUSTICIABLE AND NON-JUSTICIABLE PROTECTIONS OFFERED UNDER THE CONSTITUTION AND OTHER STATUTES OF SRI LANKA AND INDIA TO PERSONS WORKING IN UNORGANIZED SECTORS	16
9.	EVOLUTION OF LABOUR LEGISLATIONS AND “RATIONALIZATION” LABOUR LEGISLATIONS	21
10.	ISSUES RELATED TO WOMEN WORKFORCE	23
11.	ISSUES RELATED TO DOMESTIC WORKERS	26
12.	ISSUES RELATED TO DISABLEMENT	30
13.	ISSUES RELATED TO CHILD LABOUR	33
14.	OUTSOURCING IN SRI LANKA: SECTORS THAT EMPLOYEE CONTRACT LABOUR AND MERITS AND DEMERITS OF OUTSOURCING	37
15.	SUBSTITUTION AND LEGAL REPRESENTATION: LAWS AND DECISIONS	40
16.	UNFAIR LABOUR PRACTICES IN INDIA AND SRI LANKA	42
17.	BALANCING RIGHTS OF EMPLOYER AND EMPLOYEES	44
18.	APPLICABILITY OF UTILITARIAN, EGALITARIAN AND LIBERTARIAN PRINCIPLES IN DECIDING RIGHTS AND LIABILITIES OF UNEQUAL STRENGTH	47
19.	FEEDBACK AND EVALUATION	47

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

INTRODUCTION:

The National Judicial Academy conducted a “**5-Day Special Training Programme for Labour Tribunal Presidents of Sri Lanka**” from December 18-22, 2015. A total of 34 Labour Tribunal Presidents from different regions of Sri Lanka participated in this special training programme. This training programme comprised of 18 sessions which continued for 5 long days. Each session was dedicated to lectures by distinguished speakers. The training programme provided a forum for the Labour Tribunal Presidents of Sri Lanka to share their views and express their problem on different labour issues faced by them in their country.

The present report categorically deliberates upon the major challenges faced by the Labour Tribunal Presidents of Sri Lanka and suggestions highlighted by the resource persons and participants during the course of conference.

AIMS AND OBJECTIVES:

The aim of the programme was to provide to the Labour Tribunal presidents of Sri Lanka a forum to initiate discussion on vital issues related to labour rights in Sri Lanka with a comparative approach with that of India. The programme aimed towards devising new breakthrough in the field of judicial interpretation of labour laws by the means of discussions among the judicial officers regarding the existing system of labour laws and the possible amendments for the betterment of labour legislations in both the countries.

CONTENTS:

- *Human rights of the labourers.*
- *Applicability of ILO standards and conventions.*
- *Constitutional protection to workers.*
- *Issues related to women workforce, domestic workers, disablement and child labour.*
- *Legal framework on contractual employment.*
- *Unfair labour practices.*
- *Balancing rights of employers and employees.*

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

PROGRAMME COORDINATORS:

1. Mr. Shivraj S. Huchhanavar (Research Fellow, NJA)
2. Ms. Nitika Jain (Law Associate, NJA)

RESOURCE PERSONS:

1.	HON'BLE MR. JUSTICE V. GOPALA GOWDA	JUDGE, SUPREME COURT OF INDIA
2.	HON'BLE MR. JUSTICE B. N. SRIKRISHNA	FORMER JUDGE, SUPREME COURT OF INDIA
3.	HON'BLE MR. JUSTICE S.J. MUKHOPADHAYA	FORMER JUDGE, SUPREME COURT OF INDIA
4.	HON'BLE MR. JUSTICE K. CHANDRU	FORMER JUDGE, MADRAS HIGH COURT
5.	PROF. (DR.) B.T. KAUL	CHAIRPERSON, DELHI JUDICIAL ACADEMY
6.	MR. SANJAY SINGHVI	SENIOR ADVOCATE, BOMBAY HIGH COURT
7.	MRS. JANE COX	ADVOCATE, BOMBAY HIGH COURT
8.	MR. COEN KOMPIER	ILO REPRESENTATIVE
9.	MR. RANJIT PRAKASH	NATIONAL PROJECT COORDINATOR (ILO)
10.	MS. SUNEETHA ELURI	NATIONAL PROJECT COORDINATOR (ILO)
11.	MS. NEHA SAIGAL	ILO REPRESENTATIVE

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

DAY 1

SESSION 1:

HUMAN RIGHTS COMMITMENT OF FOREIGN COMPANIES INVESTING IN SRI LANKA

SPEAKER: JUSTICE MUKHOPADHAYA

CHAIR: JUSTICE V. GOPALA GOWDA AND JUSTICE K. CHANDRU

Justice Mukhopadhaya commenced the conference with a brief introductory session whereof the judges were asked to introduce themselves. He aspired this training programme to be an interactive session to benefit the judiciary of both the countries by exchange of their ideas and experiences. Thereafter the Sri Lankan judges were asked to share the sort of work they are undertaking as a Labour Tribunal President in their country. One of the participants replied that it is the Constitution of Sri Lanka which provides for the establishment of specialized Labour Tribunal Forums for better administration of matters pertaining to labour issues under Article 111M. A discussion was made about the functions which labour court performs and the jurisdiction over matters they can deal with. He informed that Labour Courts in Sri Lanka are authorized to deal with matters solely related to termination of employment and other incidental matters.

Justice Mukhopadhaya asked that if there is any specific provisions dealing with Human Rights of the laborers. To this they answered in affirmation. Reference was made to Chapter III of the Sri Lankan Constitution which deals with the fundamental rights.

The freedom to form an association and freedom to form a union is guaranteed in the Constitution as Fundamental Right. The relevant extract of the Constitution of Sri Lanka i.e. **Article 14** is as follows

14. (1) Every citizen is entitled to:-

(a) the freedom of speech and expression including publication;

(b) the freedom of peaceful assembly;

(c) the freedom of association;

(d) the freedom to form and join a trade union;

(e) the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice or teaching;

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

(f) the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language;

(g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise;

(h) the freedom of movement and of choosing his residence within Sri Lanka; and

(i) the freedom to return to Sri Lanka.

Right to Equality: Special Provision for Women and Disabled

A reference was also made to Article 12 which deals with Right to Equality of laws and equal protection of laws. Art. 12(4) which declares that, nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.

This article empowers the executive or legislature to make special provision for the protection of women, children and disabled persons. It can be observed that, to protect the interest of female workers, child labour and disabled workers, state either through administrative rule making or through their action, or Legislature may by law, effect the affirmative action in protection of these class of people.

Justice Mukhopadhaya then moved on to ask the major problems faced by labourers in Sri Lanka and the relief which the court can grant to them. To this one of the participants replied that long working hours is one of the major problem faced by workers in their country.

Justice Mukhopadhaya then asked Justice Chandru to share his views on the issue. Justice Chandru started with the note that labour law is developed more by labour courts and tribunals as they get the firsthand experience. Further stating in India constitution is the supreme law and every other law emanates from it. He appealed the participants while delivering any judgment they should bear in mind the constitutional mandate and scope of Human Rights.

Various rights laid down by **United Nations Human Rights Commission** and guiding principles of the **United Nations “Protect, Respect and Remedy”** were highlighted and discussed. He emphasized that since both India and Sri Lanka are signatories of UNHRC, every matter should be decided in conformity with the decisions of International forum.

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

Justice Mukhopadhaya concluded the session by saying that Human Rights come into picture when there is no specific law available. The Labour court judges should work in the best interest of the labourers. This does not mean that they should be biased towards them but genuine relief must be granted to them in the best possible way. The judges should be more relief-oriented. They should interpret the statute in the interest of the workers.

The session halted for a short tea break.

SESSION 2

COMPANY, COMMUNITY RELATIONSHIPS IN COMPLEX ENVIRONMENTS

SPEAKER: JUSTICE MUKHOPADHAYA

CHAIR: JUSTICE V. GOPALA GOWDA AND JUSTICE K. CHANDRU

The session started with a question being posed by Justice Ruhan Fernando as to whether there can be any diplomatic benefit given to an institution or individual. Justice Mukhopadhaya gave a brief historical background. He talked about the intrusion of British East India Company. They had their own charter which authorizes them to do certain things. The charter also provides them with certain diplomatic benefits. He discussed that no diplomatic immunity can be given beyond the provisions of the constitution.

The Multi-National Companies target the third world countries in anticipation of cheap labour to increase their profit. These Multinational corporations (MNCs) benefit the world in that they bring the state of the art products and services that are essentially standardized yet subtly customized to the local needs. MNCs not only transfer technology and raise the standard of living, but they also spread wealth and employment in underdeveloped regions, emerging market, and fast-developing regions of the world. MNCs also respond to host country's needs and expectations for business ethics and social responsibility.

Larger MNCs, with greater resources and greater global influence, should consider their unique role of benefiting the world not only through the delivery of their products and services, but also through providing their philanthropic activities as they pay back to the society. A large MNC has to deal with varied cultural and operational environments. This situation poses a complex challenge in formulating effective business ethics, social responsibility objectives, goals, and strategies at the corporate and subsidiary levels.

He further discussed that under labour laws the benefit is granted not only to the labourers but to their families as well. For instance if the worker dies while working, his family members are entitled to get the compensation. Thus the courts should not take a microscopic approach but should see community of labourers as a whole. They must take a holistic approach and should not decide a matter in isolation.

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

He added that it is the duty of the employer/MNC to fulfil their obligations under Corporate Social Responsibility. For eg. Building community hall, canteen, bathroom, etc. for the wholesome requirement of the labourers. He also highlighted the concept of community relationship. They should make provisions for providing education to the children of the workers, providing crutches to the women working in tea plantation to carry their children.

He also dealt with the aspect that what should be the role of the judges/courts in developing labour law jurisprudence. He asked the judges to be bold and show some courage while deciding any matter. There should not be any hesitation in granting relief to the workers. It is they who have the access to the firsthand information and can deal effectively with the evidences and witnesses. Thus they should pass orders whether they are authorized for it or not. It is for the higher/appellate courts to decide whether they had jurisdiction to pass such order or not.

The session concluded with a question being asked by one of the participants as to whether there is any provision under Indian law which provides relief to a worker during the period of suspension. To this Justice Chandru answered that there is a provision of 'subsistence allowance' given to a worker during his period of suspension.

The participants proceeded for a short tea break.

SESSION 3

APPLICABILITY OF ILO STANDARDS AND CONVENTIONS IN SRI LANKA

SPEAKER: JUSTICE V. GOPALA GOWDA AND MR. COEN KOMPIER

CHAIR: JUSTICE MUKHOPADHAYA AND JUSTICE K. CHANDRU

Mr. Coen Kompier, ILO representative, commenced the session by providing a historical background of International Labour Organization and its relation with India.

International Labour Organization (ILO) is the most important organization in the world and it has been working for the benefit of the workers throughout the world. The ILO was created in 1919, as part of the Treaty of Versailles that ended World War I, to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice.

A unique feature of ILO is that it is a tripartite body consisting of representatives of the Government, Employer, workers. It functions in a democratic way by taking interest for the protection of working class throughout the world. It is also working at the international level as a '*saviour of workers*' '*protector of poor*' and it is a beacon light for the change of social justice and social security. The ILO examines each and every problem of the workers pertaining to each member country and discusses thoroughly in the tripartite body of all the countries. The ILO passes many Conventions and Recommendations on different subjects like Social Security, Basic Human Rights, Welfare Measures and Collective Bargaining. On the basis of Conventions and Recommendations of ILO every country incorporates its recommendations and suggestions in its respective laws. Conventions are international treaties and are instruments, which create legally binding obligations on the countries that ratify them. Recommendations are non-binding and set out guidelines orienting national policies and actions.

He said that the approach of India with regard to International Labour Standards has always been positive. The ILO instruments have provided guidelines and a useful framework for the evolution of legislative and administrative measures for the protection and advancement of the interest of labour. To that extent the influence of ILO Conventions as a standard of reference for labour legislation and practices in India has been significant rather than as a legally binding norm. India has been careful in ratifying Conventions as they imposes legally binding obligations on the country. It has always been the practice in India that while ratifying a Convention, full satisfaction

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

should be made that our laws and practices are in conformity with the relevant ILO Convention. It is now considered that a better course of action is to proceed with progressive implementation of the standards and leave the formal ratification for consideration at a later stage when it becomes practicable. We have so far ratified 41 Conventions of the ILO, which is better than the position existing in many other countries. India has generally voted in favour of the Conventions reserving its position as far as its future ratification is concerned.

Looking from the other perspective, he raised a concern over the fact that India, a founder member of the ILO, is among a small minority of 19 ILO member states that have not ratified either of the two fundamental Conventions on freedom of association, namely, *the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)* and *the Right to Organize and Collective Bargaining Convention, 1949 (No. 98)*.

The non-ratification by India of these two Conventions has been a matter of concern to the world community at large. Considering the huge size of India's workforce and the fact that these Conventions contain basic human rights principles, they must be universally observed in order to ensure decent work for workers.

The participants parted for lunch break.

SESSION 4

HYPOTHETICAL PROBLEM ON APPLICABILITY OF ILO STANDARDS AND CONVENTIONS

SPEAKER: MR. COEN KOMPIER

CHAIR: JUSTICE: V. GOPALA GOWDA AND JUSTICE K. CHANDRU

This session dealt with hypothetical problems on applicability of ILO standards and conventions. Justice Gopala Gowda discussed some of the peculiar situations which might come before the labour courts for adjudication. He made a reference to approach taken by Supreme Court in various landmark decision on labour matters including the Minerva Mills case. Justice Gowda discussed the provisions of Indian Constitution viz. Article 14, 19, 21, 23, 24, 39, 41 and 43. The participants were asked to decide any matter keeping in mind the constitutional mandate being the supreme law.

Justice Gowda asked the participants whether they have the provision of issuance of writs for enforcement of fundamental rights. He pointed that the judges should have a humanistic approach and provide the best possible relief to the aggrieved workers keeping in mind the concept of social justice. He discussed the contribution of Indian judiciary in interpreting the fundamental rights and directive principles of state policy by making reference to various landmark judgments of Supreme Court of India.

Mr. Kompier continued the session by discussing the ILO standards and conventions ratified by Sri Lanka. Sri Lanka became a member of the ILO in 1948. In 1984 the ILO Country Office in Colombo was established, covering both Sri Lanka and the Maldives. Since 2008 Sri Lanka has had two Decent Work Country Programmes (DWCPs). The 2008-12 DWCP supported the amendment of labour laws and the formulation of national policies to protect workers' rights and promote the concept of Decent Work for All. It also supported the sustainable development of economically disadvantaged and conflict-affected areas, better labour administration, equitable employment practices, social dialogue and labour market governance. Building on the achievements of the first DWCP, the second DWCP (2013-17) aims to improve social protection further and create decent work for more people, with a particular focus on young women and men.

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

He discussed the problems of unfair labour practices and forced labour in Sri Lanka. He made the situation understand by quoting the illustration of Qatar. Lastly, Justice Gowda summed up the whole session and provided his valuable inputs.

DAY 2

SESSION 5:

JUSTICIABLE AND NON-JUSTICIABLE PROTECTIONS OFFERED UNDER THE CONSTITUTION AND OTHER STATUTES OF SRI LANKA AND INDIA TO PERSONS WORKING IN ORGANIZED SECTORS

SPEAKER: MR. SANJAY SINGHAVI

CHAIR: JUSTICE K. CHANDRU

Mr. Singhavi opened the first session on Day 2. Before starting with the topic of discussion he preferred to give a brief historical background of changing trend in the unorganized sector in the world after 1970s. Starting from Japan, during the post-World War II rebuilding of industry: 1. Japan's lack of cash made it difficult for industry to finance the big-batch, large inventory production methods common elsewhere. 2. Japan lacked space to build big factories loaded with inventory. 3. The Japanese islands lacked in natural resources with which to build products. 4. Japan had high unemployment, which meant that labor efficiency methods were not an obvious pathway to industrial success. Thus the Japanese "leaned out" their processes. "They built smaller factories in which the only materials housed in the factory were those on which work was currently being done. In this way, inventory levels were kept low, investment in in-process inventories was at a minimum, and the investment in purchased natural resources was quickly turned around so that additional materials were purchased." Thus they developed the concept of **Just-in-time (JIT) manufacturing**, also known as just-in-time production or the **Toyota production system (TPS)**.

As far as Indian labour law is concerned, he said it is closely connected to the Indian independence movement, and the campaigns of passive resistance leading up to independence. While India was under colonial rule by the British Raj, labour rights, trade unions, and freedom of association were all suppressed. Workers who sought better conditions, and trade unions who campaigned through strike action were frequently, and violently suppressed. After independence in 1947, the Constitution of India embedded a series of fundamental labour rights in the constitution,

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

particularly the right to join and take action in a trade union, the principle of equality at work, and the aspiration of creating a living wage with decent working conditions. He discussed the role of Labour Commission established under the Chairmanship of Justice Gajendragadkar in 1967.

He presented certain statistical data by stating that the Indian Economy is characterized by the existence of a vast majority of informal or unorganized labour employment. As per the Economic Survey 2007-08, 94% of India's workforce include the self-employed and employed in unorganized sector. As per the National Sample Survey Organization (NSSO), 30 million workers in India are constantly on the move (migrant labour) and 25.94 million women workforce has been added in the labour market from the year 2000 onwards.

He made a reference by quoting J. Beg in the famous case of *Bangalore Water Works v. A. Rajappa* and then move on with the constitutional aspect.

In the Constitution of India from 1950, articles 14-16, 19(1) (c), 23-24, 38, and 41-43A directly concern labour rights. Article 14 states everyone should be equal before the law, article 15 specifically says the state should not discriminate against citizens, and article 16 extends a right of "equality of opportunity" for employment or appointment under the state. Article 19(1) (c) gives everyone a specific right "to form associations or unions". Article 23 prohibits all trafficking and forced labour, while article 24 prohibits child labour under 14 years old in a factory, mine or "any other hazardous employment".

Articles 38-39, and 41-43A, however, like all rights listed in Part IV of the Constitution are not enforceable by courts, creates an aspirational "duty of the State to apply these principles in making laws". The original justification for leaving such principles unenforceable by the courts was that democratically accountable institutions ought to be left with discretion, given the demands they could create on the state for funding from general taxation, although such views have since become controversial. Article 38(1) says that in general the state should "strive to promote the welfare of the people" with a "social order in which justice, social, economic and political, shall inform all the institutions of national life. In article 38(2) it goes on to say the state should "minimize the inequalities in income" and based on all other statutes. Article 41 creates a "right to work", which the National Rural Employment Guarantee Act 2005 attempts to put into practice. Article 42 requires the state to "make provision for securing just and human conditions of work and for maternity relief". Article 43 says workers should have the right to a living wage and "conditions

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

of work ensuring a decent standard of life". Article 43A, inserted by the Forty-second Amendment of the Constitution of India in 1976, creates a constitutional right to codetermination by requiring the state to legislate to "secure the participation of workers in the management of undertakings".

In the later part of the session Mr. Singhvi dealt with the following cases and made certain observations:

1. In *Standard Vacuum Refining Co. Ltd* ([1961] 3 SCR 536) it was held,

"It would thus be obvious that the concept of a living wage is not a static concept; it is expanding and the number of its constituents and their respective contents are bound to expand and widen with the development and growth of national economy. That is why it would be impossible to attempt the task of determining the extent of the requirement of the said concept in the context of today in terms of rupees, annas and pies on the scanty material placed before us in the present proceedings. We apprehend that it would be inexpedient and unwise, to make an effort to concretize the said concept in monetary terms with any degree of definiteness or precision even if a 'fuller enquiry is held. Indeed, it may be true to say that in an under-developed country it would be idle to describe any wage structure as containing the ideal of the living wage, though in some cases wages paid by certain employers may appear to be higher than those paid by others."

2. In the same case, the Supreme Court set out elaborately the method for calculating the minimum wage as accepted by the 15th session of the Indian Labour Conference in 1957 based on the report of the Tripartite Committee. The judgement states,

"To calculate the minimum wage the Committee accepted the following norms and recommended that they should guide all wage fixing authorities including Minimum Wage Committees, Wage Boards, adjudicators, etc. The five norms accepted by the Committee were stated by it in these terms:

" (i) In calculating the minimum wage, the standard working class family should be taken to consist of 3 consumption units for one earner; the earnings of women, children and adolescents should be disregarded.

(ii) Minimum food requirement should be calculated on the basis of a net intake of calories, as recommended by Dr. Aykroyd for an average Indian adult of moderate activity.

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

(iii) *Clothing requirements should be estimated at a per capita consumption of 18 yards per annum which would give for the average workers family of four, a total of 72 yards.*

(iv) *In respect of housing, the rent corresponding to the minimum area provided for under Government's Industrial Housing Scheme should be taken into consideration in fixing the minimum wage.*

(v) *Fuel, lighting and other I miscellaneous' items of expenditure should constitute 20% of the total minimum wage."*

3. The Supreme Court in 1992 in the matter of **Workmen vs Raptakos Brett ([1992] 1 SCC 290)** further added to this. It stated,

"The concept of 'minimum wage' is no longer the same as it was in 1936. Even 1957 is way-behind. A worker's wage is no longer a contract between an employer and an employee. It has the force of collective bargaining under the labour laws. Each category of the wage structure has to be tested at the anvil of social justice which is the live-fibre of our society today. Keeping in view the socio-economic aspect of the wage structure, we are of the view that it is necessary to add the following additional component as a guide for fixing the minimum wage in the industry:--

"(vi) Children education, medical requirement, minimum recreation including festivals/ceremonies and provision for old age, marriages etc. should further constitute 25% of the total minimum wage."

The wage structure which approximately answers the above six components is nothing more than a minimum wage at subsistence level. The employees are entitled to the minimum wage at all times and under all circumstances. An employer who cannot pay the minimum wage has no right to engage labour and no justification to run the industry.

A living wage has been promised to the workers under the constitution. A 'socialist' framework to enable the working people a decent standard of life, has further been promised by the 42nd Amendment. The workers are hopefully looking forward to achieve the said ideal. The promises are pilling-up but the day of fulfilment is nowhere in sight. Industrial wage looking as a whole--has not yet risen higher than the level of minimum wage."

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

Mr. Singhvi then left the session for open discussion. One of the participants posed a question as to practicality of Right to Work under Article 39 of the Constitution and how far it violates the employer's right to terminate. To which the resource person replied that Right to Work is only a Directive Principle and not a fundamental right. This concern has been raised in many cases in Supreme Court including *Brojonath Ganguly's case*. It removed the arbitrary hire and fire rule and replaced employers' right to terminate as per the rules and regulation prescribed under various labour legislations. Industries which cannot pay minimum wages should not function.

Another question raised was regarding the powers of Tribunals in India. Justice Chandru replied that as far as power of Tribunal is concerned no additional question can be discussed during the proceedings apart from any incidental issue.

The session ended with a funny question being asked by one of the participants as to whether there is any logical criteria to reach these magical numbers. The resource persons answered that it is just for the sake of convenience of the legislators.

The session halted for lunch break.

SESSION 6:

JUSTICIABLE AND NON-JUSTICIABLE PROTECTIONS OFFERED UNDER THE CONSTITUTION AND OTHER STATUTES OF SRI LANKA AND INDIA TO PERSONS WORKING IN UNORGANIZED SECTORS

SPEAKER: MRS. JANE COX

CHAIR: JUSTICE K. CHANDRU

Mrs. Cox commenced the session by discussing the term 'unorganized sector'.

According to her, the term "unorganised sector" is an amorphous and variously described term used to cover different groups in the workforce and sectors of the Indian economy. It refers to both segments of the Indian economy loosely termed as "informal" or small scale, and to workers who whether in terms of location or rights, or implementation are on the fringes of the more organised sector and laws applicable to, or implemented for the latter. The term is also used to cover those employees not organised under the banner of a trade union or Association – i.e. around 95% of the Indian workforce.

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

She dealt with the statistical data. Approximately 93% of the Indian workforce is engaged in the unorganised sector of which 52% are agricultural workers. According to the National Statistical Commission (Government of India), the unorganised or informal sectors constitute a pivotal part of the Indian economy and account for around 50% of the national product.

Then she moved on to discuss the constitutional provisions safeguarding the rights of the workers. The Constitution of India includes Fundamental Rights and Directive Principles which, though not expressly referring to unorganised sector workers, embrace them and have been used for their protection and benefit. The Fundamental Rights are Justiciable whereas the Directive principles are not. Most tellingly of course, some of the most important provisions which cover workers, and especially those in the unorganised sectors are only covered under non- justiciable **Directive Principles**. For example:

- The right to an adequate means of livelihood; that the ownership & control of the material resources of the community are so distributed as best to subserve the common good; that the operation of the economic system does not result in the concentration of wealth & means of production to the common detriment; equal pay for equal work for women & men; that the health & strength of worker, and tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength (**Article 39**);
- The directive that the State shall, within the limits of its economic capacity and development make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want (**Article 41**);
- The provision for securing just and humane conditions of work and for maternity relief (**Article 42**);
- The directive that the State shall endeavor to secure by suitable legislation or economic organization or in any other way to all workers, agricultural, industrial or otherwise, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and in particular the State shall endeavor

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

to promote cottage industries on an individual or co-operative basis in rural areas;
(Article 43).

As far as the Fundamental rights are concerned, most obvious Fundamental Right relevant for the Unorganised Sector is Article 23, which prohibits trafficking in human beings, beggar and any form of forced labour. The same Article provides that contravention of this Article shall be an offence punishable in accordance with law. Our Courts have given a very expansive interpretation to Article 23, most famously in the *Asiad Games* case¹, where the Supreme Court rejected the contention that the Article does not prohibit *any* form of forced labour but only that where the person is forced to work with no wages or remuneration or whatsoever, and held that even non-payment of the statutory wage amounts to forced labour.

She also made reference to the famous case of *Bandhua Mokti Morcha v. Union of India* where the Supreme Court widened the scope of Right to Life as Right to live with dignity and free from exploitation.

She then dealt with the **statutory enactments for unorganised sector**. There is a whole host of Central legislations applicable for unorganised sector workers. Some cover a broad section of unorganised sector workers, across industries; some are enacted specifically for certain types of workers and industries, whilst some general labour laws which cover organized sector workers also apply to the unorganised sector, depending on the number of workers employed in an establishment and the nature of the industry/establishment in which they are employed. Those which cover broad section of unorganised sector workers, across industries include:

1. Bonded Labour System (Abolition) Act, 1976
2. Child Labour (Prohibition and Regulation) Act, 1986
3. Contract Labour (Regulation and Abolition) Act, 1970
4. Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979
5. National Rural Employment Guarantee Act, 2005
6. Unorganised Sector Workers' Social Security Act, 2008

¹ People's Union for Democratic Rights vs. Union of India, 1982 3SCC 235

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

Acts covering specific sections of unorganised workers include:

- i. Beedi and Cigar Workers (Conditions of Employment) Act, 1966;.
- ii. Building and other Construction Workers' (Regulation of Employment and condition of Service Act, 1996;
- iii. Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993;
- iv. Mines Act, 1952;
- v. Plantation Labour Act, 1951;
- vi. Cine-Workers and Cinema Theatre Workers (Regulation of Employment Act, 1982.

Some of the main general labour legislations applicable to both organised and unorganised sectors include:

- i. The Industrial Disputes Act, 1947
- ii. The Factories Act, 1948
- iii. Shops and Establishments Acts, enacted by various State legislatures
- iv. Minimum Wages Act, 1948
- v. Payment of Wages Act, 1936
- vi. Employees' Provident Funds and Miscellaneous Provisions Act, 1952
- vii. Maternity Benefit Act, 1961
- viii. Employees State Insurance Act, 1948
- ix. Equal Remuneration Act, 1976;
- x. The Payment of Gratuity Act, 1972
- xi. Trade Unions Act, 1926.
- xii. Workmen's Compensation Act, 1923.

She then discussed **the concept of casual and contract workers**. In the case of *Steel Authority of India v. National Union Water Front Workers ("SAIL") 2001 (7) SCC 1*, a Constitutional Bench of five judges of the Supreme Court was dealing with the question as to whether on the abolition of a contract labour system under section 10 of the Contract Labour Act, 1970, the contract workmen will automatically become the permanent employees of the principal employer.

Earlier a three-judge Bench in the matter of *Air India Statutory Co-operation vs. United Labour Union 1997 (9) SCC 377* categorically held that it was “obvious” that the contract workmen would become permanent on the abolition of the contract labour system, else the cure would be worse than the disease. The Court almost equated the directive principle to provide employment with the fundamental right to life under Article 21 of the Constitution of India (*para 50*) & with this background of the Constitution held that on the abolition of a contract labour system under section 10 of the Act the contract workers *automatically* become the workmen of the principal employer and that there was no express right to automatic absorption provided in section 10 of the Act as no such express provision was needed - the very concept of abolition of a contract labour system must mean improvement of such contract workers and not its worsening. Justice Majumdar in his concurring judgement stated that to hold otherwise would mean that:-

“The contract labourers who were earlier having regulatory protections would be rendered persona non grata and would be thrown out from the establishment and told off the gates. Then in such a case the remedy of abolition of contract labour would be worse than the disease and it has to be held that the legislature whilst trying to improve the lot of erstwhile contract labourers... had really left them in the lurch by making them lose all facilities available to contract labour on the establishment as per Chapter V and desired them to wash their hands off the establishment and get out and face starvation.... If on abolition of contract labour system, contract labour itself is to be abolished, it would cause economic ruin and economic death to contract labourers and his dependents for amelioration of whose lot order under section 10 is to be passed. (para 69).

She then moved to discuss **the scope of sham and bogus contracts.**

Mrs. Cox further stated that however, cases premised on sham & bogus contracts stand on a separate footing and an Industrial Tribunal still has jurisdiction to go into the issue of Reference under the Industrial Disputes Act, 1947. If a contractual arrangement is found sham & bogus, then a declaration in law the workmen are entitled to the status of direct and permanent employees of the principal employer and are entitled to back wages on par with other permanent workmen (though the relief is often moulded on a case to case basis). Further, a detailed discussion went on this area of law, and criteria evolved by the Courts for deciding if a contract is sham & bogus. Ultimately, it’s a question of piercing the corporate veil:

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

“the presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the management, not the immediate contractor. Myriad devices, half hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions, and the like may be resorted to when labour legislation casts welfare obligations on the real employer, based on Articles 38,39,42,43 and 43-A of the Constitution. The Court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the maya of legal appearances”

-Krishna Iyer J, *Hussainbhai v/s. Alath Factory Ehezilali Union.*

With this Mrs. Jane Cox concluded the session and the participants dispersed for a short tea break.

SESSION 7

EVOLUTION OF LABOUR LEGISLATIONS

AND

SESSION 8

“RATIONALIZING” LABOUR LEGISLATIONS

SPEAKER: JUSTICE K. CHANDRU

This session dealt with the topic of “Evolution and Rationalization of labour legislations”. India’s Labour Policy is mainly based on Labour Laws. The labour laws of independent India derive their origin, inspiration and strength partly from the views expressed by important nationalist leaders during the days of national freedom struggle, partly from the debates of the Constituent Assembly and partly from the provisions of the Constitution and the International Conventions and Recommendations. The relevance of the dignity of human labour and the need for protecting and safeguarding the interest of labour as human beings has been enshrined in **Chapter-III (Articles 16, 19, 23 & 24) and Chapter IV (Articles 39, 41, 42, 43, 43A & 54)** of the Constitution of India keeping in line with Fundamental Rights and Directive Principles of State Policy. The Labour Laws were also influenced by important human rights and the conventions and standards that have emerged from the United Nations. These include right to work of one’s choice, right against discrimination, prohibition of child labour, just and humane conditions of work, social security, protection of wages, redress of grievances, right to organize and form trade unions, collective bargaining and participation in management. Our labour laws have also been significantly influenced by the deliberations of the various Sessions of the Indian Labour Conference and the International Labour Conference. Labour legislations have also been shaped and influenced by the recommendations of the various National Committees and Commissions such as **First National Commission on Labour (1969) under the Chairmanship of Justice Gajendragadkar, National Commission on Rural Labour (1991), Second National Commission on Labour (2002) under the Chairmanship of Shri Ravindra Varma** etc. and judicial pronouncements on labour related matters specifically pertaining to minimum wages, bonded labour, child labour, contract labour etc.

He further discussed these following **legislations during the colonial period** which included:

1. The Workmen’s Compensation Act, 1923

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

2. The Trade Unions Act, 1926
3. The Trade Disputed Act, 1929
4. The Payment of Wages Act, 1936
5. The Defense of India Act, 1939 and Rules

Justice Chandru then discussed the **three types of labour legislations** developed by Indian legislators:

1. Regulatory legislations.
2. Legislations intervening in relationship of employer and employee.
3. Welfare legislations.

Lastly he discussed the **major problems faced by Indian Labour system:**

1. Outsourcing of workers
2. Corrupt labour bureaucracy
3. Delayed law making process
4. Disadvantages of LPG policy
5. Multi-tier appeal system causing unnecessary delay

With this the session halted for a lunch break on Day 2.

DAY 3

SESSION 9:

ISSUES RELATED TO WOMEN WORKFORCE

SPEAKER: MS. SUNEETHA ELURI

CHAIR: JUSTICE K. CHANDRU

Ms. Suneetha Eluri started the session with the words that over last few decades, there have been a rapid growth in the number of women employed in India with majority of them being engaged in informal sector of the economy where jobs are often low paid and repetitive. The number of female workers in the informal sector in India has gone up considerably, which implies that employment opportunities for them in the formal sector have become restricted.

Issues related to women are gaining importance today due to the various incidents taking place in the society, beginning with rape, child marriage, trafficking of women, women violence due to dowry etc. There is a crying need for the emancipation of women. Even in labour economy women are neglected to the extent that they go through mental trauma, physical torture and sexual abuse, physical and verbal abuse etc. Employment of women domestic workers is indispensable today in every society of upper middle class and affluent families.

She drew the attention of the participants towards gender equality and International Labour standards for women. Although most international labour standards apply without distinction to men and women workers, there are a number of Conventions and Recommendations that refer specifically to women.

ILO standards regarding women address three key issues:

- The elimination of sex-based discrimination in the employment relationship;
- The balance of work and family responsibilities; and
- The protection of maternity and the health of women in order to promote effective equality.

Then she dealt with the major International Labour Conventions relating to issues pertaining to issues related to women workforce:

1. *Equal remuneration for work of equal value:*

The Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1951 apply to all workers in all economic sectors, private or public. These instruments set out principles for national policy on how to promote and secure equal remuneration for men and women workers for work of equal value.

2. *Non-discrimination in the employment relationship:*

The Discrimination (Employment and Occupation) Convention (No.111) and Recommendation (No. 111), 1958 aim at the elimination of discrimination in the employment relationship through effective application of appropriate national policies and measures to implement such policies. They apply to all workers in all sectors of activity. The Convention defines seven specific types of discrimination, including discrimination based on the sex of a worker.

3. The main instruments for maternity protection includes the ***Maternity Protection Convention (No. 183) and Recommendation (No. 191), 2000***. These instruments apply to all women in all employment relationships. The Convention sets out specific provisions to ensure the health and well-being of a woman and her child during maternity, e.g. by providing health protection at work, maternity leave, social benefits, protection against dismissal and discrimination based on maternity, and breast-feeding breaks. The Convention provides for 14 weeks of maternity leave, while the Recommendation provides for 18 weeks in certain circumstances. Convention No. 183 is considered the most up-to-date instrument on maternity protection.

4. ***The Night Work Convention (No. 171) and Recommendation (No. 178), 1990*** apply to men and women. Especially for women workers, the Convention requires alternatives to night work before and after childbirth and during pregnancy, if it is deemed necessary to protect the health of the mother or child. The Night Work (Women) Convention (Revised) (No. 89), 1948 obliges ratifying States to prohibit women from working in industrial undertakings at night.

5. ***Home Work Convention, 1996*** is another International Labour Organization (ILO) Convention, which came into force in 2000. It offers protection to workers who are employed in their own homes. The Convention provides protection for home workers, giving them equal rights with regard to workplace health and safety, social security rights,

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

access to training, remuneration, minimum age of employment, maternity protection, and other rights.

In the later part of her lecture she emphasized on the problems faced by women workers in India. Some of the problems highlighted by her were as follows:

1. Discrimination at work
2. Gender wage gap
3. Considered as cheap docile labour
4. Double burden
5. Child care responsibilities
6. Cultural and social restrictions on their movement in public domain
7. Occupational segregation
8. Lack of occupational mobility
9. Occupation performed by women is considered unskilled
10. Occupation in which women work are not within the purview of labour legislations
11. Sexual harassment at workplace
12. Double discrimination on women workers from marginalized social background
13. Lack of effective trade union organization resulting in failure in exercise of collective bargaining practices.

She presented her growing concern over the fact that women domestic labour employment is increasing, which signifies worsening conditions and insecurity of vulnerable sections in the society. Yet the phenomenon has been addressed in the context of the large cities only. It varies from region to region and city to city.

She concluded the session by saying that the struggle has to start with wages and job security, then going beyond those issues to raising the class consciousness of the workers. These struggles have to gradually move from the factories and homes to the streets. The conditions for women workers can ultimately improve only through their participation in the movements and unitedly fighting for their human rights.

After that the session went into an open discussion. The participants interacted and posed their queries to the resource persons which were dealt by them comprehensively. Finally Justice

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

Chandru, concluded the session by making references of two very important Indian case laws on the topic viz. *Nutan Mills v. Employees' State Transport v. Labour Court (1984) and Air India v. Nargesh Meerza Case (1979)*.

The participants dispersed for a short tea break.

SESSION 10:

ISSUES RELATED TO DOMESTIC WORKERS

SPEAKER: MS. SUNEETHA ELURI

CHAIR: JUSTICE K. CHANDRU

The session continued with a question being asked by one of the participants whether any practical additional measures have been adopted to ensure protection of women workers especially working in government sector. Ms. Eluri answered in affirmation. She talked about the Sexual Harassment at Workplace guidelines framed by the Supreme Court in the famous *Vishakha Judgment*. Another question being posed was regarding misuse of sexual harassment laws by the women and the so called biasness against the men. Ms. Eluri vehemently supported the law and argued that just because it is being misused by a few women, we cannot question the existence of such laws. Every law has a tendency of being misused. The same is the case with the sexual harassment laws.

She further added that sexual harassment is a common problem affecting all women in this world irrespective of the profession that they are in, but legal system is sleeping and so they fail in providing them security. Sexual harassment is about male dominance over women and it is used to remind women that they are weaker than man. In a society where violence against women is posed just to show the patriarchal value operating in society, these values of men pose the greatest challenge in curbing sexual harassment.

Ms. Eluri continued the session by highlighting certain provisions of the **ILO Convention No. 189 on Decent Work for Domestic Workers**.

1. What is domestic work?

Convention No. 189 defines domestic work as “work performed in or for a household or households”. This work may include tasks such as cleaning the house, cooking, washing and ironing clothes, taking care of children, or elderly or sick members of a family, gardening, guarding the house, driving for the family, even taking care of household pets.

2. Who is a domestic worker?

Under the Convention, a domestic worker is “any person engaged in domestic work within an employment relationship”.

A domestic worker may work on full-time or part-time basis; may be employed by a single household or by multiple employers; may be residing in the household of the employer (live-in worker) or may be living in his or her own residence (live-out). A domestic worker may be working in a country of which she/he is not a national.

3. Who is the employer of a domestic worker?

The employer of a domestic worker may be a member of the household for which the work is performed, or an agency or enterprise that employs domestic workers and makes them available to households.

4. What can domestic workers do to enjoy the protections offered by Convention No. 189?

Convention No. 189 affirms the fundamental rights of domestic workers. It sets minimum labour standards for domestic workers. Domestic workers can:

- organize & mobilize support for the ratification and implementation of the Convention by their Governments;
- use the provisions of the Convention and the Recommendation to influence changes in laws and improve the working and living conditions of domestic workers, regardless of whether or not the country in which they work has ratified Convention No. 189.

5. Basic rights of domestic workers

- Promotion and protection of the human rights of all domestic workers (Preamble; Article 3).
- Respect and protection of fundamental principles and rights at work: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) elimination of all forms of forced or compulsory labour; (c) abolition of child labour; and (d) elimination of discrimination in respect of employment and occupation (Articles 3, 4, 11).
- Effective protection against all forms of abuse, harassment and violence (Article 5).
- Fair terms of employment and decent living conditions (Article 6).

6. Information on terms and conditions of employment

- Domestic workers must be informed of their terms and conditions of employment in an easily understandable manner, preferably through a written contract (Article 7).

7. Hours of work

- Measures aimed at ensuring equal treatment between domestic workers and workers generally with respect to normal hours of work, overtime compensation, periods of daily and weekly rest, and annual paid leave (Article 10).
- Weekly rest period of at least 24 consecutive hours.
- Regulation of stand-by hours (periods during which domestic workers are not free to dispose of their time as they please and are required to remain at the disposal of the household in order to respond to possible calls) (Article 10).

8. Remuneration

- Minimum wage if a minimum wage exists for other workers (Article 11).
- Payment of wages must be paid in cash, directly to the worker, and at regular interval of no longer than one month. Payment by cheque or bank transfer – when allowed by law or collective agreements, or with worker’s consent (Article 12)
- In-kind payment is allowed under 3 conditions: only a limited proportion of total remuneration; monetary value is fair and reasonable; the items or services given as in-kind payment are of personal use by and benefit to the workers. This means that uniforms or protective equipment’s are not to be regarded as payment in kind, but as tools that the employer must provide to the workers at no cost to them for the performance of their duties (Article 12).
- Fees charged by private employment agencies are not to be deducted from the remuneration (Article 15).

9. Occupational safety and health

- Right to safe and healthy working environment (Article 13).
- Measures are put in place to ensure workers’ occupational safety and health (Article 13).

10. Standards concerning child domestic workers

- Requirement to set a minimum age for entry into domestic work (Article 4).
- Domestic workers aged 15 years old but less than 18 years old – their work should not deprive them of compulsory education, or interfere with their opportunities for further education or vocational training (Article 4).

11. Standards concerning live-in workers

- Decent living conditions that respect the workers’ privacy (Article 6).

- Freedom to reach agreement with their employers or potential employers on whether or not to reside in the household (Article 9).
- No obligation to remain in the household or with its members during their periods of rest or leave (Article 9).
- Right to keep their identity and travel documents in their possession (Article 9).
- Regulation of stand-by hours (Article 10).

12. Standards concerning migrant domestic workers

- A written contract that is enforceable in the country of employment, or a written job offer, prior to traveling to the country of employment (Article 8).
- Clear conditions under which domestic workers are entitled to repatriation at the end of their employment (Article 8).
- Protection of domestic workers from abusive practices by private employment agencies (Article 15).
- Cooperation among sending and receiving countries to ensure the effective application of the provisions of the Convention to migrant domestic workers (Article 8).

She further discussed the problem relating to domestic workers in Indian scenario. She presented some statistical data developed by **Indian Sample Survey Organization (ISSO) and Labour Bureau Survey**. She discussed various national legislations and policies for domestic workers:

1. *List of Occupations & Processes under the Child Labour Prohibition and Regulation Act, 1986*
2. *Unorganized Workers' Social Securities Act, 2008*
3. *Rashtriya Swastha Bima Yojana*
4. *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*

Lastly she presented a list of eight state governments which have notified minimum wages to the workers and also talked of trade union organizations for domestic workers.

Justice Chandru concluded the entire session and gave his valuable inputs. He recommended to frame a Convention on Duties of Workers to determine the work to be done under judicial officers. One of the participants informed the resource persons regarding the situation of domestic workers in Sri Lanka. He informed that domestic workers are covered under Industrial Disputes Act, which

is not the case in India. He proposed India to make appropriate amendments in domestic laws to adequately protect the rights of the domestic workers.

SESSION 11

ISSUES RELATED TO DISABLEMENT

SPEAKER: MS. NEHA SAIGAL

CHAIR: JUSTICE K. CHANDRU

This session dealt with a very pertinent problem of issues related to disablement in labour market. Ms. Neha Saigal posed a concern on persons with disability in India facing many challenges when looking to develop employable skills and in gaining meaningful employment in conditions of decent work. Whilst India has ratified the United Nations Convention on the Rights of People with disability (UNCPRD), persons with disability continue to face many difficulties in the labor market.

In India, the disability sector in general estimates that 4-5% of the population is disabled. The Planning Commission recognizes this figure as 5%. A report by the World Bank states that while estimates vary, there is growing evidence that persons with disability are around 40-80 million, which constitute between 4-8% of India's population. Both Census 2001 and NSS round of 2002 estimate lower incidence of disability in the country. The Census of India showed that the prevalence of disability in India was 2.2% translating into 21.9 million affected individuals. 12.6 million are males and 9.3 million females. Among the five types of disabilities on which data had been collected in the 2001 Census, visual impairment constituted 48.5%; mobility impairment 27.9%; mental disability 10.3%; speech impairment 7.5% and hearing impairment 5.8%.

Ms. Neha discussed the four barriers for people with disablement to enter labour market namely:

1. *Attitudinal Barrier*
2. *Informational Barrier*
3. *Environmental Barrier*
4. *Institutional Barrier*

Then she discussed the topic "*Gender & disability*". She argued that disabled women are the most marginalized. There are 250 million of them with 75% in developing countries. In the third world, girls with disability are excluded from education because of the gender aspect. The general opinion

is that it is important for boys with disability to get education but little thought is given to girls in the same situation, especially in the rural areas.

In India, government departments and public sector enterprises have been important employers of disabled people. Whilst government initiated the policy of 3% reservation of jobs for persons with disability in 1977, the reservation was only in the lower ranking jobs (C & D categories). However, with India adopting the Disability Act of 1995, the reservation was extended to higher ranking (A & B) categories. Other measures adopted by Government of India include establishment of National Institutes.

NCPEDP Analysis of employment in government posts

1. Ministries & Departments

- Total number of posts: 2698762
- Identified posts for disabled: 281398
- Employed persons with disabilities: 9975
- Percentage of identified posts filled by disabled people: 3.54%
- Percentage of all posts filled by disabled people: 0.37%

2. Public Sector:

- Total number of posts: 4527,293
- Identified posts for disabled people: 460,396
- Employed people with disabilities: 20053
- Percentage of identified posts filled by disabled people: 4.46%
- Percentage of all posts filled by disabled people: 0.44%

She moved on with the presentation and discussed various models of disability:

- 1. Charity Model*
- 2. Medical Model*
- 3. Social Model*
- 4. Rights-based Model*
- 5. Economic Model*

Ms. Saigal asked the participants that which model they follow in Sri Lanka, to which participants replied they have a combination of all but in broader sense they follow right-based model.

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

A discussion was also made on the provisions of UNCEPD. 'Disability', as defined in the Persons with Disability Act is: "Person with disability" means a person suffering from not less than 40 percent of any disability as certified by a medical authority;

She also discussed the Sri Lankan **Rights of Persons with Disabilities Act**. The legal definition of disability in Sri Lanka is that described in the Protection of the Rights of Persons with Disabilities Act. A “person with disability means any person who, as a result of any deficiency in his physical or mental capabilities, whether congenital or not, is unable by himself to ensure for himself, wholly or partly, the necessities of life”. This definition is a reasonably broad one, encompassing both medical and socio-economic aspects of disability.

In the later part of her presentation she discussed International standards related to disablement in Indian context.

India has ratified the United Nations Convention on the Rights of persons with disability (UNCRPD) in 2007. Article 27 of UNCRPD “recognizes the right of persons with disability to work, on an equal basis with others; this includes the opportunity to gain a living by work freely chosen or accepted in the labour market and work environment that is open, inclusive and accessible to persons with disability”. Further, UNCRPD prohibits all forms of employment discrimination, promotes access to vocational training, promotes opportunities for self-employment, and calls for reasonable accommodation in the workplace. However, despite the fact that India has ratified the UNCRPD, young people still struggle to access decent work. Access to quality education, vocational training and employment are denied to millions of young persons with disability, worldwide including India. India has not ratified ILO Convention 159, which concerns Vocational Rehabilitation and Employment (Disabled Persons) Convention.

She concluded her presentation by providing a way forward. Following recommendations were made by her:

1. Develop an Employment Portal for Persons with Disability
2. Develop a Compendium of Best Practices
3. Implement a social marketing campaign
4. Use the web portal to leverage the ILO Global Business and Disability Network
5. Giving technical aid to training centers for persons with disability
6. Establish an Innovation Fund
7. Advocacy and Policy change

8. Inclusion of Persons with disability in trade unions

One of the participants raised a question as to whether there is any criteria to determine disability. Justice Chandru concluded the session with his valuable suggestions.

SESSION 12

ISSUES RELATED TO CHILD LABOUR

SPEAKER: MR. RANJITH PRAKASH

CHAIR: JUSTICE K. CHANDRU

Mr. Prakash started the session by giving a context of effective abolition of child labour. He first dealt with the meaning of child labour. **Child labour** is the practice of having children engage in economic activity, on part or -time basis. The practice deprives children of their childhood, and is harmful to their physical and mental development. In India, the problem of child labour is well recognized. There are varying estimates of the number of working children in the country due to differing concepts and methods of estimation. The 1991 national census estimates the number of working children at 11.2 million (out of a total of 210 million children aged 5-14 years), of whom 9.8 million are classified as 'main' workers, and 2.2 million as 'marginal' workers. The 55th Round of the National Sample Survey, carried out by the National Sample Survey Organization (NSSO) in 1999/00, indicates that there are about 10.4 million working children.

He then presented the situation of child labour at international level and highlighted important international instruments including ILO Convention 138 and 182.

ILO Conventions and Recommendations on child labour

A majority of countries have adopted legislation to prohibit or place severe restrictions on the employment and work of children, much of it stimulated and guided by standards adopted by the International Labour Organization (ILO). In spite of these efforts, child labour continues to exist on a massive scale, sometimes in appalling conditions, particularly in the developing world. If progress has been slow or apparently nonexistent, this is because child labour is an immensely complex issue. It cannot be made to disappear simply by the stroke of a pen.

The term *child labour* as suggested by ILO, is best defined as work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental

development. It refers to work that is mentally, physically, socially or morally dangerous and harmful to children, or work whose schedule interferes with their ability to attend regular school, or work that affects in any manner their ability to focus during war and clubs and bouts, school or experience a healthy childhood.

ILO Convention No. 182 on the worst forms of child labour, 1999

Child labour, as the statistics clearly demonstrate, is a problem of immense global proportions. Convention No. 182 helped to focus the international spotlight on the urgency of action to eliminate as a priority, the worst forms of child labour without losing the long term goal of the effective elimination of all child labour.

ILO Convention No. 138 on the minimum age for admission to employment and work

One of the most effective methods of ensuring that children do not start working too young is to set the age at which children can legally be employed or otherwise work. The main principles of the ILO's Convention concerning the minimum age of admission to employment and work.

As far as constitutional provisions are concerned, Constitution of India contains provisions for survival, development and protection of children; these are mainly included in Part III and Part IV of the Constitution, i.e., fundamental rights and directive principles of state policy. India follows pro-active policy towards tackling child labour problem. The concern for children in general and child labour in particular is reflected through the Articles of the Constitution of India. Article 23 it prohibits traffic in human being and begar and other similar forms of forced labour. Article 24 laid down that "no child under the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment". Article 39(e) and (f) requires the State to secure that the tender age of children are not abused and to ensure that they are not forced by economic necessity to enter avocations unsuited in their age or strength. Those children are given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Article 45 provides for free and compulsory education for all children until they complete the age of 14 years. Article 51A (k) makes it a fundamental duty of the parent or Guardian to provide opportunities for education to the child or ward between the age of 6 and 14 years. Art. 21-A recognizes Right to Education as fundamental right and it mandates that, the state shall

provide free and compulsory education to all children between six to fourteen years in such manner as the state may, by law, determine.

He then moved towards the Indian context and discussed various legislations, policies and programmes in India to deal with the issue of child labour.

Child labour is a matter on which both the Union Government and state governments can legislate. A number of legislative initiatives have been undertaken at both levels. The major national legislative developments include the following:

- **The Child Labour (Prohibition and Regulation) Act, 1986:** The Act prohibits the employment of children below the age of 14 years in 13 occupations and 57 processes that are hazardous to the children's lives and health. These occupations and processes are listed in the Schedule to the Act;
- **The Factories Act, 1948:** The Act prohibits the employment of children below the age of 14 years. An adolescent aged between 15 and 18 years can be employed in a factory only if he obtains a certificate of fitness from an authorized medical doctor. The Act also prescribes four and a half hours of work per day for children aged between 14 and 18 years and prohibits their working during night hours.

An important judicial intervention in the action against child labour in India was the 1996 Supreme Court judgement, directing the Union and state governments to identify all children working in hazardous processes and occupations, to withdraw them from work, and to provide them with quality education. The Court also directed that a Child Labour Rehabilitation-cum-Welfare Fund be set up using contributions from employers who contravene the Child Labour Act.

Government policies and programmes

In pursuance of India's development goals and strategies, a National Child Labour Policy was adopted in 1987. The national policy reiterates the directive principle of state policy in India's Constitution. It resolves to focus general development programmes to benefit children wherever possible and have project based action plans in areas of high concentration of child labour engaged in wage/quasi-wage employment. The **National Child Labour Policy (NCLP)** was adopted following the Child Labour (Prohibition and Regulation) Act, 1986.

The Ministry of Labour and Employment has been implementing the NCLP through the establishment of National Child Labour Projects (NCLPs) for the rehabilitation of child workers

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

since 1988. Initially, these projects were industry specific and aimed at rehabilitating children working in traditional child labour endemic industries. A renewed commitment to fulfil the constitutional mandate resulted in enlarging the ambit of the NCLPs in 1994 to rehabilitate children working in hazardous occupations in child labour endemic districts.

The strategy for the NCLPs includes the establishment of special schools to provide non-formal education and pre-vocational skills training; promoting additional income and employment generation opportunities; raising public awareness, and conducting surveys and evaluations of child labour.

The experience gained by the Government in running the NCLPs over several years resulted in the continuation and expansion of the projects during the Ninth Five-Year Plan (1997/02). Around 100 NCLPs were launched across the country to rehabilitate children working in hazardous industries such as glass and bangles, brassware, locks, carpets, slate tiles, matches, fireworks, and gems. The Central Government made a budgetary allocation of Rs 2.5 billion (about US\$57 million) for these projects during the Ninth Five-Year Plan. The Government of India has committed to expand the coverage of the NCLPs to an additional 150 districts and increase the budgetary allocation to over Rs 6 billion (about US\$131 million) during the Tenth Five-Year Plan (2003/07).

Lastly, a discussion was made on status of children employment in India and implications thereof. The speaker provided his valuable inputs and suggestion to end the session.

DAY 4

SESSION 13

OUTSOURCING IN SRI LANKA: SECTORS THAT EMPLOYEE CONTRACT LABOUR

AND

SESSION 14

MERITS AND DEMERITS OF OUTSOURCING

SPEAKER: JUSTICE K. CHANDRU AND JUSTICE B.N. SRI KRISHNA

Justice Chandru opened the session by quoting the *Royal Commission of Labour*, " whatever the merits of the system in primitive times, it is now desirable, if the management is to discharge completely the complex responsibility laid upon it by law and by equity, that the manager should have full control over the selection, hours of work and payment of the workers ".

Quoting Justice O.Chinnappa Reddy in the *Catering Cleaners of Southern Railway Vs Union of India & Ors. AIR 1987 SC 777*

“The practice of employing labour through contractors for doing work inside the premises of the primary employer, known to researchers of the International Labour Organisation and other such organisations as 'Labour only contracting' or 'inside contracting' system, has been termed as an arobaic system and a relic of the early phase of capitalist production, which is now showing signs of revival in the more recent period. Of late there has been a noticeable tendency on the part of big companies including public sector companies to get the work done through contractors rather than through their own departments. It is a matter of surprise that employment of contract labour is steadily on the increase in many organised sectors including the public sector, which one expects to function as a model employer.”

He then discussed the law before the Special Act. He moved on to discuss he famous *Standard-Vacuum Refining Co. of India Ltd. Vs. Its Workmen & Others AIR 1960 SC 948*.

Supreme Court Rules:

Whenever a dispute is raised by workmen with regard to the employment of contract labour by any employer it would be necessary for the tribunal to examine the merits of the dispute apart from the general consideration that contract labour should not be encouraged, in a

given case the decision should rest not merely on theoretical or abstract objections to contract labour but also on the terms and conditions on which contract labour is employed and the grievance made by the employees in respect thereof. The contract in this case is a bona fide contract would not necessarily mean that it should not be touched by the industrial tribunals. If the contract had been mala fide and a cloak for suppressing the fact that the workmen were really the workmen of the company, the tribunal would have been justified in ordering the company to take over the entire body of workmen & treat it as its own workmen.

Later, he dealt with the current position of law and discussed the provisions of **Contract Labour (Abolition and Regulation) Act, 1970**. The Contract Labour (Regulation and Abolition) Act, 1970” provides for regulation of the employment of contract labour and its abolition under certain circumstances.

- ***Gammon India Ltd v. Union of India AIR 1974 SC 960***, where the SC upheld the constitutional validity of the Act by quoting that: *The crucial point is that the interests of the workmen are remedied by the objects of the Act. Those interests are minimum labour welfare. There is no unreasonableness in the measure.*
- ***Vegoils Private Limited v. The Workmen AIR 1972 SC 1942***

Labour Courts - no jurisdiction to deal with contract labour

“Under sec 10 of the said Act the jurisdiction to decide matters connected with prohibition of contract labour is now vested in the appropriate Government.

w.e.f 10.2.1971, it is only the appropriate Government that can prohibit contract labour by following the procedure and in accordance with the provisions of the Central Act.

The Industrial Tribunal, in the circumstances, will have no Jurisdiction.”

- ***Air India Statutory Corporation v. United Labour Union & Ors. AIR 1997 SC 645***

“We hold that though there is no express provision in the Act for absorption of the employees whose contract labour system stood abolished by publication of the notification under section 10 (1) of the Act,

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

In a proper case, the court as sentinel in the qui vive is required to direct the appropriate authority to act in accordance with law and submit a report to the court and based thereon proper relief should be granted.”

Following were the cases discussed by Justice Chandru to clarify the situation:

- *Steel Authority Of India Ltd. v. National Union Water Front Workers 2001 (7) SCC 1*
- *U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey (2006 (1) SCC 479)*
- *Bharat Heavy Electrical Ltd. v. The Government of Tamilnadu (1985) IILLJ 509 Mad.*
- *BHEL Thuppuravu Thozhilalar Sangam v. Mgmt. Of BHEL & Ors. (2000) ILLJ 1533 Mad.*
- *L&T MCnEIL Ltd. v. Govt. of Tamil Nadu (2001) 3 SCC 170*

Justice Chandru further discussed the **Role of Labour Courts:**

On issuance of prohibition notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere camouflage to evade compliance of various beneficial legislations so as to deprive the workers of the benefit thereunder.

He then left the session for open discussion. Justice SriKrishna added his valuable inputs by enumerating the idea of outsourcing. According to him, the two reasons of outsourcing: 1. Profit making; 2. No compliance of statutory benefits to be given to the workers. He further added that the new Contract Labour law focused on two major aspects: 1. Abolition; 2. Regulation. He made a reference to the famous *Hussainbhai's Case*. He added that the 'Control Test' has now become obsolete and is replaced by economic test. Operational in dependence does not defeat the control test.

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

One of the participants raised his query regarding the difference between the economic and beneficial test, to which the resource person answered that it is one and the same thing. Another question posed was regarding determination of whether or not a contract is sham and bogus.

With this the participants parted for a short tea break.

SESSION 15

SUBSTITUTION AND LEGAL REPRESENTATION: LAWS AND DECISIONS

SPEAKERS: JUSTICE BN SRIKRISHNA AND JUSTICE CHANDRU

This session dealt with an important aspect of laws relating substitution and legal representation. Justice Srikrishna started with discussing the legal provisions laid down under Industrial Disputes Act for substitution and legal representation of workers.

Section 36 of Industrial Disputes Act, 1951 reads as follows:

36. Representation of parties.-

(1) A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by--

(a) any member of the executive or office bearer of a registered trade union of which he is a member:

(b) any member of the executive or other office bearer of a federation of trade unions to which the trade union referred to in clause (a) is affiliated;

(c) where the worker is not a member of any trade union, by any member of the executive or other office bearer of any trade union connected with, or by any other workman employed in, the industry in which the worker is employed and authorized in such manner as may be prescribed.

(2) An employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by--

(a) an officer of an association of employers of which he is a member;

(b) an officer of a federation of association of employers to which the association referred to in clause (a) is affiliated;

(c) where the employer is not a member of any association of employers, by an officer of any association of employers connected with, or by any other employer engaged in, the industry in which the employer is engaged and authorized in such manner as may be prescribed.

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

(3) No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceedings under this Act or in any proceedings before a Court.

(4) In any proceeding before a Labour Court, Tribunal or National Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be.

He made reference to the rules laid down in the Standing Orders Act. He emphasized on the principles of natural justice viz. no person should be condemned unheard. He dealt with the issues related to enquiry proceedings. He raised a very pertinent question as to what will happen if the worker dies pending the enquiry proceeding? Can he be represented by his legal representative after his death? Justice Srikrishna said that there can be no domestic enquiry done after the death of the worker. The Court/Tribunal/Officer has no jurisdiction to deal with the matter. Once the worker is dead, no enquiry proceeding can be continued. The matter is put to an end. This view has been taken by the Jharkhand High Court and later supported by Bombay High Court as well.

Justice Chandru further made his presentation on legal representation of workers and laws related to it. He gave a brief historical background of law of representation under the British Raj and the reasons behind its codification. He said that Right to Legal representation and Substitution is allowed only if the statute provides so. He also discussed certain landmark case laws of different High Courts and Supreme Court. He ended his presentation by providing his valuable suggestion on the above discussed issue.

The session concluded with a question being raised by one of the participants that whether India follows the principles of natural justice or not. Justice Srikrishna answered in affirmation.

The participants parted for lunch break.

SESSION 16

UNFAIR LABOUR PRACTICES IN INDIA AND SRI LANKA

SPEAKER: PROF. DR. B.T. KAUL

CHAIR: JUSTICE SRIKRISHNA AND JUSTICE CHANDRU

Prof. Kaul started with the words that in the present scenario of increasing demand for labour flexibility by employers, some practices are followed that would legally amount to unfair labour practices (ULPs). The Industrial Disputes Act, 1947 has provisions against ULPs by employers, workmen and unions. Another important state law protecting against ULPs is the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (MRTU & PULP Act). It provides important legal safeguards for workers against victimization and persecution at the hands of their employers.

Chapter V-C of the Industrial Disputes Act, 1947 provides for Unfair Labour Practices under 2 sections. Section 25-T of the Industrial Disputes Act prohibits an employer or workman or a trade union from committing any unfair labour practice. Section 25-U provided for penalty for committing unfair labour practice and mandates that whoever is guilty of any unfair labour practice can be prosecuted before the competent court on a complaint made by or under the authority of an appropriate Government under Section 34(1) read with Section 25-U of the Industrial Disputes Act.

An unfair labour practice is defined as any practice specified under **Fifth Schedule** which mentions two categories which are unfair labour practices on the part of employers and trade unions of employers including instances like abolishing the work of a regular nature being done by workmen, and to give such work to contractors as a measure of breaking a strike; or to transfer a workman mala fide from one place to another, under the guise of following management policy; or to discharge or dismiss workmen by way of victimization, or not in good faith, but in the colorable exercise of the employer's rights, or by falsely implicating a workman in a criminal case on false evidence or on concocted evidence; etc. The other category mentioned in the Schedule relates to unfair labour practices on the part of workmen and trade unions of workmen which includes advise or actively support or instigate any strike deemed to be illegal under the Industrial Disputes Act; or to incite or indulge in willful damage to employer's property connected with the

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

industry; or to indulge in acts of force or violence or to hold out threats of intimidation against any workman with a view to prevent him from attending work, etc.

Prof. Kaul said that the list provided under Fifth Schedule constituting unfair labour practices is not exhaustive. He raised a concern over the fact that the term unfair labour practices cannot be adequately defined and it is the Indian judiciary which has to determine its scope from time to time. He made a reference to the famous case of *Indian Iron and Steel Company v. It's Workmen*. He said that the list of unfair labour practices enumerated under the Standing Orders Act is inclusive in nature.

He referred to the judgment of *Tulsi Ram Patel case* where it was held that inefficiency does not amount to misconduct. He further discussed that the earlier the role of Industrial Labour Tribunal was supervisory. But later as the time progresses there were many changes brought in the existing laws. Two such changes were related to the aspect of: 1. Reappreciation of evidence and 2. Quantum of punishment. He discussed these two aspect in detail.

He further referred to the judgment in the *G.P. Pant University Case* which dealt with the interference of employers in Trade Unions.

He discussed a very peculiar situation where excess of facilities provided to a worker also amounts to unfair labour practice. On this one of the participants asked a question as to whether a termination on the account of continuous inefficiency amounts to unfair labour practice. To this Prof. Kaul replied in negative.

Lastly he discussed the role of judges in evolving the labour jurisprudence. He vehemently argued that the Labour Courts and Tribunal should have wide powers. He strongly supported the *Labour Appellate Tribunal (LAT) formula*.

DAY 5

SESSION 17

BALANCING RIGHTS OF EMPLOYER AND EMPLOYEES

SPEAKER: PROF. DR. B.T. KAUL

CHAIR: JUSTICE K. CHANDRU

The session started by Prof. Kaul discussing the historical aspect related to employer-employee rights in India. He begin with the concept of *lassiez faire* where there was complete autonomy to carry out trade activities without any restrictions and interventions. There was full freedom to sign contract with the laborers as per his own needs and requirements. From here started the exploitation of the workers by the industrialists. As the time progressed the workers started forming associations for better collective bargaining for their rights. But still, the employers remained in the dominant position. The laws being framed by the state were not enough to provide adequate safeguard to the workers. Activities/Contract in restraint of trade was considered as null and void as per the Indian Contract Act, 1872. He made a reference to the *Karnataka Mills Case*.

The industrial/labour legislations enacted by the British were primarily intended to protect the interests of the British employers. Considerations of British political economy were naturally paramount in shaping some of these early laws.

Thus came the Factories Act. It is well known that Indian textile goods offered stiff competition to British textiles in the export market and hence in order to make India labour costlier the Factories Act was first introduced in 1883 because of the pressure brought on the British parliament by the textile magnates of Manchester and Lancashire. Thus India received the first stipulation of eight hours of work, the abolition of child labour, and the restriction of women in night employment, and the introduction of overtime wages for work beyond eight hours. While the impact of this measure was clearly welfarist, the real motivation was undoubtedly protectionist. The earliest Indian statute to regulate the relationship between employer and his workmen was the Trade Dispute Act, 1929 (Act 7 of 1929). Provisions were made in this Act for restraining the rights of strike and lock out but no machinery was provided to take care of disputes.

The original colonial legislation underwent substantial modifications in the post-colonial era because independent India called for a clear partnership between labour and capital. The content

of this partnership was unanimously approved in a tripartite conference in December 1947 in which it was agreed that labour would be given a fair wage and fair working conditions and in return capital would receive the fullest co-operation of labour for uninterrupted production and higher productivity as part of the strategy for national economic development. Ultimately the Industrial Disputes Act (the Act) came into force on 01.04.1947 repealing the Trade Disputes Act 1929 has since remained on statute book.

Further he discussed the legal position of strike in industries which amounts to both civil as well as criminal liability. "Strike" means a cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal, or a refusal, under; a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment [Section 2(q)]

He discussed that "Strike" is a weapon of collective bargaining. Strike can take place only when there is a cessation of work or refusal to work by the workmen acting in combination or in a concerted manner. Time factor or duration or purpose of the strike is immaterial. It is enough if the cessation of work is in defiance of the employer's authority.

A concerted refusal or a refusal under a common understanding of any number of persons to continue to work or to accept employment will amount to a strike. A general strike is one when there is a concert in mind of combination of workers stopping or refusing to resume work. Going on mass casual leave under a *common understanding* amounts to a strike. However, the refusal by workmen should be in respect of normal lawful work, which the workmen are under an obligation to do. Refusal to do work which the employer has no right to ask for performance, such a refusal does not constitute a strike [*Northbrooke Jute Co. Ltd Vs. Their Workmen, AIR 1960 SC 879*]. If on the sudden death of a fellow-worker, the workmen acting in concert refuse to resume work, it amounts to strike [*National Textile Workers' Union v. Shree Meenakshi Mills (1951) II LLJ 516*].

He urged that striking a balance between **Art. 19(1) (c) and Art. 19(1) (g)** is very important.

He further discussed the multi-party role of the state in balancing the rights between the employer and employees as discussed in the case of *State of Kashmir v. Edward Mills*. "Initial periods of imperialism were based on exploitation of the worker class. With the emergence of ILO at an international level and with the inhumane treatment meted out to workmen being replaced with an

REPORT ON TRAINING PROGRAMME FOR LABOUR TRIBUNAL PRESIDENTS OF SRI LANKA

outlook of dignity of labour, the whole scenario of labour legislations began in pre independence India.”

After independence legislations related to worker welfare like Provident Fund Act, Employee State Insurance Act, Payment of Bonus Act and Payment of Gratuity Act were enacted with the intention of providing security and retirement benefits to workmen.

In 1948, a Committee on Fair Wages was constituted which resulted in evolution of the concept of minimum wage, fair wage and living wage. Section 17, 18 and 19 of the Trade Unions Act also provided for the immunity to the workers from contracts made under restraint of trade, criminal conspiracy and tortious liability. He made reference to the *Management of the Dimakuchi Tea Estate v. Workmen of Dimakuchi Tea Estate*.

In the case of *Workmen of Dimakuchi Tea Estate v. Dimakuchi Tea Estate*, AIR 1958 SC 353, the Supreme Court laid down following objectives of the Act:

*** Promotion of measures of securing and preserving amity and good relations between the employer and workmen. Investigation and settlement of industrial disputes between employers and employers, employers and workmen, or workmen and workmen with a right of representation by registered trade union or federation of trade unions or an association of employers or a federation of associations of employers.*

*** Prevention of illegal strikes and lockouts.*

*** Relief to workmen in the matter of lay-off and retrenchment.*

*** Promotion of collective bargaining.*

He also referred to the *All India Bank Employee Case* which dealt with the illegal strikes and lock-outs.

SESSION 18

**APPLICABILITY OF UTILITARIAN, EGALITARIAN AND LIBERTARIAN PRINCIPLES IN DECIDING
RIGHTS AND LIABILITIES OF THE PARTIES OF UNEQUAL STRENGTH**

SPEAKERS: JUSTICE CHANDRU AND PROF. DR. B.T. KAUL

This session dealt with a very important issue. The issue was related to misuse of courts by parties to delay the proceedings. Prof. Kaul made reference to the famous cases of *Sukhdev Singh and Bhopal Gas Disaster Case*.

This session was more of a question-answer session. One of the participants raised the query as to whether an employer terminating the services of the workers for illegal strike is liable for paying compensation. Prof. Kaul answered that that he is not required to do so. Another participant asked for a clarification of Section 17-B of Industrial Disputes Act, 1951. A question was also asked as to whether there is any difference between independent contract and contract for contract labour. Prof. Kaul answered the query by discussing the two aspects viz. contract of service and contract for service.

Lastly, Justice Chandru asked the participants to share their own practical experiences and knowledge pertaining to this issue.

SESSION 19

FEEDBACK AND EVALUATION

In this session, the presiding officers of the Labour Tribunals of Sri Lanka were given a feedback form to express their opinion and to review their training program. Everyone seemed satisfied with the whole training programme conducted by NJA and gave a positive feedback.

The programme was concluded by vote of thanks by Justice Fernando.